ADVISORY COMMITTEE
ON
CRIMINAL RULES

Santa Fe, NM
October 30, 2004

CRIMINAL RULES COMMITTEE MEETING

October 30, 2004
Santa Fe. New Mexico

I PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of May 2004, Meeting in Monterey, California

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

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rule Amendments Approved by Supreme Court and Pending Before Congress

1 Rules Governing § 2254 and § 2255 Proceedings

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

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

B. Proposed Amendments Approved by Standing Committee and Judicial Conference and Pending Before the Supreme Court.

1 Rule 12.2 Notice of Insanity Defense, Mental Examination Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information

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

3 Rule 32, Sentencing, Proposed Amendment Re Allocution Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies

4 Rule 32 1. Revoking or Modifying Probation or Supervised Release Proposed Amendments to Rule Concerning Defendant's Right of Allocution.

5 Rule 59, Proposed New Rule Concerning Rulings By Magistrate Judges.

C. Proposed Amendments to Rules Which Have Been Published for Public Comment.

1 Rule 5 Initial Appearance Proposed amendment permits transmission of documents by reliable electronic means

2 Rule 32 1 Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means

3 Rule 40 Arrest for Failing to Appear in Another District Proposed Amendment to provide authority to matter where person was arrested for violating conditions set in another district

4. Rule 41 Search and Seizure. Proposed amendment permits transmission of documents by reliable electronic means

5. Rule 58 Petty Offenses and Other Misdemeanors Amendment to make it clear that Rule 5.1 governs who is entitled to a preliminary hearing

III. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

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

B. Amendment to Criminal Rules Regarding Local Rules for Electronic Filings (Memo)

C. Rule 11; Proposed Amendment to Provide that Judge May Question Defendant Regarding Proposed Plea Agreement (Memo).

D. **Rules 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee (Memo).**

E. **Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal (Memo)**

F. **Rule 41, Status of Amendments Concerning Tracking Device Warrants (Memo).**

G. **Rule 45; Amendment to Provide for Extending Time for Filing (Memo).**

H. **Use of Section 2254 and 2255 Official Forms (Memo).**

IV. 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**

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

ADVISORY COMMITTEE ON CRIMINAL RULES

October 2004

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			Start Date	End Date
Susan C. Bucklew Chair	D	Florida (Middle)	Member: 1998 2004	--- 2007
Harvey Bartle III	D	Pennsylvania (Eastern)	2001	2007
Anthony J. Battaglia	M	California (Southern)	2003	2006
Lucien B. Campbell	FPD	Texas (Western)	1999	2005
Robert B. Fiske, Jr.	ESQ	New York	2000	2006
Paul L. Friedman	D	District of Columbia	1999	2005
Donald J. Goldberg	ESQ	Pennsylvania	2000	2006
James Parker Jones	D	Virginia (Western)	2003	2006
Nancy J. King	ACAD	Tennessee	2001	2007
Richard C. Tallman	C	Ninth Circuit	2004	2007
David G. Trager	D	New York (Eastern)	2000	2006
Christopher A. Wray*	DOJ	Washington, DC	---	Open
David A. Schlueter Reporter	ACAD	Texas	1988	Open

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

May 6-7, 2004
Monterey, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at Monterey, California on May 6 and 7, 2004 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 Thursday, May 6, 2004. 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. Harvey Bartle, III
Hon James P. Jones
Hon. Anthony J. Battaglia
Hon Reta M. Strubhar
Prof Nancy J King
Mr. Robert B Fiske, Jr
Mr Donald J Goldberg
Mr. Lucien B Campbell
Ms Deborah J. Rhodes, 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. David Levi, chair of the Standing Committee, 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, Mr Jonathan Wroblewski of the Department of Justice; Ms Laural Hooper of the Federal Judicial Center, and Mr George Leone, Chief, Appeals Division, United States Attorney's Office, D N J.

Judge Carnes welcomed Ms. Deborah Rhodes as the new member representing the Department of Justice.

II. APPROVAL OF MINUTES

Judge Trager moved that the minutes of the Committee's meeting in Gleneden Beach, Oregon in October 2003, be approved The motion was seconded by Judge Battaglia and, following corrections to the Minutes, carried by a unanimous vote

III. STATUS OF PROPOSED AMENDMENTS TO RULES PENDING BEFORE THE SUPREME COURT

Mr. Rabiej informed the Committee that the package of amendments submitted to, and approved by the Judicial Conference in September 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35) had been approved by the Supreme Court and were being transmitted to Congress.

IV. PROPOSED AMENDMENTS PUBLISHED FOR COMMENT AND PENDING FURTHER ACTION

A. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information.

The Reporter stated that only four commentators had expressed views on the proposed amendment to Rule 12 2(d)—which is intended to fill a gap created in the 2002 amendments to the rule and include a sanction provision if the defendant fails to disclose any expert reports, as required under Rule 12 2(c)(3). First, he stated, 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, he noted that the Federal Bar Association had expressed the view that the proposed amendment goes too far and 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 suggested that the government be given "ample opportunity" to have the defendant tested and to prepare a rebuttal Finally, the Reporter stated that the Standing Committee's Style Subcommittee has offered brief comments on this rule.

Following brief discussion, Judge Bucklew moved that the Committee approve the amendment to Rule 12 2 and forward it to the Standing Committee with a

recommendation to forward it to the Judicial Conference Judge Friedman seconded the motion, which carried by unanimous vote

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

The Reporter stated the Committee had received comments on the proposed amendments to Rules 29, 33, and 34; those amendments are intended to remove the language from the current rules that impose 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. He noted that first, Professor Lushing noted a grammatical error in the Committee Note for Rule 34 Second, another commentator, 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 suggested 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. And finally, the Reporter stated that the Magistrate Judges Association supports the proposed amendments to Rules 29, 33, 34, and 45

During the brief discussion on the proposed amendments, Judge Levi noted that the Committee might wish to revisit Rule 45 following proposed amendments to Civil Rule 6. Judge Friedman moved that the Committee approve the proposed amendments and forward them to the Standing Committee with a recommendation to forward them to the Judicial Conference Mr Campbell seconded the motion, which carried by a unanimous vote.

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

Professor Schlueter reported that four commentators had offered views on the proposed amendment to Rule 32; that amendment would extend the right of allocution to all victims in non-violent, non-sexual abuse felony cases He noted that Mr Jack Horsley supported the package of amendments published in 2003, but offered no specific comments about the proposed change to Rule 32 Professor Schlueter added that Judge Robert Holmes Bell, Chief District Judge of the Western District of Michigan, opposed the amendment to the extent it requires the court to hear victim testimony. In his view, victims do not provide anything new because the Presentence Report is supposed to present the victim's perspective about the crime. Judge Bell also noted that that the definition of victim is so vague that many people will demand to be heard and suggested that that the entire section (B) should be rewritten to give the court the discretion to decide whether to hear from victims Third, Professor Schlueter continued, 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 identified two concerns. First, the Association noted that the amendment does not explicitly state who is

a "victim." Second, the amendment may unduly restrict the discretion of the court Although the rule uses the term "must," the Association commented that 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, Professor Schlueter, noted that the Style Subcommittee had questioned why the term "Felony Offense" is used in the title of Section (C), rather than just the word "Felony." Following discussion, the Committee agreed with the Subcommittee's recommendation and changed that wording.

Professor Schlueter noted that the House of Representatives had passed an Act according a wide-range of rights to victims of crime and that the same measure was being considered by the Senate. He recommended that in light of the pending legislation and the fact that other rules would likely be affected, that the Committee defer consideration of the proposed amendment. During the brief discussion of the pending legislation and it possible effects on criminal trials, Judge Trager noted that he favored going forward with the proposed amendment In his view, if Congress actually enacted the Victims Right bill, there would be time to pull the proposal from the process. He moved that the Committee approve the amendment to Rule 32 and forward it to the Standing Committee with the understanding that in the event Congress enacted the related legislation, that Committee could withdraw the proposal. Mr Fiske seconded the motion, which carried by a vote of 10-2

D. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution.

The Reporter indicated that the Committee had received only two written comments on the proposed amendment to Rule 32.1 The amendment, he explained, would provide allocution rights for a person who faces revocation or modification of probation or supervised release He noted that first, Mr Jack Horsley commented favorably on the package of published amendments, but did not comment on the specific amendment to Rule 32.1. Secondly, he stated that the Federal Magistrate Judges Association supported the amendment Following brief discussion, Judge Bucklew moved that the Committee approve the amendment and forward it to the Standing Committee. Judge Bartle seconded the motion, which carried by a unanimous vote

E. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges.

Professor Schlueter reported that the Committee had received three written comments on the proposed new Rule 59, which is intended to parallel Civil Rule 72. First, he stated, Mr. Jack Horsley had commented favorably on the package or rule amendments but had offered no specific comments on Rule 59 Second, the Magistrate Judges Association had offered a number of suggested changes to the rule

First, he reported, the Association believed 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 suggested 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. Following brief discussion, Judge Trager moved that the rule be amended to reflect that suggestion Judge Bartle seconded the motion, which carried by a vote of 10 to 1

Next, Professor Schlueter reported that the Association had noted some ambiguity in the rule regarding the time for filing objections It had suggested 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 Committee discussed this point and by a vote of 8 to 2 initially decided to use the word "entered" on line 9 of the proposed rule Following additional discussion, however, the Committee voted to reconsider that vote (by a margin of 9 to 1) and ultimately, on motion by Judge Trager, seconded by Professor King, voted by 9 to 1 to use the word "stated" instead on line 9.

Professor Schlueter noted that the Association had also suggested that Civil Rule 72 be changed to include the language in Rule 59, concerning the failure to object. The Committee agreed that that was a matter within the jurisdiction of the Civil Rules Committee.

Next, Professor Schlueter informed the Committee that the Association had stated 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, it must be made within the 10-day period The Committee discussed this suggestion and ultimately decided that the current language of the proposed new rule was sufficient to address those concerns.

Professor Schlueter also reported that the Association had suggested 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. Following a brief discussion, the Committee agreed with Professor Schlueter's observation that it would be more appropriate for the Note not to include any discussion comparing the two rules, and instead focus on the scope and purposes of Rule 59

Finally, he noted that the Association had written that the proposed 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) stating 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 Committee discussed this proposal; a consensus emerged that the effect of the absence of a report and recommendation need not be reflected in the rule and that in keeping with other rules of procedure, it would be better not to state the effective dates for rulings.

Finally, Professor Schlueter reported that the Style Subcommittee had offered some suggested style changes to the Rule. Following brief discussion, most of those changes were included. In addition, Professor Schlueter suggested, at the urging of several members, additional language for the Note to address the issue of what constitutes a "dispositive" or "nondispositive" matter, terms which do not appear in the governing statute.

Judge Trager moved, and Judge Jones seconded, a motion to approve the proposed new rule and forward it to the Standing Committee for its approval. The motion carried by a vote of 10 to 1

V. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Report of Subcommittee on Rules 3, 4, 5.1, 32.1, 40, 41 & 58.

Judge Battaglia reported that the subcommittee, consisting of himself as chair and Mr Campbell and Ms Rhodes as members, had considered possible amendments to a number of rules. The subcommittee had been charged with reviewing the rules for the purpose, inter alia, of determining whether any provision should be made to codify the requirements of *Gerstein v Pugh*; to provide for filing documents by electronic means, including facsimile transmissions; and about entitlement to preliminary hearings

1. Issue of Whether to Adopt Rule Codifying *Gerstein v. Pugh*.

Judge Battaglia reported that as to the first issue, whether to codify *Gerstein*, that the Subcommittee had decided not to propose any amendments A survey of the magistrate judges indicated a number of different procedures exist and although the magistrates stated that they believed that adoption of a national rule would be helpful, they also stated that it would be important to maintain as much flexibility as possible. The Subcommittee believed that promulgating a rule on the topic might create additional, and unanticipated, problems in application. Judge Battaglia moved that no action be taken at this time. Mr. Campbell seconded the motion, which carried by a unanimous vote.

2. Amendments to Rules 3 and 4 to Allow for Issuance of Arrest Warrants by Facsimile.

Judge Battaglia next reported that the Subcommittee had considered a recommendation from Judge Bernard Zimmerman to amend Rule 4 to permit issuance of an arrest warrant by facsimile transmission; currently, Rule 4 does not address any particular means of issuing an arrest warrant. Similarly, the Subcommittee also considered whether Rule 3, which addresses use of complaints, was silent on the manner of presenting the necessary information to a magistrate judge The Subcommittee, he stated, decided not to propose any amendments at this time, in its view, there are no perceived problems with using the rules or with the traditional methods of issuing arrest warrants. Judge Battaglia moved that the Committee take no further action on this proposal at this time Mr. Campbell seconded the motion, which carried by a unanimous vote.

3. Rules 32.1(a)(6) and Rule 40, Regarding Release on Bond.

The Subcommittee also considered a conflict between Rules 32 1 and 40 concerning the ability of the court to consider bail in out of district cases Judge Battaglia reported that the Subcommittee agreed with a recommendation from Magistrate Judge Robert Collings, that although Rule 32.1(a)(6) permits a court to consider bail in out of district proceedings regarding revocation of release Rule 40 does not. The Subcommittee recommended that Rule 40 be amended to conform to Rule 32 1. Judge Battaglia moved that Rule 40 be amended in that way and that the amendment be forwarded to the Standing Committee with a recommendation to publish it for public comment Professor King seconded the motion, which carried by a unanimous vote

4. Amendments Regarding Use of Other Reliable Electronic Means in Rules 5, 32.1, and 41.

Judge Battaglia stated that, at the suggestion of Judge William Sanderson, the Subcommittee had considered possible amendments to the rules regarding greater use of facsimiles or other electronic means in transmitting various documents Although Judge Sanderson's proposal had focused only on Rule 32 1, the Subcommittee, at the direction of the Committee, had considered similar amendments to Rules 5 and 41 Those amendments would provide that the documents referenced in those rules could be transmitted by "reliable electronic means." During the brief discussion on these amendments, Judge Battaglia noted that the key here is that the term "reliability" focuses on the quality of the transmission and not necessarily on the authenticity of the underlying document Judge Battaglia moved that the Committee approve the amendments to Rules 5, 32 1, and 41 and that they be forwarded to the Standing Committee with a recommendation to publish them for public comment Mr Campbell seconded the motion, which carried by a unanimous vote Turning to a discussion of the proposed Committee Note, Professor King moved that the last paragraph of the Note, which addresses the factors that a court may wish to consider in using electronic means, be deleted. Judge Jones seconded the motion The Reporter pointed out that the language used in the proposed Notes to Rules 5, 32.1 and 41, was similar to that used in recent

amendments to Rules 5 and 10 concerning video teleconferencing. The motion failed by a vote of 4 to 8

5. Amendments Regarding Right to Preliminary Hearings; Rules 5 and 58

Referencing an e-mail from Magistrate Judge Nowak, Judge Battaglia reported that the Subcommittee had considered an amendment to Rule 58 that would resolve a conflict between that rule and Rule 5 1(a) concerning the right to a preliminary hearing The Subcommittee noted that the right to a preliminary hearing is correctly stated in Rule 5 1, and rather than redrafting Rule 58 to clarify the issue, the Subcommittee recommended that Rule 58(b)(2)(G) be amended to delete the reference to those cases where the defendant is in custody and to simply refer the reader to Rule 5.1. Judge Battaglia moved that the amendment be approved and forwarded to the Standing Committee for publication Judge Friedman seconded the motion, which carried by a unanimous vote

6. Amendments to Rule 41 Regarding Expanded Use of Facsimile or Other Electronic Means

Finally, Judge Battaglia reported that in response to the survey regarding possible codification of *Gerstein*, a number of Magistrate Judges indicated an interest in expanding the use of facsimiles or other electronic means in obtaining or issuing search warrants. The Subcommittee recommended that Rule 41 be amended to permit transmission of the warrant itself. During the discussion, Mr. Campbell noted that during the recent restyling of the rule, the introductory language in Rule 41(d)(3), "If the court determines it is reasonable under the circumstances," had been deleted. Although the deletion of that language was not specifically mentioned in the Committee Note, it was apparently deleted because the Committee believed it was unnecessary Mr. Campbell's motion to restore the language failed for lack of a second

Judge Battaglia moved that the amendments to Rule 41 be approved and forwarded to the Standing Committee with a recommendation that they be published for public comment Mr. Campbell seconded the motion, which carried by a unanimous vote.

B. Rule 29; Proposed Amendment Regarding Deferral of Ruling on Motion for Judgment of Acquittal Until After Verdict.

Judge Carnes introduced the subject of a proposed amendment to Rule 29, which would require the court in all cases to defer ruling on a motion for a judgment of acquittal until after the jury had returned a verdict He noted that the issue had been discussed at the last several meetings and that the Department of Justice had been asked to address two issues raised at the Fall 2003 meeting—first, the problem of multiple counts and multiple defendants, and second, the problem of the hung jury Mr Rabiej also reported

that the Administrative Office had conducted an additional statistical study of cases during FY 2002 involving Rule 29 rulings. He noted that the study indicated that of the approximately 80,000 felony cases during that time frame and that of those, approximately 3000 cases were disposed of by trial and of those, the courts entered a pre-verdict Rule 29 motion in favor of approximately 37 felony defendants Mr Leone and Mr Wroblewski both commented that in some regards those statistics might be underinclusive.

Ms. Rhodes reported that the Department had considered both of those issues and had drafted an alternate version of Rule 29 that would address the issue of the hung jury, but not the problem of multiple defendants or multiple counts cases. She also noted that Judge Levi had proposed a possible solution to the problem by suggesting that Rule 29 be amended to require waiver of double jeopardy objections as a prerequisite for pre-verdict rulings, and thus provide the possibility of a government appeal of an adverse ruling. She indicated that the Department would be willing to pursue that type of amendment and added that although the number of Rule 29 pre-verdict rulings was low, the numbers were still important to the Department. In addressing the proposed waiver provisions, Ms. Rhodes pointed out that from the Department's view, there are many benefits in proceeding to final verdict, noting that approximately 50 percent of cases are tried in one day and that approximately 96 percent are tried in nine days or less

Judge Carnes noted that it would be difficult to articulate in a rule the competing interests in granting a pre-verdict motion, or continuing to a final verdict, especially in multi-count or multi-defendant cases. Mr Fiske stated that the hung jury situation would be easier to address in a rule, and that in multiple defendant cases, the defendants who have their motions granted are out of the case In the case of multiple counts, the matter becomes more complicated Judge Levi added that in considering this issue, the Committee could expect a significant amount of opposition, for what some view as a highly controversial topic. He noted that the waiver provision might be a good middle ground for further discussion.

Professor King stated that in her view the statistics provided by the Administrative Office may not have sufficiently pinpointed the specific problems on the multiple defendant and multiple count cases Judge Bucklew noted that there is no constitutional right for a defendant to obtain a pre-verdict ruling and that the whole issue had been complicated by the 1971 Appeals Act, which expanded the government's right to appeal, and the fact that there were a few cases in which the courts had apparently granted the motion for wrong reasons Judge Bartle observed that he was not convinced by the Department's cost-benefit approach and that it seemed arbitrary

Mr Goldberg indicated that the Department should consider the waiver provisions because it appeared to be a way to obtain the change the Department wished to see —the ability to appeal a bad ruling by the court Mr Campbell stated that he still opposed any further amendments to Rule 29 and that to do so was part of an alarming trend to transfer the outcome of a case to one of the parties. He also noted that in his view

the low number of cases did not justify any further amendments to Rule 29 Mr. Fiske indicated that he supported an amendment to Rule 29 that would permit the defendant to waive any double jeopardy claims Both Judge Jones and Judge Battaglia expressed the view that the costs of fixing the problem of erroneous Rule 29 rulings outweighed any possible benefits Judge Jones stated that the costs of the amendment would include the possibility of the jury hearing evidence on all of the charges, regardless of how valid they were, in addition, prosecutors sometimes intentionally include many additional charges, which may or may not have merit The proposed amendment requiring the courts to defer ruling on any Rule 29 motion until after verdict would deprive them of the ability to weed out bad counts. Professor King agreed with the view that there is no constitutional right to have the court rule on a pre-verdict motion, but that doing so makes good policy.

Judge Trager stated that he had originally supported the Department's proposal and that he supported Judge Levi's waiver proposals. He added that although the cases are few where the courts have erroneously granted Rule 29 motions, he believed that such rulings reflect poorly on the courts and the community.

Following additional discussion about the various options for amending Rule 29, Judge Jones moved that the Committee make no amendments to the Rule. Mr. Campbell seconded the motion, which carried by a vote of 9 to 3

C. Proposed Amendments to Criminal Rules to Implement E-Government Act.

Professor Schlueter reported that 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). He noted that Section 205 of that Act, requires, in part, that 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.

He continued by informing the Committee that the Act requires that the Judicial Conference use the Rules Enabling Act procedures to prescribe the appropriate rules and that they are to be applied in a uniform manner throughout the federal courts In order 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 Professor Schlueter continued by stating that 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 Strubhar represents this Committee on the Subcommittee

Professor Schlueter reported that the Subcommittee had met in Scottsdale Arizona in January 2004, to discuss the approach and scheduling for drafting uniform privacy rules The Subcommittee had asked each of the Rules Committees for their input on what information should be deleted from filings. Another Subcommittee Meeting is scheduled for June 2004. He indicated that it would be important at this stage for the Committee to provide guidance to Judge Carnes, Judge Strubhar, or himself on what the Criminal version of the rule might look like.

He further stated that he had drafted proposed amendments to Rule 49, Serving and Filing Papers, using Professor Capra's original template

During the ensuing discussion, the Committee indicated that any privacy filing provisions should be listed in a separate new rule, Rule 49.1. Later in the meeting, Judge Carnes appointed an E-Government Subcommittee consisting of Judge Strubhar (chair), Judge Bartle, and Ms. Rhodes

D. Other Proposed Amendments to Rules.

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

Judge Carnes informed the Committee that Judge David Dowd, a former member of the Committee, had written to the Committee again urging it to address the problems arising in those cases where a defendant pleading guilty has not been informed of a plea offer from the government. In his proposal, Judge Dowd included several decisions from the Sixth Circuit evidencing the problem Judge Carnes noted that in his most recent proposal, Judge Dowd recommended that Rule 11 include a provision to the effect that a court may inquire of the defendant about whether the defendant has been fully apprised of any offered plea agreements, without violating the provision barring the court from taking part in the plea discussions.

Judges Trager and Bartle expressed the view that this has not been a problem in their courts. Judge Bucklew indicated that she does question the parties but does not view that as engaging in the plea discussions herself Judge Friedman agreed that making the inquiry is not a violation of the provision in Rule 11 that prevents the court from taking part in the plea discussions, and added that he did not see a need for an amendment to that rule. Judges Jones and Battaglia also stated that they did not see the need for any amendments to Rule 11 Following additional discussion, a consensus emerged that no change should be made to the rule.

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

Judge Carnes stated that after the last meeting, the Committee had received a proposal from the American College of Trial Lawyers to amend Rules 11 and 16 to require prosecutors to disclose favorable information, similar to that required by *Brady v Maryland* He informed the Committee that he had appointed a Subcommittee consisting of Judge Bucklew (chair), Judge Trager, Mr Campbell, Mr Goldberg, and Mr Wroblewski to study the proposal and report to the Committee

Judge Bucklew reviewed the extensive written proposal from the College and stated that the Committee had met once and had been divided on whether to proceed with proposing any amendments to either Rule 11 or Rule 16. She indicated that one of the first issues that would have to be addressed is the definition of "favorable" evidence, noting that at this point, there is a large amount of case law that has interpreted *Brady*

Judge Carnes noted briefly, the case law subsequent to *Brady*, which also includes an apparent change in the meaning of the term "materiality" and identified several potential problems of attempting to codify *Brady*. Mr. Fiske explained his role in the College's proposal, he indicated that as a past president of that organization he had spoken in favor of the proposal at the meeting during which it was considered He also identified a number of issues that would have to be considered if the Committee was inclined to amend either Rule 11 or 16 Mr Goldberg questioned the need for the rule, noting that he agreed with the Department of Justice's view that *Brady* is really a post-trial rule. He noted that prosecutors and judges apply a variety of timing requirements, and that perhaps it would be beneficial to adopt some sort of bright line rule for the time to disclose the information

Mr. Campbell stated that the proposal was worth pursuing and that it would be possible for the Committee to draft an amendment that addressed the core obligations Mr Goldberg questioned whether any states had such rules; if not, he noted, a federal rule could serve as a helpful model. Ms. Rhodes stated that the government takes its *Brady* obligations seriously, but that there are mistakes from time to time. She added that there is almost forty years of case law on the subject and that any amendment to Rule 16, for example, would not solve all of the problems associated with pre-trial discovery

Judge Jones questioned what the Department's response might be to a proposed amendment that required the prosecution to state on the record that it had used due diligence in attempting to discover favorable information. Ms Rhodes responded that she was not sure that including that in a rule would add any weight to the existing obligations In the following discussion, several members focused on the question of whether government attorneys are ever disciplined for withholding information favorable to the defense and the underlying problem of attempting to define what information must be disclosed.

Mr. Goldberg expressed the hope that any consideration of an amendment would not flounder on the specifics of the rule itself Judge Jones observed that the Committee

could draft a rule that granted greater protections than *Brady* Other members noted that attempts to codify the *Jencks* obligations in a rule had been unsuccessful.

Judge Friedman believed that it would be helpful to consider the issue further and that it might be time for an amendment to the rules. Other members agreed with that view, noting however that it would be important to address those issues that could be included in a rule. Mr Goldberg moved that the Committee consider the College's proposal further Mr Fiske seconded the motion, which carried by a vote of 9 to 3. Judge Carnes appointed a subcommittee to give further consideration to the proposal Mr. Goldberg (chair), Mr. Fiske, Mr. Campbell, Professor King, and Ms. Rhodes

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

Professor Schlueter informed the Committee that the Rules Committee Support Office had received information that there appeared to be an inconsistency between the text of Rule 15(d) and the Committee Note. The rule states that "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..." (emphasis added) On the other hand, the Note states in relevant part "Under the amended rule, if the deposition was requested by the government, the court *must* require the government to pay .." (emphasis in original) Professor Schlueter indicated that the general policy is to not amend only the Committee Note and that in the absence of an amendment to the rule itself, it would probably not be appropriate to change the language of the Note to conform to the clear text of the rule itself. Following additional discussion, Mr Rabiej offered to contact the publisher and point out the issue, with the thought that some sort of notation could be added, noting the inconsistency

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

Judge Carnes indicated that the Committee had a proposal from Magistrate Judge Robert Collings concerning a possible amendment to Rule 16 Judge Collings had recently decided a case involving interpretation of Rule 16 vis a vis the obligation of the government to give to the defense an agent's rough notes of an interview with the defendant. Judge Carnes continued by stating that Judge Collings believed that Rule 16 could be clarified by placing all of the provisions dealing with a defendant's oral statements under one subdivision. Several members of the Committee observed that the law concerning disclosure of an agent's notes seemed settled, that revising Rule 16 would not change the substance of the law, and that there appeared to be no need for the change Following additional discussion, a consensus emerged that no further action was required on the proposed amendment.

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

Professor Schlueter stated that the Committee had received a suggestion from Judge James Trimble suggesting that the Criminal Rules be amended to permit a less than unanimous verdict, as is used in some state criminal and civil cases The suggestion was apparently triggered by the recent mistrial in the *Tyco* case Following a very brief discussion, a consensus emerged that no favorable action would be taken on the proposal.

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

Professor Schlueter reviewed a proposal from Judge Gregory Carman that Rule 32 be amended to require the court to resolve all objections to the presentence report, regardless of whether the matter would have an impact on the sentence In support of his proposal, the judge had included a copy of his law review article entitled, "Fairness at the Time of Sentencing The Accuracy of the Presentence Report." His proposal is grounded on the view that even if the sentencing court does not disapprove or modify the objected-to matters in imposing a sentence, the Bureau of Prisons considers all of that information in making decisions about the defendant's incarceration. Professor Schlueter noted that the issue had been considered in some detail by the Committee during the restyling amendments to the Rules in 2001. Mr Campbell recognized that the Committee had considered a similar proposal but stated that the article made good sense and that it would be appropriate to reconsider the issue. He added that the Bureau of Prisons is not equipped to resolve incorrect information in the presentence report.

Ms. Rhodes noted that judges do make rulings on information that might have an impact on incarceration, even though the rule does not require them to do so, in her view, no amendment was required. Judge Carnes agreed with that assessment.

Following additional discussion on the various ways of dealing with information in the presentence report, a consensus emerged that no further action was required on the proposal

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.

1. Possible Amendments to Rule 46 Regarding Bail.

Mr. Rabiej reported that Congress had continued to consider amendments to Rule 46 that would restrict the ability of the court to revoke bail on grounds other than a failure to appear. He noted that the lobby for the Bail Bondsmen was extremely strong and that despite the clear opposition from the Judicial Conference on the issue, various

congressional committees continued to discuss the issue and propose legislation to amend Rule 46. He added that Judge Carnes and Judge Davis, past chair of the Committee, had testified before congress on the matter and made known the Judicial Conference's position.

2. Possible Conforming Amendment to Rule 6

Mr Wroblewski reported that several years ago, Congress had voted to amend Rule 6 to provide for greater sharing of grand jury information vis a vis the war on terrorism. But the amendment was to an older version of Rule 6, which had gone into effect automatically under the provisions of the Rules Enabling Act. Because the amendment made no sense when applied to the new version of the rule, it had been considered a nullity. He added that the Department and the Administrative Office had continued to work with Congress in correcting the problem.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Carnes indicated that his term as chair and member of the Committee expired in September 1, 2004, and that the Chief Justice would be appointing his successor during the summer He thanked the members for their service and indicated that it had been a high honor to work on the committee.

The Committee tentatively agreed to hold its next meeting in the Fall 2004 at Santa Fe, New Mexico. Judge Carnes asked the members to contact Mr. Rabiej concerning dates during which they could not meet.

The meeting adjourned at 9:30 a.m on Friday, May 7, 2004

Respectfully submitted

David A Schlueter
Professor of Law
Reporter, Criminal Rules Committee

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 17-18, 2004
Washington, D.C.
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 17-18, 2004. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Patrick F McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Professor Steven Gensler, Supreme Court Fellow with the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice was John S. Davis, Associate Deputy Attorney General.

INTRODUCTORY REMARKS

Judge Levi reported that no major amendments to the rules were scheduled to take effect on December 1, 2004. He noted that the Supreme Court had recommitted the proposed amendment to FED. R. EVID. 804(b)(3) — governing the hearsay exception for statements against penal interest — in light of its recent decision in *Crawford v Washington* In *Crawford,* the Court substantially revised its Confrontation Clause jurisprudence, thus making the proposed rule amendment inappropriate. He added that the Advisory Committee on Evidence Rules had decided to defer consideration of any

hearsay exception amendments until adequate case law develops to determine the meaning and implications of the *Crawford* case.

Judge Levi pointed out that the federal courts were facing a severe budget crisis that could result in substantial layoffs and furloughs of court staff. He explained that it was important for the committee to consider its rules decisions in the light of their impact on the resources of the courts. He noted that amendments have been proposed to the bankruptcy rules that could save the courts more than a million dollars in postage and handling costs by facilitating electronic notices and use of the national Bankruptcy Noticing Center. He explained that the committee would be asked to expedite the rulemaking process to achieve the anticipated savings earlier.

Judge Levi said that the project to restyle the civil rules was achieving excellent progress. The Style Subcommittee, he noted, had now reached the landmark of having completed a first draft of all 86 rules.

Judge Levi reported that the E-Government Subcommittee had met the day before the committee meeting to refine the guidance that it would provide the advisory committees in drafting rules amendments to implement the E-Government Act of 2002. The statute requires that rules be promulgated under the Rules Enabling Act to protect privacy and security concerns implicated by posting court case files on the Internet.

Judge Levi noted that the Court Administration and Case Management Committee had been working diligently on privacy and security issues for three years and had offered constructive comments on the latest proposed guidance to the advisory committee. He added that the E-Government Subcommittee had made a great deal of progress at its meeting in addressing a number of difficult policy and practical questions raised when court documents that had been practically obscure in the past are now posted on the Internet. He observed that there will likely have to be some differences in detail among the amendments proposed by the advisory committees. The bankruptcy rules, he noted, will be the most affected by privacy concerns because of the heavy use of social security numbers in bankruptcy cases.

Judge Levi reported that he attends most of the meetings of the advisory committees. Each committee, he observed, has a different personality, reflecting in part the style of its chair and reporter and the role of the Department of Justice. He emphasized that the rules process is blessed with great chairs and reporters, and the work product of the committees is truly outstanding.

Judge Levi noted that the Chief Justice had extended Judge Alito's term as chair of the Advisory Committee on Appellate Rules for an additional year. He also reported that Judge Susan Bucklew had been selected to replace Judge Carnes as chair of the Advisory Committee on Criminal Rules and Judge Thomas Zilly had been selected to replace Judge

Small as chair of the Advisory Committee on Bankruptcy Rules. He said that Judge Carnes and Judge Small had been outstanding and successful committee chairs, and they would be sorely missed He also reported that the Standing Committee would greatly miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — Charles Cooper and Patrick McCartan. Finally, Judge Levi emphasized that one of the highlights of his legal career had been to work closely with Professor Cooper as reporter to the Advisory Committee on Civil Rules.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 15-16, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring 34 bills introduced in the 108th Congress that would affect the federal rules.

He noted that legislation was still pending, proposed by the bail bond industry, that would directly amend the Federal Rules of Criminal Procedure and limit the authority of a judge to forfeit a bond. He said that the bill had been reported out by the House Judiciary Committee, but was opposed by the Judicial Conference. The legislation, he said, had not reached the House floor, thanks to efforts by the Administrative Office and the Department of Justice. He added that: (1) there had been recent communications with representatives of the bail bond industry, but the industry had not changed its essential position; and (2) there has been no action on the bill in the Senate.

Mr. Rabiej noted that legislation sponsored jointly by the Judicial Conference and the Department of Justice should be be enacted shortly to amend the E-Government Act. Under the present law, a party has the right to file an unredacted version of a document under seal with the court. In accordance with the revised E-Government Act, the public file would contain only a redacted version of the document or a reference list identifying redacted information accessible only to the parties and the court. He added that the E-Government Subcommittee and the advisory committees are now implementing the rulemaking requirements of the Act.

Mr. Rabiej reported that the Class Action Fairness Act was expected to be brought to the Senate floor for debate sometime in June.

He noted that comprehensive crime victims' rights legislation had passed the Senate in April 2004 on a 96-1 vote. It would give criminal victims a broad array of rights in such areas as protection against the accused, notice of proceedings, being heard at court proceedings, conferring with prosecutors, and receiving restitution. He added that the legislation was expected to pass the House of Representatives, but the chair of the House Judiciary Committee appeared to be holding up the legislation for tactical reasons.

Mr. Rabiej said that the crime victims legislation will have an impact on the criminal rules. He explained that the Advisory Committee on Criminal Rules had a separate proposal ready for final approval that would amend FED. R. CRIM. P. 32 to extend the right of allocution to victims of all crimes, not just victims of violence or sexual abuse.

Mr Rabiej reported that two more bills had been introduced in the preceeding week that appeared to be moving quickly through the legislative process. First, he said, a hearing would be held within a week on H.R. 4547, a bill designed to protect children from drug violence. He noted that it would directly amend FED. R. CRIM. P. 11 to impose additional conditions on a court before it may accept a plea agreement. The second new bill (H.R. 4571), designed to limit "frivolous filings," would directly amend FED. R. CIV. P. 11 by mandating that a judge impose sanctions for a violation of the rule.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4)

He reported that the Center was completing work on developing a new weighted caseload formula for the district courts. He explained that the study had been completed without requiring judges to keep detailed diaries of their daily activities.

Mr. Cecil noted that the Center had also completed a report comparing class actions in the federal and state courts. Among other things, the report addresses why attorneys bring cases in one court system rather than the other and finds few differences between federal and state judges and cases. Finally, he pointed to a new Center report on sealed court settlements. One of the findings of the report is that only 1 of every 227 civil cases in the federal courts contains a sealed settlement.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of May 14, 2004. (Agenda Item 6)

Amendments for Final Approval

FED. R. APP. P. 4(a)(6)

Judge Alito said that the proposed amendments to Rule 4(a)(6) (reopening the time to file an appeal) provides an avenue of relief for parties who fail to file a timely appeal because they have not received notice of the entry of judgment against them. The amendment allows a court to reopen the time to appeal if certain conditions are met. First, the court must find that the party did not receive notice of the judgment within 21 days after entry. Second, the party must move to reopen the time to appeal within 7 days after receiving notice of the entry of judgment. And third, the party must move to reopen within 180 after entry of the judgment.

Judge Alito pointed out that use of the word "notice," appearing twice in the rule, has been unclear. Most courts have interpreted the existing rule as requiring that the type of notice required to trigger the 7-day period to reopen be written notice. Others, though, have included other types of communications. The proposed amendment, he said, offers a clear solution by specifying that notice must be the formal clerk's office notice required under FED. R. CIV. P. 77(d).

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 26(a)(4) and 45(a)(2)

Judge Alito stated that the proposed amendments to Rule 26 (computing time) and 45 (when court is open) would replace the incorrect phrase "President' Day" with "Washington Birthday," the official, statutory name of the holiday.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP P. 27(d)(1)(E)

Judge Alito explained that Rule 32 (form of briefs) sets out typeface and type-style requirements. But Rule 27, which specifies the requirements for motions, does not. The proposed amendment would add a new Subdivision (E) to Rule 27(d)(1) to make it clear

that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motions papers.

Judge Alito said that the proposed amendment had received support during the public comment period, although one comment suggested increasing the number of words allowed in motions. He said that there was also some sentiment to express the length limits in terms of words, rather than pages. But, he explained, clerks of court favor a page limit because it is much easier to verify.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. APP. P. 28(c) & (h), 28.1, 32(a)(7)(C), and 34(d)

Judge Alito reported that the current rules say very little about briefing in cases involving cross-appeals. As a result, local rules fill in the gaps with procedural guidance. The advisory committee, he said, recommended moving the few provisions in the current national rules addressing cross-appeals into a new Rule 28.1 and adding several new provisions to fill the gaps in the existing rules. The new Rule 28.1 (cross-appeals) would parallel Rule 28 (briefs). In addition, conforming amendments would be made to Rule 28(c) (briefs), 32(a)(7)(C) (certificate of compliance), and 34(d) (oral argument).

The provisions of the new rule, he said, follow the local rules of every circuit save one. They would authorize four briefs and specify their lengths and colors. (1) The appellant's principal brief would be limited to 14,000 words. (2) The appellee's combined response brief and cross-appeal principal brief would be limited to 16,500 words. (3) The appellant's response and reply brief would be limited to 14,000 words. (4) Finally, the appellees's reply brief would be limited to 7,000 words.

Judge Alito said that the lawyers who had commented on the proposal uniformly had recommended higher word limits, while the judges who had commented wanted fewer words. Professor Schiltz added that the local rules of the circuits generally prescribe word limits of 14,000, 14,000, 14,000, and 7,000 for the four briefs. The advisory committee, he said, had decided to increase the second brief to 16,500 words because it serves two functions — responding to the appellant's principal brief and initiating the principal brief in the cross-appeal.

Several members said that the advisory committee's proposal to authorize an additional 2,500 words for the second brief was a sound compromise that should accommodate most cases and result in fewer motions by attorneys seeking word extensions

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 32.1

Judge Alito reported that the the proposed new Rule 32.1 (citing judicial dispositions) had attracted more than 500 public comments.

He noted that the proposed rule enjoyed the support of the major bar associations. It would equalize the treatment of unpublished opinions with other types of non-precedential materials presented to the courts of appeals. The rule, he emphasized, would merely prevent a court of appeals from prohibiting the citation of unpublished opinions. It would not require a court to give unpublished opinions any weight or precedential value, or even to pay any attention to them. It would just allow the parties to cite them. He said that prohibiting the citation of court opinions undermines confidence in the courts of appeals and the judiciary. It implies that there is something second-class about unpublished opinions. The practice, he said, is very difficult to explain to lay people and most practitioners.

On the other hand, he pointed out, opponents of the rule claim that it will have an adverse impact on judges because they will have to spend more of their limited time on crafting unpublished opinions. This, it is claimed, would both detract from the quality of judges' published opinions and lead to the issuance of more one-sentence orders. He noted, too, that opponents of the rule assert that it will inevitably require lawyers to take the time to read unpublished opinions and increase expenses for their clients.

Judge Alito emphasized that the advisory committee had taken the adverse comments very seriously, but it had concluded that there is simply no empirical support for them. He noted that a number of the federal circuits currently permit citation of unpublished opinions The committee, he said, had not received any comments from judges on the courts allowing citation that the practice has increased their work. Moreover, he added, the trend at both the federal and state levels is moving away from non-citation rules.

Judge Alito said that, as a result of the public comments, the advisory committee had deleted from the proposed rule a clause that would have prohibited a court of appeals from prohibiting or restricting citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispostions."

Judge Levi observed that the sheer size of the body of comments was daunting, even though many of the comments seemed to copy each other. He congratulated Professor Schiltz for a superb job in summarizing the comments.

One of the members suggested that the key issue was not citation, but the status of unpublished opinions. He pointed out that the committee note refers to unpublished opinions as "official actions" of the court. But, he noted, they are commonly crafted by law clerks and only endorsed by judges. They do not receive the same scrutiny as published opinions and clearly do not represent the views of the full court. The proposed rule, he said, would elevate unpublished opinions into actions of the court and give them a status that they do not presently have. He recommended that the proposal be deferred and the circuits be given time to issue their own rules addressing the contents and effect of unpublished opinions. He added that this approach would promote transparency, for the circuits would articulate what they are doing with regard to unpublished opinions.

One lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court. He added that, regardless of precedential value, an unpublished opinion is in fact an official disposition by a government body.

Two members pointed out that the proposed rule had given rise to concern among state-court leadership as to the use by the federal courts of unpublished state-court opinions. For example, a federal court applying the doctrine in *Erie R.R. Co v. Tompkins* might cite an unpublished state-court opinion as establishing binding state law in a way that the opinion was not intended to be used. Judge Alito responded that the advisory committee's deliberations had focused on citing a federal circuit court's own decisions, not on citing state-court opinions. Moreover, he said, the rule does not address what weight is to be given to unpublished opinions. He added, though, that he would not object to amending the rule to limit its application specifically to federal opinions.

One participant pointed out that unpublished opinions are widely available today, and the circuits are free to give them precedence or not, as they see fit. He argued that lawyers should be free to call a court's attention to cases decided by their colleagues that have similar facts and issues. Other panels of the court, he said, should be made aware of what one panel has done with a similar pattern of facts, particularly in sentencing guideline cases. He added that it would be beneficial for courts to look at their unpublished opinions as part of their efforts to achieve consistency and reliability in circuit case law.

One member observed that there are very strong arguments on both sides of the issue, but on balance he favored allowing the courts of appeals to continue their non-

citation policies. He said that the adverse consequences predicted by opponents of the rule might well come to pass. He emphasized the vital need for courts to have a two-tiered opinion system because some cases simply do not deserve the same time and attention as others. He also said that he was not convinced that it is appropriate to compare unpublished opinions of a court of appeals with other types of nonprecedential materials cited to the court. Unpublished opinions, he said, inevitably carry far more weight with the lawyers and the court because they have been signed off on by three judges of the deciding court.

One member noted that he had been struck by how strongly a number of judges feel about the issue. He said that the arguments on both sides appear to be empirical in nature, but they are essentially not provable at this point. He stressed the need for empirical research and suggested that the committee not be put in the position of accepting one side of the argument and rejecting the other without further data. He argued that appropriate research would focus on the practices and results in those circuits that allow citation of unpublished opinions. He conjectured that it should be possible to obtain good empirical data because several circuits now allow citation.

Judge Levi said that he agreed and had spoken with the Federal Judicial Center about what shape an empirical study might take. He emphasized that the proposed rule was very controversial. And in dealing with controversial matters, he said, the rules committees have consistently sought strong empirical support for proposed amendments. In this case, he noted, nine circuits now allow citation of unpublished opinions, and four do not. Researchers, for example, could examine the courts that allow citation to see whether disposition times have lengthened or the number of judgment orders has increased. In addition, judges and lawyers might be surveyed to examine the practical impact of citation policy on their work. Lawyers might be surveyed to examine whether citation policy affects the costs of legal practice. Attention might also be directed to the four circuits that prohibit citation to see whether there are any special conditions in those circuits that make them different.

Judge Levi added that it would be seek to proceed to the Judicial Conference's approval at this time of the proposed new rule without appropriate empirical data. Obtaining the data would better inform the committee and take much of the passion out of the debate. If the data turn out to support the proposed rule, he said, the committee would be in a much better position to secure Conference approval.

Several participants endorsed Judge Levi's approach, citing the great sensitivity of the issue among circuit judges, the need for a period of reflection, and the value of gathering whatever empirical data can be produced. One member added that there were powerful arguments in favor of the proposed amendment, but it would be a mistake institutionally to go forward with a rule that has generated so much opposition. He said

that, as a matter of basic policy, the committee should proceed with a controversial proposal only if: (1) there is a compelling need for the rule; and (2) the committee is convinced that the opposition is clearly wrong. Other participants endorsed this analysis, emphasizing the need for empirical information and institutional restraint. They added that a year's delay for study would not cause any harm and may even lead some opponents to reassess their positions.

Judge Alito agreed that a study would be helpful, especially since opposition to the rule was based largely on empirical observations. Mr. Cecil added that the Research Division of the Federal Judicial Center was prepared to conduct the research. He cautioned, however, that the results of the study may not in fact solve the committee's problems. The key issue, he said, is how judges perform their work in chambers. That, he said, is a matter of utmost sensitivity.

Judge Kravitz moved to have the committee take no action on the proposed new Rule 32.1 and return it to the advisory committee, with the expectation that the advisory committee will work with the Federal Judicial Center to conduct appropriate empirical studies. The studies, for example, would explore the practical experience in the circuits that have adopted local rules allowing citation of unpublished opinions. The advisory committee would then have the discretion to make a fresh decision on the matter and return to the standing committee with a proposal, or not.

One member asked that the record reflect that the committee's discussion of the matter and its returning the rule to the advisory committee did not reflect a judgment by the Standing Committee on the merits of the proposal. Rather, he said, the committee's concerns were directed purely to instutional values and the rulemaking process. Judge Kravitz agreed to the clarification.

One member added that the advisory committee should take advantage of the delay to explore the impact of the rule on citing unpublished state-court opinions.

The committee without objection approved Judge Kravitz's motion by voice vote. Therefore, it decided to take no action on the proposed new Rule 32.1, return it to the advisory committee, and recommend that appropriate empirical study be undertaken.

FED. R. APP. P. 35(a)

Judge Alito reported that Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) both specify that "a majority of the circuit judges who are in regular active service" may order that an appeal or other proceeding be heard or reheard en banc. Although the standard applies to all the courts of appeals, he said, the circuits are divided in

interpreting the provision when one or more active judges are disqualified in a particular case. Seven circuits follow the "absolute majority" approach, counting disqualified judges in the base to calculate a majority. Six circuits follow the "case majority" approach, requiring a majority only of the active judges who are not recused.

Judge Alito emphasized that the advisory committee believes that whatever the rule means, it should mean the same all across the country. There is no principled basis, he said, for having different interpretations of the same rule. The primary objective of the proposed amendment, thus, was to promote national uniformity. The advisory committee, he said, believed that the better interpretation is the case majority approach because it is most consistent with what Congress must have intended in enacting the statute. He noted that 28 U.S.C. § 46(c) uses the phrase "circuit judges . . . in regular active service" twice. In the second sentence, the phrase clearly does not include disqualified judges, since disqualified judges obviously cannot participate in a case heard en banc. The proposed amendment to Rule 35(a), he added, was not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d).

The committee without objection approved the proposed amendment for final approval by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. BANKR. P. 1007

Judge Small reported that the proposed amendment to Rule 1007 (lists, schedules, and statements) would require a debtor to file a mailing matrix with the court, a practice now required universally by local court rules. The matrix must include the names and addresses of all entities listed on Schedules D-H, including holders of executory contracts and unexpired leases.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 3004 and 3005

Judge Small explained that the proposed amendments to Rules 3004 (filing of claims by a debtor or trustee) and 3005 (filing of a claim, acceptance, or rejection by codebtor) deal with the situation where an entity other than the creditor files a proof of claim. The amendments to Rule 3004 make it clear that the third party may not file a proof of claim until the exclusive time has expired for the creditor to file its own proof of claim. In addition, FED. R. BANKR. P. 3005 would no longer permit the creditor to file a proof of claim to supersede the claim filed by the debtor or trustee. Instead, the creditor could amend the proof of claim filed by the debtor or trustee. The changes would make the rules consistent with § 501(c) of the Bankruptcy Code.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. BANKR. P. 4008

Judge Small reported that Rule 4008 (reaffirmation agreement) would be amended to establish a deadline of 30 days after entry of the order of discharge to file a reaffirmation agreement with the court. He said that some public comments had recommended a shorter period, and the advisory committee had considered a deadline of 10 days following discharge. But, he explained, the shorter time limit would not be practical because it takes several days for the the noticing center to process and distribute discharge notices.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 7004

Judge Small reported that the proposed amendment to Rule 7004 (process and service) would authorize the clerk of court to sign, seal, and issue a summons electronically. He noted that the rule does not address the service requirements for a summons, which are set out elsewhere in Rule 7004.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 9006

Judge Small stated that Rule 9006 (time) would be amended to remove any doubt that the additional three-day period given a responding party to act when service is made

on the party by specified means — by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served — are added after a rule's prescribed period to act expires.

The committee considered and approved the proposed amendment to Rule 9006 in conjunction with a proposed parallel amendment to FED. R. CIV. P. 6(e).

The committee without objection approved the proposed amendment for final approval by voice vote.

OFFICIAL FORMS 6-G, 16-D, and 17

Judge Small reported that the proposed amendments to the forms had not been published because they were technical in nature. The change to Form 6-G is required to conform the form to the proposed amendment to Rule 1007, and the revisions to Forms 16-D and 17 reflect the abrogation of Official Form 16-C in 2003. He asked that: (1) the changes to Form 16-D and 17 take effect on December 1, 2004; and (2) the change to Form 6-G take effect on December 1, 2005, to coincide with the effective date of the proposed amendments to Rule 1007.

The committee without objection approved the proposed amendments to the forms for final approval by voice vote.

Amendments for Publication

FED. R. BANKR. P. 1009, 4002, and OFFICIAL FORM 6-I

Judge Small pointed out that the proposed amendments to Rule 1009 (amendments to schedules and statements), Rule 4002 (debtor's duties), and Form 6-I (schedule of debtors' current income) had been proposed by the Executive Office for United States Trustees. He noted that the amendment to Rule 4002 was controversial.

The U.S. trustee organization had asked the committee for a rule that would require debtors to bring a substantial number of documents with them to the meeting of creditors under § 341 of the Code The proposal, he said, had attracted the attention and strong opposition of the debtors' bar. The advisory committee had received more than 80 letters from attorneys opposing the proposal, even though the committee had not approved or published it.

Judge Small noted that the advisory committee's consumer subcommittee had met in Washington to consider the proposal, and it had invited several knowledgeable trustees and attorneys to participate, along with representatives of the U.S. trustee organization. At the meeting, the subcommittee decided that the most of the proposed changes were not needed.

The full committee, however, decided to adopt a compromise amendment to Rule 4002 that would require debtors to bring with them to the § 341 meeting a government-issued picture identification, evidence of their social security number, evidence of their current income (such as a pay stub), their most recent federal income tax return, and statements for each of their depository accounts. That, he said, was the proposal that the advisory committee sought authority to publish.

Judge Small said that the proposed amendment to Rule 1009 specifies that if the debtor files an incorrect social security number, he or she must correct it and notify all those who received notice of the incorrect number.

The proposed change to Form 6-I would extend to Chapter 7 cases the requirement that a debtor divulge a non-filing spouse's income. The form's mandate to divulge currently applies only to Chapter 12 and 13 cases.

The committee without objection approved the proposed rule amendments for publication by voice vote. It also approved without objection the proposed amendment to the Official Form by voice vote.

FED. R. BANKR. P. 7004

Judge Small explained that under the current Rule 7004 (process and service), the debtor's attorney must be served only if the summons and complaint are served on the debtor by mail. The proposed amendment would make it clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor, regardless of the manner of service on the debtor. The rule would also allow the attorney to request that service be made electronically.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 2002(g) and 9001

Judge Small reported that the changes to Rule 2002 (notices) and 9001 (general definitions) were designed in large part to facilitate noticing national creditors. The proposed amendment to Rule 2002(g) would allow creditors to make arrangements with a

"notice provider" to have notices sent to them at a preferred address or addresses. Notices would normally be sent electronically, but the rule also covers the sending of paper notices to central addresses. The amendment to Rule 9001 would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors at a preferred address or addresses under the proposed amendment to Rule 2002(g).

Judge Small explained that the amendments could result in significant financial benefits to the judiciary and taxpayers because more creditors would sign up for electronic service of court notices. In light of the potential cost savings, the advisory committee had decided to pursue "fast track" promulgation of these two amendments — as well as the amendment to Rule 9036 approved by the Standing Committee in January 2004, which specifies that notice by electronic means is complete on transmission.

Under the fast track proposal, the rules would become effective on December 1, 2005, rather than December 1, 2006. They would be published for public comment in August 2004. Comments would be due by mid-February 2005. The advisory committee and Standing Committee could approve them by mail ballot and submit them to the Judicial Conference for approval at its March 2005 session. They would then be sent immediately to the Supreme Court, which could act on them before May 1, 2005. Mr. Rabiej added that the Court would be given copies of the amendments well in advance of the March 2005 Conference session to give the justices time to review them carefully.

Judge Small said that the advisory committee had carefully considered the rules at three meetings, and he did not anticipate any controversy over them. Professor Morris added that even though the primary thrust of the rules was to facilitate electronic notice, there would also be savings in processing paper notices under the rules because notice providers will be able to bundle notices to creditors and save postage costs.

The committee without objection approved the proposed amendments for publication by voice vote.

The committee also approved expediting approval of the amendments, together with the proposed amendment to Rule 9036 approved by the Standing Committee in January 2004.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of May 17, 2004. (Agenda Item 8)

Amendments for Final Approval

FED. R. CIV. P. 6(e)

Judge Rosenthal reported that the proposed change to Rule 6(e) (additional time allowed following certain kinds of service) had been referred by the Advisory Committee on Appellate Rules, which was considering parallel changes to FED. R. APP. P. 26(c). Under the existing Rule 6(e), there is some uncertainty in calculating the three additional days given a party to act when service is made on the party by mail, leaving it with the clerk of court, electronic means, or other means consented to by the party served.

The proposed clarifying amendment would specify that the three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and holidays would be included in counting the additional three days, but the last day cannot be a Saturday, Sunday, or holiday. Judge Rosenthal added that the committee note sets forth a number of practical examples calculating the time period.

One member asked why the advisory committee had not used the term "calendar days," as used in the appellate rules. Judge Rosenthal responded that the committee had considered that option, but had decided not to use "calendar days" because it is not found anywhere else in the civil rules.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 27(a)(2)

Judge Rosenthal said that the proposed change in Rule 27 (deposition before action or pending appeal) would merely correct an outdated reference in the rule to former Rule 4(d), which deals with serving a copy of the petition and a notice stating the time and place of a deposition hearing. The corrected reference makes clear that all forms of service under Rule 4 can be used to serve a petition to perpetuate testimony.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 45(a)

Judge Rosenthal reported that the proposed amendment to Rule 45 (subpoena) would close a small gap in the rule by requiring that a deposition subpoena state the method for recording testimony.

The committee without objection approved the proposed amendment for final approval by voice vote.

SUPPLEMENTAL RULE B(1)(a)

Judge Rosenthal stated that the proposed amendment to Supplemental Rule B (attachment and garnishment) would bring the rule into conformity with case law. The amendment specifies that the time for determining whether a defendant is "found" in a district is the time the verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed.

The committee without objection approved the proposed amendment for final approval by voice vote.

SUPPLEMENTAL RULE C(6)(b)

Judge Rosenthal reported that the proposed amendment to Supplemental Rule C(6) (responsive pleadings and interrogatories) would correct an oversight made during the course of the 2000 amendments to the rule. It would delete the rule's reference to a time 10 days after completed publication under Rule C(4). That rule requires publication of notice only if the property is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

The committee without objection approved the proposed amendment for final approval by voice vote.

Amendments for Publication

SUPPLEMENTAL RULE G

Professor Cooper explained that civil forfeiture proceedings have long been governed by the Supplementary Rules for Certain Admiralty and Maritime Claims because of tradition, the in rem nature of forfeiture proceedings, and many forfeiture statutes expressly invoking the supplemental rules. But, he said, the relationship had come under considerable strain because of an explosion in the number of civil forfeiture proceedings. In particular, court interpretations of the supplemental rules by the courts in forfeiture cases have been cited by the admiralty bar as creating problems for maritime practice.

Professor Cooper noted that the supplemental rules had been amended in 2000 to draw some distinctions between forfeiture and admiralty practice. At about the same time, Congress enacted the Civil Asset Forfeiture Reform Act, which required a number

of other changes in the rules as they apply to civil forfeiture proceedings. Soon after enactment of the legislation, the Department of Justice approached the Advisory Committee on Civil Rules, suggesting that it was time to consolidate all the civil forfeiture procedures into a single supplemental rule that would be consistent with the new statute.

Professor Cooper said that the advisory committee had appointed a subcommittee that produced a proposed new Rule G after several conference calls, a meeting in December 2003, and substantial input from the Department of Justice and the National Association of Criminal Defense Lawyers. The new rule, he said, was ready for publication, together with conforming amendments to SUPPLEMENTAL RULES A, C, and E and FED. R CIV. P. 26(a)(1)(E).

Professor Cooper pointed out that the advisory committee had devoted a great deal of attention to a proposal by the Department of Justice to define in the rule what "standing" is needed to assert a claim to property once the government initiates a civil forfeiture action. The Department had proposed that the rule limit standing to a person qualifying as an "owner" within the statutory definition of the innocent-owner defense. The committee, however, concluded that defining standing to file a claim should be left to developing case law, not the rules. Instead, proposed Rule G(8) only sets forth the procedural framework for determining a claimant's standing and deciding a claimant's motion to dismiss.

In the same vein, Professor Cooper reported that the advisory committee had not included a provision in the new rule barring the use FED. R. CRIM. P. 41(g) to accomplish the return of property outside Rule G. This issue, too, would be left to case law development.

Professor Cooper proceeded to describe the provisions of the new rule. He noted that subdivision (1) specifies that Rule G governs in rem forfeiture actions arising from federal statutes. It also states that Supplemental Rules C and E and the Federal Rules of Civil Procedure apply to the extent that Rule G does not address an issue.

Subdivision (2) would replace the particularized pleading in the existing rule with a statement of sufficiently detailed facts to support a reasonable belief that the government will be able to meets its burden of proof at a trial.

Subdivision (3), dealing with arrest warrants, would provide that only the court, on a finding of probable cause, may issue a warrant to arrest property not in the government's possession or not subject to a judicial restraining order. The existing rule allows issuance of a summons and warrant by the clerk without a probable-cause finding. In addition, the proposed rule would require the warrant and any supplemental service to

be served as soon as practicable, unless the court orders a different time. Professor Cooper noted that the National Association of Criminal Defense Lawyers had expressed concern that the change would encourage courts to permit more filings under seal. But, he added, the rule does not address when it is appropriate to file under seal. It merely reflects the consequences for execution when sealing or a stay is ordered.

Professor Cooper noted that subdivision (4), the basic notice requirement, reflects the traditional practice of publishing notice of an in rem action. For the first time, the rule would recognize publication on an official government-created Internet forfeiture site to provide a single, easily identified means of notice. He pointed out that there is no such site now, but if the government were to establish one, it would provide more effective notice than newspaper publication.

In addition, proposed paragraph (4)(b) would require the government to send individual notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant, based on the facts known to the government. Although the National Association of Defense Lawyers had asked for formal service of the summons in the manner required by FED. R. CIV. P. 4, the proposed rule does not require that level of service. Rather, due process requirements are satisfied by practical means reasonably calculated to accomplish actual notice.

The proposed rule also specifies that the notice must be sent by means reasonably calculated to reach the potential claimant. Notice may be sent to the attorney if the potential claimant has an attorney, and that this may be the most effective notice in many cases. Notice to an incarcerated person must be sent to the place of incarceration. The rule, however, does not attempt to deal with the due process problems implicated by *Dusenbery v United States,* 534 U.S. 161 (2002), where a particular prison has deficient procedures for delivering notice to prisoners.

The proposed paragraph also sets out deadlines for filing claims and motions Professor Cooper pointed out that the provision dealing with filing an answer or motion under FED. R. CIV. P. 12 had generated advisory committee discussion. Contrary to an ordinary civil action, where Rule 12 suspends the time to answer, the proposed rule requires that an answer or motion be filed no later than 20 days after a claim is filed.

Professor Cooper pointed out that under subdivision (5), a claim must identify the claimant and state the claimant's interest in the property. If the claim is filed by a person asserting an interest in the property as a bailee, it must identify the bailor.

Subdivision (6) would allow the government to serve special interrogatories under FED. R. CIV. P. 33 limited to the claimant's identity and relationship to the property. The purpose, he said, is to elicit information promptly so the government can move to dismiss

for lack of standing. The government need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered the interrogatories.

Professor Cooper noted that subdivision (7) would allow property to be sold on an interlocutory basis. The court could order the property sold, for example, if it were perishable or at risk of diminution of value. Likewise, it could be ordered sold if the expense of keeping the property is excessive, or if the court finds other good cause.

Professor Cooper pointed out that subdivision (8) govern motions. He noted that paragraph (8)(A) states that a party with standing to contest the lawfulness of the seizure of property may move to suppress use of the property as evidence. He explained that the advisory committee had deleted a reference in the proposed rule to constitutional standing under the Fourth Amendment. Likewise, a party who establishes standing to contest forfeiture may move to dismiss the action under FED. R. CIV. P. 12(b). At any time before trial, the government may also move to dismiss because the claimant lacks standing Professor Cooper pointed out that the court must decide the government's motion before any motion by the claimant to dismiss the action The claimant has the burden of establishing standing based on a preponderance of the evidence.

Professor Cooper stated that paragraph (8)(d) deals with a petition to release property under the Civil Asset Forfeiture Reform Act. The venue provision in the rule had been inserted at the request of the Department of Justice. It is derived from the statute and serves as a guide to practitioners. It makes clear that the status of a civil forfeiture action is a "civil action" eligible for transfer under 28 U.S.C. § 1404. Finally, Professor Cooper noted that the rule contains a provision allowing a claimant to seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment.

Judge Rosenthal reported that the Style Subcommittee had reviewed the proposed rule and had suggested a few improvements in language. She asked for and received permission to adopt the Style Subcommittee suggestions without having to return to the Standing Committee before publication.

Judge Rosenthal added that the advisory committee anticipated that a significant number of comments would be received during the publication period, but from a narrow section of the bar. Judge Levi and Professor Cooper pointed out that the committee had benefitted greatly as a result of excellent suggestions and input from the Department of Justice and the National Association of Criminal Defense Lawyers.

The committee without objection approved the proposed new rule for publication by voice vote.

SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E)

Professor Cooper reported that the proposed changes to Supplemental Rules A, C, and E and FED. R. CIV. P. 26(a)(1)(E) were conforming amendments to account for the consolidation of civil forfeiture provisions into the new Rule G. He noted that the amendment to Rule 26(a)(1)(E) (initial disclosures) would add civil forfeiture actions to the list of cases exempted from the initial disclosure requirements.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CIV. P. 50(b)

Judge Rosenthal reported that the proposed amendments to Rule 50(b) would remove a trap that occurs when a party moves for judgment as a matter of law under Rule 50(a) before the close of all the evidence and then fails to renew the motion at the close of all the evidence. The revised rule, she said, would delete the requirement that a renewal motion be made at the close of all the evidence. It responds to court decisions that have begun to move away from a strict interpretation of the current rule requiring a motion for judgment as a matter of law at the literal close of all the evidence. Professor Cooper added that the amendments are fully consistent with the Seventh Amendment.

In addition, the rule would be amended to add a time limit of 10 days after discharge of the jury for a party to make a post-trial motion when a trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict.

The committee without objection approved the proposed amendments for publication by voice vote.

ELECTRONIC DISCOVERY
FED. R. CIV. P. 16, 26, 33, 34, 37, and 45 and FORM 35

Judge Rosenthal reported that the package of "electronic discovery" amendments was the product of a lengthy and thorough examination by the advisory committee into whether the current rules are adequate to regulate discovery of electronically stored information. She pointed out that the committee had enjoyed invaluable cooperation and input from the bar on the project, and it had conducted three productive conferences with lawyers, judges, and law professors on electronic discovery. She thanked Professor Capra and Fordham Law School for hosting the most recent conference, held in New York in February 2004. She also thanked Kenneth Withers of the Federal Judicial Center for his major assistance and wise counsel.

Judge Rosenthal explained that the advisory committee had initiated the electronic discovery project with a good deal of skepticism regarding the need for rule changes. But as the project progressed and lawyers articulated their experiences, she said, the committee moved to a consensus that the existing discovery rules do not fit current practice as well as they should. The committee, she emphasized, had reached the conclusion that the national rules needed to be amended and the amendments were needed now.

Judge Rosenthal pointed out that the materials in the committee's agenda book demonstrate that there are many real differences between electronic discovery and other types of discovery. For one thing, computer-stored information is dynamic and often changes without active human intervention. Unlike paper information, moreover, computer information may be incomprehensible without the machine and software that created it.

She said that the bar had informed the committee that discovery had become more difficult, burdensome, and costly because the current rules — even though they are very flexible — are simply not specific enough with regard to electronic discovery. She pointed out that some federal district courts now have local rules in place governing electronic discovery, and pertinent case law is beginning to develop. In addition, state court systems have issued or are considering rules to deal with electronic discovery. She concluded that if the advisory committee were to wait too long to propose amendments to the national rules, it would run the risk of having local rules proliferate and wide variations develop in federal practice.

Judge Rosenthal summarized the advisory committee's key proposals, pointing out that they would: (1) require parties and the court early in a case to discuss issues relating to electronicaly stored information and privilege waiver; (2) clarify and modernize the definition of discoverable electronic information; (3) address the form in which electronically stored information must be produced; and (4) provide a procedure for handling inadvertent privilege waivers.

She explained that the committee had heard repeatedly from lawyers that privilege review of discovery materials is very time consuming and expensive. Electronically stored information, moreover, presents special problems because privileged information, though not readily visible, may be embedded in electronic documents or found in metadata. She emphasized that the proposed amendments respect the Rules Enabling Act and avoid dealing with the substance of privilege law Rather, they only set forth a procedure for retrieving inadvertently produced privileged information.

FED. R. CIV. P. 26(f) and FORM 35

Professor Cooper said that the proposed amendments to FED. R. CIV. P. 26(f) (conference of the parties) were non-controversial. They would require the parties at the 26(f) conference to discuss any issues relating to preserving discoverable information and to include in their discovery plan: (1) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and (2) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information. He noted that the latter item was a response to concerns expressed to the committee by members of the bar regarding the enormous burden imposed by having to screen voluminous documents for privilege.

He said that it was generally accepted that the discovery process moves much more quickly and efficiently when the parties in a case agree on how to deal with privilege issues. He said that the proposed amendment contemplates that the parties will enter an agreement. The court order will enhance the status of the agreement and may well affect future waiver litigation. In addition, Form 35 would be amended to include a new section dealing with disclosure of electronic information and privilege protection.

FED. R. CIV. P. 16(b)

Professor Cooper reported that the proposed amendments to FED. R. CIV. P. 16(b) (scheduling and planning) would alert the court to the need, early in the litigation, to address the handling of discovery of electronically stored information and to consider adopting the parties' agreement for protection against privilege waiver.

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that the proposed amendment to FED. R. CIV. P. 26(b)(5) (claims of privilege or protection of trial preparation materials) specifies that when a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party receiving the information that it claims a privilege. The receiving party must then promptly return or destroy the specified information and any copies. Professor Cooper added that the committee note specifies that the amendment does not address the controversial question of whether there has in fact been a privilege waiver. It merely provides a procedure for addressing privilege issues.

One member said that the proposed waiver provision would not make a real difference in practice. Parties, he said, will still have to review all documents in order to avoid the danger that a state court may find a waiver of privilege. He urged the

committee to publish a much more ambitious proposal that would address the waiver issue itself. He suggested that this would be a great opportunity for the committee to make a major improvement in practice.

Judge Rosenthal responded that the advisory committee was very sympathetic to that approach, but it had opted for a more cautious amendment because of concerns over the limits of the Rules Enabling Act. The statute specifies that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." (28 U.S.C. § 2074) Another participant added that privilege issues implicate fundamental questions of federalism that rules committees should approach with hesitancy.

Other participants countered, though, that a bolder waiver proposal to protect parties against inadvertent waiver of privilege would in fact be consistent with the Rules Enabling Act. They asserted that a federal rules provision could specify that an inadvertent turnover of privileged material through the federal discovery process does not constitute a waiver of privilege. The provision, they said, would be procedural in nature, not substantive. It would not address the scope of the privilege itself. Instead, it would merely address the procedural consequences arising as a result of the mandatory federal discovery process. In other words, if a court requires a party to produce materials through the federal discovery rules, those rules can prescribe the character of the privilege waiver without modifying the content of the privilege itself.

One member pointed out that the advisory committee's proposed amendment may put a court in an awkward position because its order may not effectively bind third parties or prevail in a later proceeding before another court. He noted that there is a split in state law as to whether third parties are bound.

One member pointed out, though, that the proposed amendment would still be a valuable change because — despite uncertainty as to the scope of the privilege protection — parties are in a much better position with a court order than without one. Judge Rosenthal added that the pertinent committee note addresses the issue in general terms by stating that a court order adopting the parties' agreement "advances enforcement of the agreement betweeen the parties and adds protection againt nonparty assertions that privilege has been waived."

Another member noted that the proposed new Rule 26(b)(5)(B) states that a party receiving privileged information must promptly return or destroy it upon being notified by the producing party that it intends to assert a claim of privilege. He suggested that the rule might be amended to require the receiving party to certify that they have in fact destroyed the information in question.

FED. R. CIV. P. 26(b)

Judge Rosenthal reported that the proposed new Rule 26(b)(2)(C) (discovery scope and limits) would establish a two-tiered approach to electronic discovery. A producing party would automatically have to turn over requested information that is "reasonably accessible." Even if it makes a showing that the information sought is not "reasonably accessible," the requesting party may then ask the court to order discovery of the information "for good cause." She pointed out that this approach is similar to the two-tiered approach embodied in the 2000 amendments to Rule 26(b)(1), under which parties may obtain discovery automatically as to matters "relevant to the claim or defense of any party," but they may ask the court for good cause to order discovery of any matter "relevant to the subject matter involved in the action."

One member pointed out that there is no provision in the proposed amendments explicitly addressing the sharing of discovery costs. He noted that judges already have general authority under Rule 26 to shift discovery costs, but recommended that the proposed amendments themselves, or the accompanying committee notes, specify that a judge may assess part or all of the costs of certain discovery requests on the requesting party. One member suggested that language covering cost sharing be added to the proposed amendment to Rule 26(b)(2)(C). Judge Rosenthal responded that it might be preferable to include such language in the committee note, rather than the rule.

Professor Cooper pointed out that the committee note in fact quotes the *Manual for Complex Litigation*, instructing that certain forms of production be conditioned upon a showing of need or the sharing of expenses. He pointed out, however, that the Standing Committee has been very sensitive to cost sharing or cost bearing, and it is a controversial concept for many members of the bar. Mr. Rabiej added that language regarding cost-shifting had been proposed by the Advisory Committee on Civil Rules in the 2000 amendments to Rule 26, but it had been removed by the Standing Committee.

Judge Kravitz moved to add language at the end of the proposed amendment to Rule 26(b)(2)(C) to specify that if a responding party shows that requested information is not reasonably accessible, the court may order discovery of the information "on such terms as the court may determine." He added that no explicit language as to cost sharing should be included in the text of the rule itself, but a reference to costs could be included in the committee note.

The committee without objection approved Judge Kravitz's motion by voice vote.

FED. R. CIV. P. 33

Judge Rosenthal noted that the proposed amendment to Rule 33(d) (option to produce business records in response to interrogatories) makes it clear that a party may respond to interrogatories by using electronically stored information.

FED. R. CIV. P. 34

Judge Rosenthal explained that the proposed amendments to Rule 34(a) (production of documents and inspection of tangible things) draw a new distinction between "electronically stored information" and "documents." The word "document" in the current rule, she said, is simply not adequate to capture all the types of information stored on computers. The proposed rule, thus, would acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. She also pointed out that under the amendment copying, testing, and sampling would apply explicitly both to electronically stored information and tangible things.

She noted that the proposed amendments to Rule 34(b) permit a party to specify the form in which it wants electronically stored information to be produced. If no request is made as to form, or if there is no agreement by the parties, the producing party may turn over the information in the form in which it is ordinarily maintained or in an electronically searchable form. One member suggested that the term "electronically accessible" might be more appropriate than "electronically searchable."

FED. R. CIV. P. 45

Judge Rosenthal reported that Rule 45 (subpoenas) would be amended to conform it to the various changes proposed in the discovery rules to address electronically stored information.

The committee without objection approved the proposed amendments to Rules 16, 26, 33, 34, and 45 and Form 35 for publication by voice vote.

FED. R. CIV. P. 37

Judge Rosenthal reported that the committee had approved a limited "safe harbor" provision in Rule 37 (sanctions for failure to cooperate in discovery) that would give a party protection when information that it is asked to produce has been destroyed or lost through the routine business operation of its computer systems. The loss would occur, for example, when information is destroyed as a result of recycling back-up tapes or automatically overwriting deleted information. She reported that this was the only provision among the proposed amendments in which there had been any disagreement

within the advisory committee. She pointed out, though, that the disagreement had been only as to the actual language of the proposed amendment, and not as to the need for including a limited safe harbor provision in the rules.

As a consequence, she explained, the advisory committee had decided to present the Standing Committee with two alternative versions of a safe harbor provision in FED. R. CIV. P. 37(f). She added that the committee clearly preferred Alternative 1, but several members also wanted to publish Alternative 2 for public comment. Both alternatives, she said, are very narrow. The essential difference between them concerns the standard of culpability applicable to the producing party. Alternative 1 would establish a reasonableness standard, while Alternative 2 would require intentional or reckless conduct. She reported that one member of the advisory committee strongly opposed publishing the second alternative because it would inappropriately limit a court's discretion.

Judge Rosenthal said that whether or not both alternate versions are published, it should be made clear in the publication that the committee is continuing to consider both culpability standards and would like to generate public comment specifically directed to them.

One participant emphasized that Rule 37 deals with sanctions for violation of discovery obligations. But, he said, spoliation issues are generally governed by a separate body of law. He pointed out that what occurs before a case is filed in the district court is not, and cannot be, covered by the rules. Thus, he said, the rules committees should focus on a party's obligation under applicable discovery law, not on spoliation. He suggested that the committee note state explicitly that spoliation is governed by a different body of law, even though discovery and spoliation issues often tend to blend in practice.

He added that the culpability standard under discovery law is negligence, including intentional neglect. But, he said, the key problem is not so much the applicable standard as the boundary of obligations arising before a case is filed and discovery obligations that attach after a case has been filed. Other members pointed out that lawyers' legal and ethical obligations before filing are clearly established by existing law.

One member said that even though the bar had made a compelling case for a safe harbor at the recent Fordham conference, it appeared that any effective protective provision would lie outside the scope of the rules. He suggested that it would take legislation to achieve the sort of protection that the bar seeks. Other members responded, though, that an effective safe harbor provision could indeed be crafted with some additional work.

In light of the difficult competing considerations and the committee discussions, Judge Rosenthal agreed to craft some additional language to address the concerns expressed by the participants. She emphasized the need to include a safe harbor provision together with the rest of the proposed electronic discovery amendments because all the amendments fit together as part of a single, interrelated package.

On the second day of the meeting, Judge Rosenthal presented the committee with revised language for both the text of the proposed Rule 37 amendments and the accompanying committee note. She noted that the proposed revisions would make it clear that the rule does not address the actions of a party before a case is filed.

Judge Rosenthal said that the recommendation of the advisory committee was to publish only one alternative for public comment. But, she said, that version would include appropriate brackets and footnotes to draw the attention of the public to the fact that the committee would continue to study what standard of fault must be met to take a party out of the safe harbor protection.

Dean Kane moved to approve publication of the proposed amendment, together with appropriate cover language —— to be drafted by the advisory committee — directing the public's attention to the committee's desire to receive public comment on the applicable culpability standard and the other issues identified by the committee. The motion was approved without objection by voice vote.

Amendments for Delayed Publication

1. Pure Style Revisions

FED. R. CIV. P. 38-63, except FED. R. CIV. P. 45

Judge Rosenthal reported that the advisory committee was planning to publish the complete set of restyled civil rules as a single package in February 2005. She noted that the Standing Committee at earlier meetings had approved publication of restyled Rules 1-37. She asked for authority to publish the current batch of proposed amendments — Rules 38-63, except Rule 45 — subject to further refinement before publication. And she reported that the remaining civil rules, Rules 64-86, would be presented to the Standing Committee at its January 2005 meeting.

Judge Rosenthal said that the advisory committee, in partnership with the Style Subcommittee of the Standing Committee and its consultants, would continue to make refinements in the language of the rules. It would also resolve a series of "global" style

issues and present a completed style package of all the civil rules at the January 2005 meeting.

The committee without objection authorized delayed publication of the proposed amendments by voice vote.

2. "Style-Substance" Amendments

FED. R. CIV. P. 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40

Judge Rosenthal reported that the goal of the restyling project was very narrow — simply to restate the present language of the civil rules as clearly as possible in consistent English without any change in meaning. Nevertheless, she said, as part of the restyling effort, the advisory committee had approved a limited number of minor, non-controversial improvements in language that are arguably more than purely stylistic in nature. She pointed out that the proposed changes, although possibly substantive, reflect sound common sense, universal current practice, or the likely intention of the drafters. Accordingly, she said, the advisory committee would like authority to publish in tandem with the style package a separate track of proposed "style-substance" changes to Rules 4(k), 8(a) & (d), 9(h), 11(a), 14(b), 16(c)(1), 26(g), 30(b), 31(c), 36(b), and 40. She added that a few additional minor "style-substance" changes might be presented to the Standing Committee at the January 2005 meeting.

One member spoke against the proposed deletion of Rule 8(d)(1) as part of the "style-substance" package. Although the proposed committee note suggested that the current rule is redundant and no longer needed, the member said that it might be helpful to retain it. Judge Rosenthal responded that it was important to restrict the "style-substance" package to purely non-controversial items. Thus, in light of the objection expressed, the advisory committee would drop the proposal from the list of proposed amendments.

The committee without objection approved the proposed "style-substance" amendments for deferred publication by voice vote.

Informational Item

Judge Rosenthal reported that the advisory committee had published a proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) to implement 28 U.S.C. § 2403 and replace the final three sentences of FED. R. CIV. P. 24(c). The statute and current rule require a court to certify to the attorney general of the United States or a state when a federal or state statute has been drawn into question In addition, the rule requires

a party challenging the constitutionality of a statute to call the court's attention to its duty to certify.

Judge Rosenthal pointed out that the reporting obligation is routinely — and unintentionally — violated, perhaps because it is buried in Rule 24. Thus, the advisory committee had proposed moving the reporting requirements from Rule 24 to the proposed new Rule 5.1 in order to attract attention to the reporting obligations by locating them next to the rules that require notice by service and pleading.

In addition, the new rule would have added a requirement that a party drawing into question the constitutionality of a statute serve the pertinent attorney general by mail with a Notice of Constitutional Question and a copy of the underlying court pleading or motion. The advisory committee had thought that the additional requirement would impose only a slight burden on the challenging party.

Judge Rosenthal pointed out that there had been few public comments on the rule. But, she said, concerns emerged in the advisory committee that the new notice and mailing obligation was unwise and should be reexamined. Accordingly, the committee decided to defer the proposed new rule and not present it at this time to the Standing Committee for final approval.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachment of May 18, 2004. (Agenda Item 9)

Amendments for Final Approval

FED. R. CRIM P 12.2(d)

Judge Carnes reported that the proposed amendment to Rule 12.2(d) (failure to comply with the requirement to give notice of an insanity defense or submit to a mental examination) would fill a gap created in the 2002 amendments to the rule. The current rule provides no sanction when the defendant does not comply with the requirement to disclose the results and reports of an expert examination. He pointed out that a comment had been received from the defense bar that the proposed amendment goes too far. But, he noted that the decision to impose a sanction is discretionary with the court.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 29(c), 33(b), 34(b), and 45(b)

Judge Carnes explained that the proposed amendments to Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), Rule 34 (motion to arrest judgment), and Rule 45 (computing time) would remove the requirement that the court rule on a post-trial motion within seven days after a guilty verdict or after the court discharges the jury.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 32(i)(4)

Judge Carnes said that the proposed amendment to Rule 32(i)(4) (opportunity to speak at sentencing) would extend the right of allocution — which currently applies only to victims of crimes of violence or sexual abuse — to victims in all felony cases. The rule, he said, allows the victim either to speak at sentencing or submit a written statement to the judge. If a crime involves multiple victims, the rule gives the court discretion to limit the number of victims who will address the court.

Judge Carnes added that Congress was likely to pass comprehensive legislation in the near future dealing with victims' rights. He said that the legislation, among other things, would give a wide array of rights to victims of all offenses, including victims of petty offenses and other misdemeanors. He stated that if the pending legislation were enacted, the committee should ask to withdraw the rule.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 32.1(b) and (c)

Judge Carnes reported that the proposed amendments to Rule 32.1 (revoking or modifying probation or supervised relief) would address an oversight in the rules by giving the defendant the right to allocution at a revocation or modification hearing.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 59

Judge Carnes reported that the proposed new Rule 59 (matters before a magistrate judge) would set forth the procedures for a district judge to review the decision of a

magistrate judge. He explained that the rule is derived in part from FED. R. CIV. P. 72. It distinguishes between "dispositive" and "nondispositive" matters, but does not attempt to define the terms, which are widely used in case law.

Judge Carnes pointed out that on a nondispositive matter, the district judge must consider any timely objections to the magistrate judge's order and set aside any part of the order that is contrary to law or clearly erroneous. But if a party fails to object within 10 days after being served with a copy of the magistrate judge's order, it waives its right to review.

As for dispositive matters, the district judge must decide de novo any recommendation of the magistrate judge to which an objection has been filed. A party's failure to object within 10 days after being served with a copy of the magistrate judge's recommended disposition waives its right to review. There is no need for the district judge to review de novo any matter to which there has not been a timely objection. Nevertheless, despite the waiver provision, the district judge retains authority to review any decision or recommendation of the magistrate judge, whether or not objections are timely filed.

One member said that he supported the rule, but he had a general problem with the way time is computed under this and some other rules. The proposed rule, he pointed out, states that a party must file an objection "within 10 days after being served with a copy" of the magistrate judge's order or recommendation. He pointed out that judges have no way of telling when a party has actually been served with a copy of a particular document. He suggested that consideration be given at a future committee meeting to addressing this uncertainty in computing time.

The committee without objection approved the proposed new rule for final approval by voice vote.

Amendments for Publication

FED. R. CRIM. P. 5(c)

Judge Carnes reported that two amendments were proposed to Rule 5(c)(3) (initial appearance in a district other than the one where the offense was committed). First, the amendment to Rule 5(c)(3)(C) would remove a reference to Rule 58(b)(2)(G). That rule, in turn, would be amended to eliminate a conflict with Rule 5.1(a) regarding the defendant's right to a preliminary examination. Second, the amendment to Rule 5(c)(3)(D) would take account of advances in technolgy and permit a magistrate judge to accept a warrant by any "reliable electronic means," rather than just by "facsimile."

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 32.1(a)(5)

Judge Carnes explained that the proposed change to Rule 32.1 (revoking or modifying probation or supervised release) was similar to that proposed for Rule 5(c). It would authorize a magistrate judge to accept a copy of a judgment, warrant, or warrant application by "reliable electronic means."

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 40(a) and (e)

Judge Carnes said that the proposed revision of Rule 40(a) (arrest for failing to appear in another district) would fill a gap in the rules by giving a magistrate judge explicit authority to set conditions of release for a defendant who has been arrested only for violation of conditions of release set in another district. He pointed out that the current rule refers only to a defendant who has been arrested for failure to appear altogether, and not to one who has only violated conditions of release.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 41

Judge Carnes reported that the proposed amendment to Rule 41(e) (issuing a search warrant) would permit a magistrate judge to use "reliable electronic means" to issue warrants. In that respect, it parallels the proposed amendments to Rules 5 and 32.1.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 58(b)

Judge Carnes explained that the proposed amendment to Rule 58(b)(2)(G) (initial appearance in a petty offense or other misdemeanor case) would remove a conflict between that rule and Rule 5.1 (preliminary examination) and clarify the advice that must be given to a defendant during an initial appearance.

The committee without objection approved the proposed amendments for publication by voice vote.

Informational Items

FED. R. CRIM. P. 29

Associate Attorney General McCallum expressed the concerns of the Department of Justice regarding the May 2004 decision of the Advisory Committee on Criminal Rules to reject the Department's proposed amendments to Rule 29 (motion for a judgment of acquittal). The proposal would have required a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. The current rule gives a judge discretion to rule on an acquittal motion either before or after verdict.

Mr McCallum pointed out that a district judge's granting of an acquittal motion before a jury verdict is a non-appealable action due to the Double Jeopardy clause of the U. S. Constitution. It is the only area, he said, in which the government has no right to correct an improper action of a trial judge. An appeal does lie, however, when a judge grants a motion for acquittal after a jury verdict.

He emphasized that United States attorneys are deeply troubled by the current rule and certain specific experiences that they have had under it. He noted that the original proposal of the Department had been to amend the rule to require a district judge to defer a ruling on an acquittal motion until after the jury returns a verdict. The aim, he said, was not to limit judicial discretion, but to address the timing of the judge's action, which has important constitutional consequences.

He explained that members had expressed concerns at the October 2003 advisory committee meeting that the Department's proposal might be too broad. They suggested that it is entirely appropriate for a judge to grant a dismissal before judgment in certain circumstances — particularly in the case of a hung jury or a multiple-defendant or multiple-count case. The advisory committee, he said, had asked the Department to consider crafting modifications to its proposal to address these two situations.

Mr. McCallum reported that the Criminal Division had prepared an amendment to deal with hung juries, but it was unable to devise a satisfactory amendment to address the problems of multiple defendants and multiple counts. But, he said, Judge Levi developed a very helpful, alternate proposal that would allow a judge to grant a dismissal before verdict conditioned upon the defendant waiving double-jeopardy rights and permitting an appeal by the government.

He said that because of the importance of this matter, the Department would like to present additional written materials and make a case for amending Rule 29 to the Standing Committee at its next meeting. If the Standing Committee were then to agree with the Department's recommendation — or with Judge Levi's alternate proposal or some other variation — it might propose an amendment itself. But, he noted, a more likely result would be for the Standing Committee to remand the matter back to the advisory committee with a direction to explore every possible alternative to achieve the result of preserving the government's right to appeal. He added that the Department would provide a comprehensive constitutional-law analysis of the Double Jeopardy clause and craft appropriate devices to avoid procedural traps. In short, he emphasized, the Department would like to work cooperatively with the Standing Committee to figure out a way to meet the government's concerns.

Judge Carnes reported that Administrative Office staff had prepared statistics on how often pre-verdict dismissals are granted in the federal courts. In the Fiscal Year 2002, for example, more than 80,000 felony defendants were disposed of in the district courts. Of that total, 3,000 were tried before a jury, and Rule 29 motions were granted in only 37 cases. He warned that the numbers may not be exact because of reporting difficulties in trying to pinpoint pre-verdict acquittals. Nevertheless, he said, the number of dismissals under Rule 29 is extremely small. This, he explained, was a primary reason why the majority of the advisory committee were persuaded that there was no compelling case to amend the rule. He pointed out, though, that several members of the advisory committee were very much concerned that when a judge grants a pre-verdict dismissal mistakenly or in questionable circumstances, it reflects badly on the judicial system. In that regard, he noted that the Department had presented the committee with some anecdotes of district judges arguably abusing the process.

Judge Carnes further explained that several members of the advisory committee were concerned that certain prosecutors overcharge. Thus, judges should be able to winnow out groundless charges before a case is submitted to the jury. For that reason, he said, the advisory committee had asked the Department to consider amending its proposal to retain the authority of a trial judge to dismiss specific counts in a multiple-count case or certain defendants in a multi-defendant case But, he explained, neither the Department nor the advisory committee could fashion a satisfactory proposal addressing those situations.

Judge Carnes said that the issues had been thoroughly explored by the advisory committee, including Judge Levi's alternate solution. If the matter were referred back to the advisory committee, he said, the same result would prevail again. Judge Levi agreed with this assessment, but he added that the Department should have a further opportunity to make a case. He pointed out that the Department has a vital role in the Rules Enabling Act process, and it has been supportive of the process. Therefore, he said, if the

Department concludes that a matter is very important to the government and it asks the Standing Committee to take a second look, the committee should accommodate the request.

Judge Levi pointed out that it is very common in rulemaking for empirical data to show that a particular problem is statistically insignificant. But the rejoinder by proponents of an amendment is always that the small number of problem occurrences in fact represents important matters. He recommended that the committee allow the Department to make its case at the January 2005 meeting. He suggested that the Department consider producing additional information, focusing particularly on the character of the actual cases in which it believes a pre-verdict dismissal was improperly granted and the government denied its right to appeal. He added that the Standing Committee might decide to return the proposal to the advisory committee with instructions.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 15, 2004. (Agenda Item 5)

Judge Smith explained that it is the policy of the advisory committee for proposed amendments to evidence rules generally to be limited to resolving case law conflicts in the courts. The committee's presumption, thus, is strongly against amending the rules. The four rules amendments recommended for publication, he said, would resolve serious conflicts in the courts.

Amendments for Publication

FED. R. EVID. 404(a)

Judge Smith reported that the proposed amendments to Rule 404(a) (admissibility of character evidence) would resolve a case law conflict regarding the admissibility in a civil case of character evidence offered as circumstantial proof of conduct. He noted that courts routinely admit such information into evidence in criminal cases. A minority of courts have also permitted its use in civil cases. The proposed amendment would allow the evidence only in criminal cases.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. EVID. 408

Judge Smith reported that the proposed amendments to Rule 408 (compromise and offers to compromise) would resolve three important conflicts in the case law as to the admissibility of statements and offers made in settlement negotiations. He added that the proposals had been substantially debated and reworked by the advisory committee.

Judge Smith pointed out that the first amendment would resolve the split in the case law regarding the admissibility in later criminal prosecutions of statements and offers made in civil settlement negotiations. He pointed out that the Department of Justice strongly supported allowing the use in criminal cases of admissions made earlier during settlement negotiations, noting that they can be critical evidence to establish guilt in certain cases. After much debate, he said, the advisory committee agreed to present an amendment that would authorize the use of admissions of fault in later criminal prosecutions, but not allow admission of the fact that there has been a civil settlement or negotiations. He emphasized that the committee had worked hard to reach the proper balance between protecting settlement negotiations and allowing critical evidence to be used in criminal cases.

Second, Judge Smith reported that the proposed amendments would resolve a conflict in case law by prohibiting the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. He noted that the proposal reinforces the main purposes of the rule — to promote unfettered settlement discussions.

Third, the proposed amendments would resolve a conflict over whether offers of compromise may be admitted in favor of the party who made the offer. The proposal would bar a party from introducing its own statements and offers when offered to prove the validity, invalidity, or amount of the claim. Judge Smith said that the advisory committee was of the view that a party should not be able to waive unilaterally the protections of the rule because introduction of the evidence would show implicitly that the opposing party had also entered into a settlement agreement. Exclusion of such evidence would not be required, though, when offered for other purposes, such as to prove the bias or prejudice of a witness.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. EVID. 606(b)

Judge Smith reported that the proposed amendment to Rule 606(b) (juror as a witness) would limit the testimony of a juror regarding the validity of a verdict to whether

there has been a clerical mistake in reporting the verdict. He explained that some courts have also allowed juror testimony on a broader basis, such as to explore whether the jury understood the court's instructions or the impact of their actions. He added that the proposed amendment is very narrowly designed to protect jury deliberations and prevent invasions of the jury process. He pointed out, however, that testimony could still be allowed from a juror as to fraud or outside influence.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. EVID. 609(a)(2)

Judge Smith reported that Rule 609(a)(2) (impeachment by evidence of conviction of a crime) provides for automatic impeachment of a witness with evidence that the witness has been convicted of a crime that "involved dishonesty or false statement." The problem, he said, is in determining which crimes involve dishonesty or false statement.

Most prior convictions, he noted, occur in other jurisdictions, especially state courts. The issue for the federal court is to determine the extent to which it may look behind the prior conviction to determine whether it involved dishonesty or false statement. Some courts, he said, make the determination by looking only at the actual elements of the crime for which the witness was found guilty. Other courts, though, allow a more detailed inquiry into the facts of the case.

Judge Smith explained that the proposed amendment takes a middle position. It would allow automatic impeachment of a witness if an underlying act of dishonesty or false statement can be "readily determined." Judges, thus, would have discretion to look behind the elements of the crime to the facts of the case. But it is contemplated that their review would be to make a quick determination, such as by reviewing the charging documents, that a crime involved dishonesty or false statement. The court, though, should not conduct a minitrial on the issue. He added that a similar problem exists under the Sentencing Guidelines, where district judges may have to look behind the elements of a crime to determine whether a prior conviction of the defendant had been for a crime of violence. Professor Capra added that the committee note sets forth some examples of key documents that could be used by judges to make the determination of dishonesty or false statement.

The committee without objection approved the proposed amendment for publication by voice vote.

Informational Items

Professor Capra explained that these four proposals complete a package of amendments that the advisory committee had been considering for several meetings. He said that the advisory committee did not have plans to bring forward to the Standing Committee in the near future other potential amendments that it had under consideration. In addition, he said, the advisory committee would continue to examine the hearsay exceptions, but it will not propose any amendments until the full impact of *Crawford v. Washington* has been determined.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. (Agenda Item 10)

He reported that the E-Government Act of 2002 requires all federal courts to post on the Internet all case documents filed electronically or filed in paper and converted to electronic form. The Act also mandates the promulgation under the Rules Enabling Act of new federal rules addressing security and privacy concerns raised by electronic posting of case documents. The Standing Committee, he noted, had created the E-Government Subcommittee to coordinate the task of drafting appropriate revisions to the rules, and it asked representatives of other Judicial Conference committees to serve on the subcommittee.

He explained that the subcommittee had asked Professor Capra to develop a template that each advisory committee could use to develop appropriate amendments to their own rules. He pointed out that each of the advisory committees had reviewed the template and had raised a number of policy issues. In addition, the Department of Justice and other interested parties had offered practical and helpful comments on the template.

Judge Fitzwater reported that the E-Government Subcommittee met just before the Standing Committee meeting and revised the template in several respects. He emphasized that in making policy choices, the subcommittee had worked from the Judicial Conference's recent privacy policy statements and the assumptions made by the Court Administration and Case Management Committee. The revised template, he said, would now be sent back to the advisory committees for further consideration at their autumn meetings.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, January 13-14, 2005.

Respectfully submitted,

Peter G. McCabe
Secretary

II A-B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

APR 26 2004

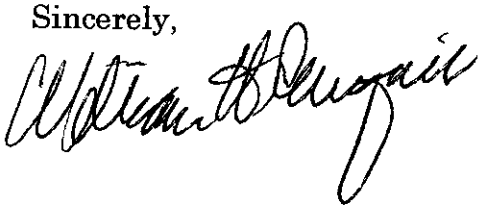
Honorable Dick Cheney
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure and the rules and forms governing cases in the United States district courts under Sections 2254 and 2255 of Title 28, United States Code, that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



APR 26 2004

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein an amendment to Criminal Rule 35.

2. That the rules and forms governing cases in the United States District Courts under Section 2254 and Section 2255 of Title 28, United States Code, be, and they hereby are, amended by including therein amendments to Rules 1 through 11 of the Rules Governing Section 2254 Cases in the United States District Courts, Rules 1 through 12 of the Rules Governing Section 2255 Cases in the United States District Courts, and forms for use in applications under Section 2254 and motions under Section 2255.

[See infra., pp. ___ ___ ___.]

3. That the foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Cases in the United States District Courts shall take effect on December 1, 2004, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Cases in the United States District Courts in accordance with the provisions of Section 2072 of Title 28, United States Code.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D C 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

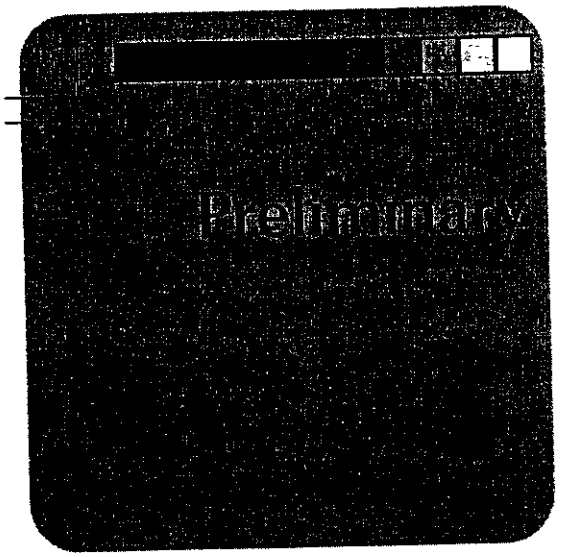
MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 of the Federal Rules of Criminal Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Leonidas Ralph Mecham
Secretary

Attachments



Draft of

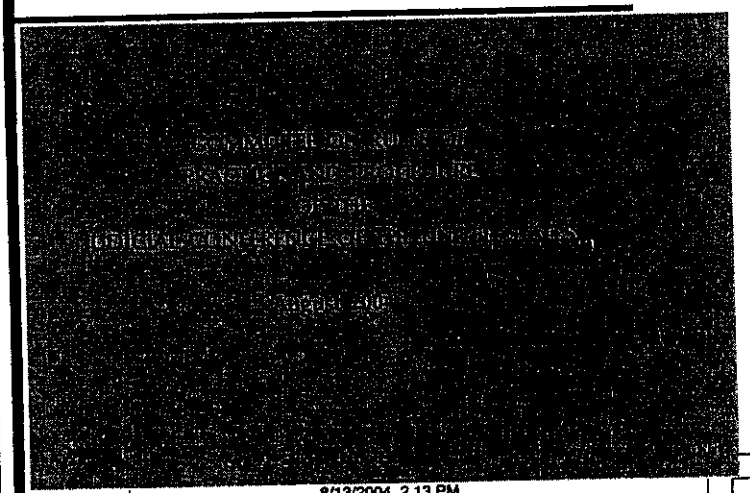
Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence

Request For Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 2005

COMMENTS ARE SOUGHT ON AMENDMENTS TO:

Bankruptcy Rules	1009, 2002, 4002, 5005, 7004, 9001, 9036, and Official Form 6
Civil Rules	16, 26, 33, 34, 37, 45, 50, and Form 35
Admiralty Rules	A, C, E, and new Rule G
Criminal Rules	5, 32.1, 40, 41, and 58
Evidence Rules	404, 408, 606, and 609



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

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

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BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E SMITH
EVIDENCE RULES

TO: **Hon. David F. Levi, 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 18, 2004**

* * * * *

II. Action Items—Summary and Recommendations.

The Advisory Committee on the Criminal Rules met on May 6 and 7, 2004, in Monterey, California, and took action on a number of proposed amendments. This report addresses matters discussed by the Committee at that meeting

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

- Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 32.1, Revoking or Modifying Probation or Supervised Release, Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.
- Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release
- Rule 41, Search and Seizure, Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant

- Rule 58, Petty Offenses and Misdemeanors, Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

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

* * * * *

III. Action Items—Recommendation to Publish Amendments to Rules

The Advisory Committee has considered amendments to a number of rules and recommends that they be published for public comment. The rules are as follows:

A. Action Item—Rule 5, Initial Appearance; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

At its Fall 2003 meeting, the Committee considered possible amendments to a number of rules that would provide for electronic transmission of various documents to magistrate judges or the court. A subcommittee, chaired by Judge Anthony Battaglia, studied those rules and proposed amendments that would permit such transmissions. Rule 5, Initial Appearance, is one of those rules In particular, the proposed amendment to Rule 5 would permit the government to use "reliable electronic means" to transmit the warrant to the magistrate judge. The accompanying Committee Note suggests several factors that a court may consider in determining whether a particular electronic media is reliable The Committee unanimously approved the amendment. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 5 be published for public comment

B. Action Item—Rule 32.1, Revoking or Modifying Probation or Supervised Release; Proposed Amendment Regarding Use of Electronic Means to Transmit Warrant.

As noted above, the Committee considered possible amendments to several Criminal Rules in order to permit the parties to submit materials to the magistrate judge or the court by electronic means. The Committee believed that the parties should be permitted to do so in Rule 32.1 proceedings, i.e , proceedings involving revocation or modification of probation or supervised release. Again, the Committee Note addresses the issue of what might constitute "reliable electronic means." The Committee approved the amendment by a unanimous vote. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 32 1 be published for public comment.

C. Action Item—Rule 40, Arrest for Failing to Appear in Another District; Proposed Amendment to Provide for Authority to Set Conditions for Release.

Based upon a suggestion from Magistrate Judge Robert Collings, the Committee has considered a conflict in Rules 32.1 and 40 concerning the ability of the court to consider bail in out-of-district cases. Although Rule 32.1(a)(6) permits a court to consider bail in out-of-district proceedings regarding revocation of release,

Rule 40 does not The Committee unanimously agreed to amend Rule 40 to conform to Rule 32.1. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 40 be published for public comment

D. Action Item—Rule 41, Search and Seizure; Proposed Amendment Concerning Use of Electronic Means to Transmit Warrant.

In conducting a survey of magistrate judges concerning use of electronic transmissions in pretrial proceedings, the Committee determined that there was an interest in expanding the use of facsimiles or other electronic means in obtaining or issuing search warrants The Committee unanimously agreed with an amendment to Rule 41(e) that would permit electronic transmission of the warrant itself. The current rule permits the court to dictate the contents of warrant to the officer for transcription and the execution. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 41 be published for public comment

E. Action Item—Rule 58, Petty Offenses and Misdemeanors; Proposed Amendment to Resolve Conflict with Rule 5 Concerning Right to Preliminary Hearings.

Magistrate Judge Nowak e-mailed the Committee to inform it that there was a possible inconsistency between Rules 5, 5.1, and

58, concerning the right of a defendant to a preliminary hearing. The Committee agreed and unanimously proposes that Rule 58(b)(2)(G) be amended by deleting any specific reference to the question of when a defendant is entitled to a preliminary hearing, and instead direct the reader to Rule 5.1, which specifically addresses preliminary hearings. The Rule and the accompanying Committee Note are at Appendix F.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 58 be published for public comment.

* * * * *

Attachments·

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Appendix F. Proposed Amendments to Rules 5, 32.1, 40, 41, and 58 for publication.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

APPENDIX F

PROPOSED AMENDMENTS TO RULES FOR PUBLICATION AND COMMENT

- **Proposed Amendment to Rule 5 & Committee Note**
- **Proposed Amendment to Rule 32.1 & Committee Note**
- **Proposed Amendment to Rule 40 & Committee Note**
- **Proposed Amendment to Rule 41 & Committee Note**
- **Proposed Amendment to Rule 58 & Committee Note**

* New material is underlined, matter to be omitted is lined through

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 and 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 a local matter. 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.

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 certified documents by 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 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 and 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, 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 a local matter. 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.

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 believes 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.

Rule 41. Search and Seizure

* * * * *

(d) Obtaining a Warrant.

* * * * *

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

(A) *In General* A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means. ~~appropriate 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(e) has been amended to permit magistrate judges to use 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 a local matter. 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.

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(b) Pretrial Procedure.

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(2) ***Initial Appearance.*** At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(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 misdemeanor charge, other than a petty offense. As currently written, the rule is restricted to those cases where the defendant is held in custody, thus creating 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.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed New Rule 49.1; Implementing the E-Government Act

DATE: September 30, 2004

Last Spring the Committee was 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) (Attached) Under that Act, every federal court is required to provide public access to docket information, the substance of all written opinions of the court, and documents filed with the court in electronic form The Act also authorizes the courts to convert any document into an electronic form Any converted document, however, must be made available to the public online

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 states that the rules of privacy and security issues are to be applied in a uniform manner throughout the federal courts. The drafters are charged 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 developed a compromise provision

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 has represented this Committee on the Subcommittee

The Subcommittee held its first meeting in Scottsdale Arizona in January 2004, to discuss the approach and scheduling for drafting uniform privacy rules. Here is an update of the proposed rules·

- 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 used 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 We discussed the draft at the May meeting.

- Third, the Reporters and liaison members met in June 2004 to discuss the various proposals and the reactions and comments of their respective committees (Due to a scheduling conflict, I was unable to attend that meeting)

- Fourth, following the June E-Government Committee meeting, Professor Capra drafted a revised template, dated June 16, 2004, to be considered by the respective Advisory Committees The hope is that the Committees will adopt the template rule, tailoring it where necessary

- Fifth, each Committee will consider the revised template at its Fall 2004 meetings and prepare draft amendments for publication and public comment

- Sixth, 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 2005 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 the revised July 16th template prepared by Professor Capra, which incorporates suggestions made during the E-Government Subcommittee meeting in June Professor Capra will be attending our meeting in October to explain the template and address any questions the Committee may have.

Please note that the Subcommittee has asked the Criminal Rules Committee to consider specific exceptions, identified by the Justice Department. (See footnote 9 in the template)

I am also attaching a recent letter from Judge Thomas Small, the outgoing chair of the bankruptcy rules committee His letter reports on that committee's actions concerning the template

Finally, I am attaching a proposed Rule 49 1 that generally follows the June 16, 2004 template for a standard rule I did not include the information in the template relating to Social Security cases, but I did include the information suggested by the Department of Justice, as referenced in Footnote 9 of the template

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K RABIEJ
Chief

Rules Committee Support Office

WASHINGTON, D.C. 20544

July 22, 2004

MEMORANDUM TO COMMITTEE REPORTERS

SUBJECT: *Revised E-Government Template*

At its June 16 meeting, the E-Government Subcommittee revised the template for rules governing security and privacy concerns arising from public access to electronic court records, subject to comment by the Committee on Court Administration and Case Management (CACM).

CACM has reviewed the revised template and concurs in the revisions. Our next step is to present to the advisory rules committees at their fall meetings proposed rule amendments based on the template, making any changes necessary to accommodate individual sets of rules. We hope to compare drafts at the January 13-14 Standing Committee meeting and address any inconsistent provisions. If all goes well, the advisory committees should be in a good position to recommend publication of the respective rules at their spring 2005 meetings.

To assist your review and drafting, I have attached copies of: (1) the minutes of the June 16 subcommittee meeting; (2) the relevant portion of the E-Government Act of 2002; (3) the legislation amending the E-Government Act to provide a cross-referencing document containing unredacted personal identifiers (Please note that although both Houses had earlier passed the bill, Congress is presently revising it. We understand that the changes are modest.); (4) the timeline for completing this project; and (5) the revised template. At the subcommittee meeting, the Department of Justice said it would provide additional empirical data of the proposed rules' burden on the Department and other Executive Branch agencies. I will send it to you as soon as it becomes available.

John K. Rabiej

Attachments

cc: Chairs, Standing and Advisory Rules Committees (with attach.)
Honorable Sidney A. Fitzwater (with attach.)
Peter G. McCabe, Secretary (with attach.)
Abel J. Mattos (with attach.)

Revised Privacy Template

Date: June 16, 2004.

Rule [ ] Privacy in Court Filings

(a) Limits on Disclosing Identifiers. If an electronic or paper filing made with the court includes any of the following identifiers,[1] only these elements may be disclosed, unless the court orders otherwise,[2]

(1) the last four digits of a person's social security number and tax identification number[3];

(2) the initials of a minor's name[4];

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

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[1] The subcommittee rejected an option that would apply the redaction requirement only to filings made by parties: "If a party includes any of the following identifiers in an electronic or paper filing with the court, the party is limited to disclosing:"]

[2] The subcommittee determined that flexibility should be added to the rule by allowing the court to excuse the redaction requirements in a particular case.

[3] The subcommittee determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.

[4] The subcommittee rejected an exception to the redaction requirement for actions in which the minor is a party; it also resolved to inquire of CACM as to how it determined that a child's name should be a protected identifier.

(4) the last four digits of a financial account[5] number.[6]

(b) Unredacted Filing Under Seal. A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal The unredacted copy must be retained by the court as part of the record.[7]

(c) Reference List. A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information.[8]

(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the

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[5] The subcommittee rejected language that would limit the protection of financial accounts to those accounts that were personal; to active accounts; and to asset accounts. The subcommittee concluded that the risk of identity theft was significant with respect to *any* financial account number available over the internet.

[6] The subcommittee deleted home address as a protected identifier. It determined that a full home address was often necessary, especially in bankruptcy cases. The subcommittee requests the Criminal Rules Committee to consider whether home address should be a protected identifier in criminal cases. CACM supports the protection of home addresses in criminal cases. The subcommittee also requests the Criminal Rules Committee to consider whether it is necessary to protect home addresses in habeas cases.

[7] The subcommittee rejected the following language that was proposed by the Justice Department:

> Where a document is filed under seal solely to comply with this rule, the seal does not prohibit the disclosure of the document to the parties, their counsel, their agents, law enforcement officers, and triers of fact, nor the disclosure by those persons when appropriate to the performance of their official duties.

[8] This language is intended to track proposed legislation that would amend the E-Government Act to permit the filing of a registry list as an alternative to an unredacted document under seal. The subcommittee directed the Lead Reporter to monitor the legislation and to make any changes to the revised template to accord with the legislation as adopted.

following: [9]

> **(1)** in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture;
>
> **(2)** records of an administrative agency proceeding;
>
> **(3)** official records of a state court proceeding in an action removed to federal court; and [10]
>
> **(4)** the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed.[11]

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[9] The subcommittee requests the Criminal Rules Committee to consider the following possible exemptions to the redaction requirement, as proposed by the Justice Department for criminal cases:

> **(1)** filings in any court in relation to a criminal matter or investigation that are prepared before the filing of a criminal charge or that are not filed as part of any docketed criminal case;
>
> **(2)** arrest warrants;
>
> **(3)** charging documents—including indictments, informations, and criminal complaints—and affidavits filed in support of those documents;
>
> **(4)** criminal case cover sheets.

The subcommittee also requests the Criminal Rules Committee to consider whether similar exemptions are necessary for civil cases.

[10] The subcommittee rejected an exception for "a certified copy of a document filed with the court." The subcommittee determined that a redaction could be indicated on a certified copy where necessary to protect an identifier.

[11] Some subcommittee members suggested that the exemption apply to "the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally ***created.***"

(e) Social Security Appeals; Access to Electronic Files. In an action for benefits under the Social Security Act,[12] access to an electronic file is authorized as follows, unless the court orders otherwise:

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

(2) all other persons may have remote[13] electronic access only to:

(A) the docket maintained under Rule [relevant civil or appellate rule]; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.[14]

(f) Court Orders. In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a).[15]

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[12] The subcommittee considered whether limited public access, as provided for Social Security cases, should be extended to other sets of cases, such as immigration, Black Lung, ADA cases, etc. The subcommittee deferred to the determination of CACM, made after extensive study, that Social Security cases are sui generis because of the sensitive information presented and the voluminous filings made. The Subcommittee concluded that in light of CACM's considered determination, the burden would be on those seeking exclusion of other sets of cases to show that public access must be limited in order to protect privacy interests. It is possible that such a showing will be made before or during the comment period.

[13] The revised template contemplates that members of the public may obtain electronic access at the courthouse.

[14] The subcommittee rejected a sentence at the end of the subdivision that would have provided: "The parties are not required to redact personal identifiers from a transcript filed in an action for benefits under the Social Security Act." The subcommittee found this language to be unnecessary.

[15] This subdivision is referred to the Advisory Committees to determine whether it is useful to clarify that the court may by order provide protection for information not covered by the redaction requirement, on the ground that it is sensitive information that should not be accessible to non-parties over the internet. CACM's position is that courts already have this power, and to

(g) Waiver of Protection of Identifiers. A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction.

Revised 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 is that documents in case files generally 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.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. 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. [Subdivision (c) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(iv) of the E-Government Act, as amended in 2004.]

In accordance with the E-Government Act, the rule refers to "redacted identifiers". The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

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.

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include it in this rule would provide an open invitation to parties to seek court orders.

Subdivision (f) provides for limited public access in Social Security cases. Under Judicial Conference policy, Social Security cases are *sui generis* in the pervasiveness of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the Social Security case file at the courthouse.

Subdivision (g) allows a party to waive the protections of the rule as to its own personal identifier by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.[16]

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[16] The subcommittee rejected language in the Committee Note that would have provided: "This rule does not apply to trial exhibits as they are not filed within the meaning of the rule." It was determined that exhibits are indeed filed in some courts, and that if exhibits are filed, they should be treated the same as any other court filing.

E-Government Subcommittee

Minutes of the meeting of June 16, 2004
Washington D.C.

The E-Government Subcommittee (the "Subcommittee") met on June 16, 2004, at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Subcommittee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Robert L. Hinkle, Liaison from the Evidence Rules Committee
Hon. Laura Taylor Swain, Liaison from the Bankruptcy Rules Committee
Deborah Rhodes for Hon. Reta M. Strubhar, Liaison from the Criminal Rules Committee
Hon. David F. Levi, Chair, Standing Committee *(ex officio)*
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)*

The following individuals participated via teleconference:

Hon. Shira A. Scheindlin, Liaison from the Civil Rules Committee
Hon. Donetta W. Ambrose, Liaison from the Committee on Court Administration and Case Management

Also present were:

Hon. Francis M. Allegra, U.S. Court of Federal Claims
Hon. Lee H. Rosenthal, Chair of the Civil Rules Committee
Hon. A. Thomas Small, Chair of the Bankruptcy Rules Committee
Bruce Curtis, Committee on Court Administration and Case Management
Robert Deyling, Esq., Attorney Advisor, Administrative Office of the Courts
Daniel Hawtof, Esq., Attorney Advisor, Administrative Office of the Courts
James Ishida, Esq., Attorney Advisor, Administrative Office of the Courts
Patricia Ketchum, Administrative Office of the Courts
Barbara Kimble, Committee on Court Administration and Case Management
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
Paul Miller, Administrative Office of the Courts
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Elizabeth Shapiro, Esq., Attorney, Department of Justice
James Wannamaker, Esq., Administrative Office of the Courts
Brooke D. Coleman, Esq.

Welcome and Introduction

Judge Fitzwater 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 briefly reviewed the activities of the Subcommittee since its previous meeting in January 2004. Judge Fitzwater explained that Professor Capra provided a draft template rule to each of the appropriate Advisory Committees. The Advisory Committees raised questions and comments regarding the template rule, as have outside groups such as the Department of Justice ("DOJ"). Judge Fitzwater explained that the goal of the meeting is to revise the template rule in light of these questions and comments and to distribute the revised template rule to the Advisory Committees. He further noted that members of the Committee on Court Administration and Case Management ("CACM") were unable to attend today's meeting. However, CACM supplied a letter with comments and concerns regarding the revised template that would be referred to and addressed during the meeting. In addition, the Subcommittee intends for CACM to review the revised template adopted at this meeting in order to identify any additional concerns.

Professor Capra explained that some changes had been made to the template by common consent. However, he planned to review these changes to confirm the Subcommittee's approval. The changes include: (i) deletion of the Judicial Conference standards from the Committee Note; (ii) deletion of home address from the template list of identifiers (the Criminal Committee should still consider this identifier for its E-Government Rule); (iii) addition of social security cases as a category of cases exempt from electronic filing; and (iv) general shortening of the Committee Note.

Professor Cooper asked how home addresses in habeas cases should be treated. The Subcommittee discussed this issue and decided to refer the question to the Criminal Rules Committee for further review. Finally, the members of the Subcommittee unanimously approved the changes proposed by Professor Capra.

Review of Drafting Options

Limits on Disclosing Identifiers. Professor Capra discussed whether the proposed rule should be limited in application to parties or expanded to cover all electronic filings. CACM prefers the latter approach. The Subcommittee unanimously agreed that the rule should cover electronic filings by both parties and non-parties.

The Subcommittee further discussed this section of the template rule. Judge Swain explained that in bankruptcy cases, certain statutes require the inclusion of some of the information listed for redaction in the template rule. She requested that the proposed rule be "subject to existing statute(s), as directed by the court." The Subcommittee discussed whether the E-Government Act of 2002 ("E-Government Act") preempts those

statutes. Judge Hinkle suggested that adding language such as "unless the court orders otherwise" to section (a) may be appropriate since Judge Swain's comment is not necessarily solely a bankruptcy issue. He explained that the rule is currently written in a definitive way, and the Subcommittee may want to provide the court with discretion to suspend redaction in certain cases. The Subcommittee discussed and debated the merits of this proposal. The following language was proposed and unanimously approved:

> "(a) Limits on Disclosing Identifiers. If an electronic or paper filing made with the court includes any of the following identifiers, only these elements may be disclosed, unless the court orders otherwise"

Delineated Identifiers. Professor Capra explained that some of the Advisory Committees have questioned whether to redact the name of a minor in every case, using only the minor's initials as an identifier. Professor Cooper questioned how parties will know who is suing them when an action is brought on behalf of a child, creating a practical notice problem. Judge Small explained that the abbreviations might create a problem in the bankruptcy setting as well. Professor Capra pointed out that as the revised rule stands, the court would have discretion to permit the filing of the full minor's name if appropriate. Judge Fitzwater asked why CACM takes the position that minor's names should be abbreviated in every case. CACM's reasoning was not clear on this issue from its correspondence. Judge Fitzwater suggested leaving the identifier in the rule, subject to CACM's response regarding their reasoning for including it. Further, Judge Fitzwater suggested that the Subcommittee could make clear that it neither supported nor opposed the inclusion of this particular identifier such that the Advisory Committees could make their own determination on the issue. Judge Fitzwater's proposal was unanimously approved.

Professor Capra reviewed the question of whether financial account numbers should be listed in section (a) of the rule. Specifically, since there is a requirement to truncate social security numbers, should tax identification numbers be subject to the same requirement. Ms. Shapiro explained that she believed the rule was aimed at protecting personal privacy, and not necessarily at the privacy of corporations or other entities. The DOJ requested that this point be clarified since it is concerned about how the rule will affect its ability to prosecute fraud (and other) cases involving corporate entities. The Subcommittee requested specific examples of how truncating tax identification numbers would negatively affect the DOJ's ability to prosecute cases. Ms. Shapiro agreed to follow up on that question. Professor Capra proposed approving the addition of tax identification numbers to the list of identifiers. The proposal was unanimously approved.

Unredacted Filing Under Seal. Professor Capra explained that the E-Government Act allows for unredacted documents to be filed under seal. Further, under the E-Government Act, courts can still require that a redacted copy be filed publicly. Professor Cooper opined that the tone of the rule as currently drafted suggests that filing a sealed copy can be done as a matter of course, and does not clearly communicate that a redacted filing may also be required. He suggested drafting the rule to state that a party that does file a redacted copy may also file an unredacted copy under seal. The Subcommittee

discussed this proposal, including a discussion of how to practically seal the documents (e.g., by court order). The Subcommittee also discussed the current legislative proposal under consideration by Congress that allows for a redacted document to be filed publicly along with a sealed list of the redacted personal identifies. Professor Capra explained that he believed this legislation would create a third option under the proposed rule. Following this discussion, Professor Capra proposed the following language for section (b):

> "(b) Unredacted Filing Under Seal A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record."

The proposal was unanimously approved. The Subcommittee asked for the DOJ to provide further information regarding its proposal that the rule specifically allow for copies of the sealed documents to be served on parties and their lawyers without violating this provision. Also, the Subcommittee agreed to advise the Advisory Committees to consider addressing sealing mechanics in their respective rules.

Reference List for Redacted Filings. Professor Capra explained that the proposed language for this provision reflects the amendment that is currently being considered by Congress. The provision basically provides that a reference list of the redacted information in a filing can be filed under seal. Ms. Shapiro questioned whether the reference list would cause authenticity problems at later stages of a case. Professor Capra pointed out that the Subcommittee has to follow the statutory language, which does not address Ms. Shapiro's concerns as of now. Judge Levi inquired about the language providing for amendment of the reference list "as of right" and questioned whether the opposing party could challenge that amendment. Judge Sheindlin thought the language was intended to cover the filing of additional information as a matter of course, and not as a way to add additional claims. Judge Fitzwater suggested that the Civil Rules Committee consider clarifying that point in the Committee Note to its rule. After discussion, the following language was proposed, subject to any additional changes in the legislation:

> "(c) Reference List. A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information."

The Subcommittee approved this language unanimously and requested that Professor Capra make any changes necessary once the final legislation passes. Any revision will be circulated to the Subcommittee for a vote via e-mail or conference call.

Exemption Options. Professor Capra explained that there might be certain categories or types of documents that should be exempted from the redaction requirements of the rule. For example, some have argued that arrest warrants should not be redacted since they may be created before the case file even exists and redacting them later could prove burdensome. The Subcommittee discussed the proposed options.

The first proposal included four related documents that arise in a criminal context (criminal documents prepared before filing a criminal charge, arrest warrants, charging documents, and criminal case cover sheets). The Subcommittee discussed this category of documents at length and decided to eliminate them from the template rule. However, the Subcommittee advised the Criminal Rules Committee that it should consider including these documents in the list of exemptions for its specific E-Government Rule. The Subcommittee also agreed to ask CACM for its opinion on this category of documents. Finally, Professor Cooper requested that the Criminal Rules Committee also consider whether the Civil Rules Committee should worry about this category of documents in the civil context. The Subcommittee unanimously agreed to refer these issues to the Criminal Rules Committee for its consideration.

Next, the Subcommittee considered whether to exempt financial account numbers from redaction when those numbers are the subject of a civil or criminal forfeiture. The Subcommittee agreed that this category should be exempted from redaction and the following language was proposed and unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (1) in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture."

The next proposal would exempt administrative records. CACM asked that this exemption not be expanded beyond social security cases, which it had specifically recommended for exemption. CACM did not wish the exemption to apply to other administrative records because they were concerned such an exemption would invite abuse. However, the Subcommittee expressed concern regarding the size of these types of records and the cost associated with redacting information for filing. The Subcommittee further discussed how to define administrative records in a way that would capture all areas of concern (for example, ERISA cases will often include a record from an administrative agency, but no direct appeal of an administrative agency decision). Judge Fitzwater proposed that the Subcommittee start with a narrow definition and let CACM and the DOJ comment as appropriate. He proposed the following language, which was unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (2) records of an administrative agency proceeding."

Next, Professor Capra discussed exempting state court records in an action removed to federal court. Judge Hinkle asked what would happen if a minor's name was included in state court documents filed in a removed abuse case. Judge Fitzwater explained that a party could still move to seal those records in that situation. The Subcommittee discussed this option. Judge Fitzwater proposed the following language, which was approved by all members of the Subcommittee with the exception of Judge Hinkle:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (3) official records of a state court proceeding in an action removed to federal court."

Professor Capra then asked the Subcommittee whether certified copies of documents should also be exempt. Judge Rosenthal suggested that this could be problematic since, for example, one may file a certified copy of his or her social security card. Judge Swain stated that she thought this category was too broad. Ms. Shapiro expressed concern that if a certified document, which by its nature has a certain legal status, is redacted, the legal status of that document once filed would be questioned. Judge Hinkle explained that the document could still be filed under seal without redaction. A proposal was made to delete any exemption for certified copies of documents filed with the court. This proposal was unanimously approved.

Next, Professor Capra discussed exemption of pre-existing court records from the redaction requirement. He explained that CACM's position was that this exception should only apply to bankruptcy. Judge Swain asked what the term pre-existing was meant to encompass -- documents filed before the E-Government Rule is effective or any document where the party did not comply with the E-Government Rule. Judge Fitzwater asked why this category had been proposed. Ms. Shapiro provided an example of records on appeal that the parties would not want to go back and redact (such as INS cases). The Subcommittee discussed whether this would be a category triggered by the timing or by the type of case and case history. The Subcommittee further discussed whether the other categories listed already covered the examples being discussed. After extensive discussion, Judge Fitzwater suggested that this category be included conceptually so that the Advisory Committees can flush it out with the assistance of CACM and the DOJ. The Subcommittee agreed and the following proposal was unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (4) the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed [created]."

Social Security Appeals; Access to Electronic Files. This section limits remote electronic access to social security cases to the parties only. Professor Capra inquired as to whether the limitation for access to social security cases should be expanded to other categories of cases (such as medical malpractice cases). The limitation of access to social security files had been developed by CACM and approved by the Judicial Conference.

Ms. Shapiro explained that immigration or black lung cases present many of the same privacy concerns as social security cases. However, the point was made that any number of specific cases are analogous to social security cases such that the exception itself could become much too broad. Mr. Deyling explained that his understanding of CACM's position what that it understood that other categories similar to social security cases exist, but that it drew the line at social security cases because of the volume of the cases and amount of personal information contained in those cases. The Subcommittee members questioned what sensitive documents typically filed in social security cases would also be found in other types of cases. In other words, the members of the Subcommittee wondered what primarily motivated the inclusion of social security cases in this section. Judge Fitzwater asked whether the DOJ could conduct a study to determine empirically what other categories of cases might be included with social security cases. The DOJ agreed to submit its views and results of its research by mid-September. In the meantime, Judge Fitzwater suggested that only social security cases be included in this section. The Subcommittee unanimously agreed to this approach.

Professor Capra explained that this section also provided that remote electronic access to social security cases would be limited to the parties, but that at the actual courthouse, any member of the public could access the physical or electronic file. The motivation for this proposal is that the E-Government Act should not limit access at the courthouse. Judge Scheindlin expressed concern that electronic access, even if at the courthouse, would give database companies even more access and that items may still get posted on the internet because of this access. Professor Morris explained that these companies were actually less likely use electronic access at the courthouse because they could not transfer the electronic files easily. In other words, they would still have to print out the documents (at $0.50/page) and scan them. However, Judge Fitzwater pointed out that PACER and the associated fees may not always be in place, making all of the files much more accessible than they are today. Following discussion, Professor Capra proposed the following language, which was approved by all members of the Subcommittee with the exception of Judge Scheindlin:

> "(2) all other persons may have remote electronic access only to: (A) the docket maintained under Rule [relevant civil or appellate rule]; and (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record."

Professor Schiltz also requested that Professor Capra draft Committee Note language to clarify the distinction between remote electronic access and courthouse electronic access.

Waiver of Identifier Protection. Professor Capra explained that CACM was opposed to allowing parties to forfeit the protection of their identifiers as provided by the proposed rule. Professor Capra inquired whether the Subcommittee believed that such a waiver should still be included. Professor Schiltz stated that if a party does not want to pay its attorneys to redact, that party should not be forced to do so. Further, if a party makes that choice, other parties should not be required to redact those same identifiers. The Subcommittee agreed with Professor Schiltz and discussed how the waiver should be

drafted. Proposals included serving a notice of waiver on other parties to the action or providing for a de facto waiver if identifiers are disclosed in a filing. Ms. Shapiro expressed concern about the latter proposal because pro se parties could mistakenly file personal identifiers without intending to forfeit the protection. Judge Hinkle stated that he understood Ms. Shapiro's concern, but the reality is that once the identifier is filed, it is public so other parties should not be forced to redact the information in their filings. The Subcommittee agreed that this was a policy decision. After additional discussion, Professor Capra suggested the following language, which was unanimously approved:

> "(g) Waiver of Protection of Identifiers. A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction."

Judge Rosenthal requested that the Committee Note clarify that a party may seek relief for improvident disclosure.

Committee Note. Professor Capra explained that the DOJ requested that a sentence warning parties against filing "other sensitive information" be deleted because it was too vague. The Subcommittee unanimously agreed to delete this sentence.

Miscellaneous Issues. The Subcommittee next discussed whether trial exhibits should be explicitly excluded from the proposed rule. Some argue that trial exhibits are not "filed" with the court and, therefore, not subject to the rule. The members of the Subcommittee discussed whether exhibits were considered part of a case file or not. Professor Capra proposed that the rule not reference trial exhibits at all -- if the exhibits are filed with the court, then they should be redacted and if they are not filed, then they are not public and not subject to the rule. The Subcommittee agreed. Judge Levi suggested that the Civil Rules Committee may still want to revisit this issue.

Professor Capra asked whether employer identification numbers ("EIN") should be included as identifiers to be redacted. The Subcommittee discussed whether an EIN raised the same privacy risks as social security or tax identification numbers. Professor Morris explained that the EIN was solely used to file taxes and did not present the same privacy concerns. The Subcommittee agreed and decided not to include EIN's in the list of redacted identifiers.

Next, Professor Capra asked whether a section clarifying the application of judge discretion outside of the new rule should be included. He explained that CACM opposed including any such language. CACM believed that judges maintain the discretion articulated, but to state it in the rule would only invite abuse by parties seeking court order under that section. The Subcommittee discussed the proposed language. A proposal was made to keep the current language in the rule and invite the Advisory Committees to consider the proposal without any Subcommittee recommendation on whether the language should be included. The Subcommittee unanimously agreed and the following language was retained in the rule for Advisory Committee consideration:

"(f) Court Orders. In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a)."

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, attorneys in attendance from the DOJ, and other attendees for their input. He reviewed the plan of action for the Subcommittee and adjourned the meeting at 6:15 p.m.

Respectfully submitted,

Brooke D. Coleman, Esq.

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:

(d) AUTHORIZATION OF APPROPRIATIONS —There are authorized to be appropriated to the General Services Administration, to ensure the development and operation of a Federal bridge certification authority for digital signature compatibility, and for other activities consistent with this section, $8,000,000 or such sums as are necessary in fiscal year 2003, and such sums as are necessary for each fiscal year thereafter.

SEC. 204. FEDERAL INTERNET PORTAL.

44 USC 3501 note.

(a) IN GENERAL.—

(1) PUBLIC ACCESS.—The Director shall work with the Administrator of the General Services Administration and other agencies to maintain and promote an integrated Internet-based system of providing the public with access to Government information and services.

(2) CRITERIA.—To the extent practicable, the integrated system shall be designed and operated according to the following criteria·

(A) The provision of Internet-based Government information and services directed to key groups, including citizens, business, and other governments, and integrated according to function or topic rather than separated according to the boundaries of agency jurisdiction.

(B) An ongoing effort to ensure that Internet-based Government services relevant to a given citizen activity are available from a single point.

(C) Access to Federal Government information and services consolidated, as appropriate, with Internet-based information and services provided by State, local, and tribal governments

(D) Access to Federal Government information held by 1 or more agencies shall be made available in a manner that protects privacy, consistent with law.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the General Services Administration $15,000,000 for the maintenance, improvement, and promotion of the integrated Internet-based system for fiscal year 2003, and such sums as are necessary for fiscal years 2004 through 2007.

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.

SEC. 206. REGULATORY AGENCIES. 44 USC 3501 note

(a) PURPOSES.—The purposes of this section are to—

(1) improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency; and

108TH CONGRESS
1ST SESSION

H. R. 1303

AN ACT

To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. RULEMAKING AUTHORITY OF JUDICIAL CONFERENCE.

Section 205(c) of the E-Government Act of 2002 (Public Law 107–347; 44 U.S.C. 3501 note) is amended by striking paragraph (3) and inserting the following:

"(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) Except as provided in clause (v), 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 wish-

es 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.

"(v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in clause (iv) 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—

"(I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that—

"(aa) identifies each item of unredacted protected information that the attorney or, if there is no attor-

ney, the party, certifies is relevant to the case; and

"(bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and

"(II) 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.".

Passed the House of Representatives October 7, 2003.

Attest:

Clerk.

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

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Memorandum To: Members of and Liaisons to the Standing Committee Subcommittee on the E-Government Act
From: Dan Capra, Lead Reporter
Re: Timeline for Enactment of Rules Protecting Privacy of Court Filings
Date: January 20, 2004

The following is the projected timeline for enactment of National Rules protecting privacy of court filings, as directed by section 205 of the E-Government Act. This timeline was reached by the Subcommittee at its meeting in Scottsdale on January 14, 2004.

Spring 2004– Advisory Committees on Civil, Criminal, Bankruptcy and Appellate Rules will each consider a rough draft of a privacy rule. These drafts will be derived from a template prepared by Professor Capra. That template will be adapted by the respective Reporters to accommodate issues particular to civil, criminal, bankruptcy or appellate practice. While the privacy rules will proceed from a template, it is recognized that the privacy rules will not be identical. For example, it may be appropriate for the Bankruptcy Rule simply to refer to the Civil Rule; and the Appellate Rule may simply provide that whatever was protected below must be protected on appeal.

Summer 2004– Reporters will confer on the results of the consideration of the rough drafts by the respective Advisory Committees. Reporter will work out any issues that may be necessary for an integrated approach to privacy.

Fall, 2004– Advisory Committees will each consider a final draft of a privacy rule as amended, if necessary, by the Reporters. If possible, the Committees each will vote out a rule with the recommendation that the Standing Committee release it for public comment. If more issues or concerns arise in any of the Advisory Committees, then a vote for public comment can be deferred to the Spring 2005 meeting of that Committee.

January, 2005– If all Advisory Committees have recommended a privacy rule for public comment, then each of those proposals will be submitted to the Standing Committee with the recommendation that they be released for public comment in August, 2005.

Spring, 2005– Final date for each Advisory Committee to prepare a privacy rule for submission for public comment.

June, 2005– Final date for submitting proposed privacy rules to the Standing Committee with the recommendation that they be released for public comment.

August 2005– Proposed privacy rules released for public comment.

January/Early February 2005– Public hearings, if necessary. [It would seem most efficient for the privacy rules to be released as a package. Public hearings, if necessary, then could be held on the entirety of the privacy package, rather than as individual committee proposals. In other words, it would seem wasteful to have a separate public hearing for each Committee's privacy rule, when the goal is to provide an integrated approach to privacy.]

February 15, 2006– Public comment period ends.

Spring 2006– Advisory Committees consider public comments. Each Advisory Committee votes out a privacy rule with the recommendation that it be forwarded to the Judicial Conference.

June 2006– Standing Committee approves each of the privacy rules and forwards the rules to the Judicial Conference with the recommendation that they be approved and sent to the Supreme Court.

Summer, 2006– Judicial Conference approval of privacy rules.

September 2006– Privacy rules referred to the Supreme Court.

May 2007– Supreme Court sends privacy rules to Congress.

December 1, 2007– Effective date of national rules on privacy of court filings

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

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September 20, 2004

Honorable David F. Levi
Committee on Rules of Practice and Procedure
Chief Judge, United States District Court
501 I Street, 14th Floor
Sacramento, CA 95814-2322

Re: Privacy Template Rule

Dear Judge Levi:

As you know, the Advisory Committee on Bankruptcy Rules considered the proposed Privacy Template Rule at our meeting last week. Since we are the first of the Advisory Committees to consider the proposal, we are reporting the Committee's action to you and the Reporters of the other Advisory Committees so that they are aware of our actions prior to their meetings.

The primary substantive concern expressed by members of our Committee relates to the treatment of a minor's name. In a bankruptcy case, it is essential to have the full name of the debtor set out in the petition as well as in notices to the creditors. Consequently, the Bankruptcy Rule version of the privacy rule will have to accommodate that need. Furthermore, the Committee believes that the need to limit the identification of a minor to his or her initials does not exist when the minor is not being identified as a minor. For example, a creditor listed on the debtor's schedules would not normally be identified as a minor. In fact, the debtor may not even know that the creditor is a minor. Nonetheless, the Template would seem to require the limited identification of the minor/creditor.

A second matter that may require special treatment in the Bankruptcy Rules is the limit on the use of the social security number. Sections 110(h) and 342(c) of the Bankruptcy Code mandate the use of social security numbers by bankruptcy petition preparers and by debtors who are giving notice to a creditor, respectively. These provisions may survive the enactment of the E-Government Act and would continue to require the full social security number of petition preparers and debtors. The Committee will be studying the issue and considering it at its March meeting.

As a result of these issues, the Advisory Committee decided to reconsider the matter at its March meeting. This will also permit the Bankruptcy Rules Committee to have the benefit of comments from the other Advisory Committees. We anticipate that we will then recommend to the Standing Committee for publication a rules amendment to implement the Privacy Template Rule for bankruptcy cases. Most likely, the Bankruptcy Rule amendment will be an incorporation of the Civil Rules version of the Privacy Template Rule. If necessary, the incorporation will be limited to meet particular needs of the Bankruptcy Code and practice.

The Committee discussion also led to a suggested revision of some of the language of subdivisions (a) and (d) of the Template. That revision is attached to this letter. It is offered to the other Advisory Committees for their consideration.

We look forward to hearing about the deliberations of the other Committees on this matter. We understand the need to make the rules as consistent as practicable, and we will continue to work with the other Committees as we prepare for our March 2005 meeting.

Please do not hesitate to give me a call if you have any questions about this matter.

Sincerely yours.

A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

Enclosure

cc: Hon. Thomas S. Zilly
Prof. Patrick J. Schiltz
Prof. Edward H. Cooper
Prof. David A. Schlueter
Prof. Daniel J. Capra
Prof. Jeffrey W. Morris

Rule [ ] Privacy in Court Filings

(a) Limits on Disclosing Identifiers. Except as provided in subdivisions (b) and (d) and unless the court orders otherwise, any filing made with the court that includes the following identifiers must be limited by disclosing only these elements:

(1) the last four digits of a person's social security number and tax identification number;

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

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

(4) the last four digits of a financial account number.

(Subdivisions (b) and (c) would be unchanged.)

(d) Exemptions. The limits on the disclosure of identifiers provided in subdivision (a) do not apply to the following:

((1) - (4) of existing template would be unchanged)

(Subdivisions (e) and (f) would be unchanged.)

Rule 49.1. Privacy in Court Filings

(a) Limits on Disclosing Identifiers. If an electronic or paper filing made with the court includes any of the following identifiers, only these elements my be disclosed, unless the court orders otherwise,

(1) the last four digits of a person's social security number and tax identification number;

(2) the initials of a minor's name,

(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.]

(b) Unredacted Filing Under Seal. A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal The unredacted copy must be retained by the court as part of the record

(c) Reference List. A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information

(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following:

(1) in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture,

(2) records of an administrative agency proceeding,

[(3) official records of a state court proceeding in an action removed to federal court,]

(4) the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (2) of this rule when originally filed,

(5) filings in any court in relation to a criminal matter or investigation that are prepared before the filing of a criminal charge or that are not filed as part of any docketed criminal case,

[(6) arrest warrants;]

[(7) charging documents—including indictments, informations, and criminal complaints —and affidavits filed in support of those documents, and]

[(8) criminal case cover sheets]

(e) Court Orders. In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court The court must be satisfied that a limitation on remote electronic access is necessary to protect against

widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a).

(f) Waiver of Protection of Identifiers A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction

Notes on Draft

This draft is based upon the June 16' 2004 template, with the following changes. First, I included in (a)(5) the home address limitation that appeared in the version the Committee reviewed last Spring The E-Government Committee has requested the Criminal Rules Committee to consider whether the home address should be a protected identifier

Second, I retained the provision in (d)(3) regarding state proceedings removed to federal court While I could not think of any cases where that sort of information would ever be relevant to a criminal case, I left it in for now so that the Committee can review it

Fourth, in subdivision (d), dealing with exemptions, I included the information suggested by the Department of Justice, and listed in footnote 9 of the template.

Finally, I did not include subdivision (e) in the template, concerning social security cases. I assumed that that information would not be applicable in a criminal by the terms of the proposed rule itself

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendments to Rules Permitting Courts to Promulgate Local Rules to Require Electronic Filings.**

DATE: **September 30, 2004**

I am attaching a letter from Judge John Lungstrum, Chair of the Committee on Court Administration and Case Management to Judge David Levi, Chair of the Standing Committee In his letter, Judge Lungstrum formally requests that the rules committees consider—on an expedited basis—amendments to their respective rules that would authorize courts to require use of electronic filing, with appropriate exceptions.

For the most part, the Criminal Rules Committee in the past has not had to directly amend Rule 49, dealing with serving and filing papers, because Rule 49(d) expressly cross-references the civil rules The other committees are in the process of considering this issue and it may be that by the time of the October meeting in Santa Fe that we will have a better idea about whether there is a desire from those committees to expedite these proposals.

I am also attaching a letter from Professor Jeff Morris, Reporter to the Bankruptcy Committee (which arrived as I was preparing this memo) in which he states that the Bankruptcy Committee has proposed an amendment to Bankruptcy Rule 5005 That amendment would permit courts to require electronic filings Apparently, that Committee is prepared to go forward with an amendment on an expedited basis.

This issue was the subject of a number of e-mail discussions among the Administrative Office and the Reporters for the five advisory committees in August In my view, it would be better to consider proposed amendments and in particular, the issue of exceptions, on the normal schedule and combine any amendments with the proposed publication schedule for the E-Government Act amendments.

If the Committee believes that it suffices to simply continue to incorporate in Rule 49 any similar electronic filing rules in the Civil Rules, then no further action may be required by the Committee. At this point, I am inclined to recommend this approach.

On the other hand, if the Committee believes that it would be better to expressly include some provision in the Criminal Rules for electronic filings, then I can quickly draft a new subdivision for Rule 49, along the lines of the provision in the Bankruptcy Rules.

This item is on the agenda for the October meeting

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

August 2, 2004

Honorable David F. Levi
Chief Judge
United States District Court
2504 U.S. Courthouse
501 I Street
Sacramento, CA 95814-7300

Dear Judge Levi:

At our recent Summer meeting, and as part of the Executive Committee's budget initiative, our Committee considered a myriad of cost containment ideas, one of which was that all cases filed in federal court be done exclusively through the CM/ECF system. After discussing this proposal, it was the consensus of the Committee that significant savings can and will be achieved through electronic filing, and therefore mandatory electronic filing should be encouraged to the fullest extent possible. Because this proposal has obvious implications for the federal rules of procedure and therefore your Committee, I wanted to alert you to our Committee's recommendations.

As you are aware, our Committee – at the request of and in coordination with your Committee – has developed model local electronic filing rules (which were subsequently endorsed by the Judicial Conference) that strongly encourage electronic filing. One of the fundamental reasons for developing these model rules was to assist the Rules Committee in its consideration of the development of national rules for electronic filing. These rules have been provided to the courts for over two years, and have been of great assistance in implementing CM/ECF.

At our Summer meeting, the Committee considered a series of proposed amendments to those rules that would create a presumption that all documents would be electronically filed, unless otherwise ordered by the court upon a showing of good cause. The Committee decided, however, that these proposals would probably conflict with the current Fed. R. Civ. P. 5(e) and Fed. R. Bankr. P. 5005, which state that a court may "permit" electronic filing, and therefore declined to endorse them. Instead, our Committee decided to tackle the issue head on, by

recommending that the Rules Committee consider expedited amendments to the civil and bankruptcy rules that would authorize the courts to "require" the use of electronic filing but that would also incorporate appropriate exceptions. Fundamentally, the Committee believes this to be the most appropriate way to formally implement electronic case filing into the culture of the federal courts. And, while the Committee was cognizant of the fact that the Appellate courts will not start implementing CM/ECF until January of 2005, and will not go live until January 2006 at the earliest, we believe now is an appropriate time to begin the rules process to effect these changes, in order that they be implemented as quickly as possible.

In the meantime, the Committee also plans to consider amendments – to the extent they are possible – to the current model local rules that would more strongly encourage the use of electronic filing without violating the current federal rules. The Committee is also requesting the Executive Committee, as part of its cost containment initiative, to strongly urge courts to work with their local bars to ensure that CM/ECF is implemented to the greatest extent possible. The Committee believes this will help eliminate paper filing practices, as well as dual paper and electronic filing practices, in favor of the full incorporation of electronic case filing, thereby achieving cost savings through this technology.

Therefore, based on the Committee's recommendations, I would like to formally request that the Rules Committee propose, on an expedited basis, amendments to Rule 5(e) of the Federal Rules of Procedure and Rule 5005(a)(2) of the Federal Rules of Bankruptcy Procedure that would authorize the courts to "require" the use of electronic filing, but would also incorporate appropriate exceptions. I would also welcome any suggestions your Committee may have regarding our initiative to review the current model local rules with an eye towards amending them to more strongly encourage electronic filing.

Thank you for your consideration of these proposals, and please do not hesitate to contact me if you would like to discuss them further. Our two committees have devoted an enormous amount of time and energy to these issues, and it looks like those efforts will continue for some time. I sincerely believe, however, that our efforts have been a great contribution to the federal judiciary.

Sincerely,

John W. Lungstrum

John W. Lungstrum

cc: Peter McCabe
John Rabiej

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

September 30, 2004

Hon David F Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Re Amendment to Bankruptcy Rule 5005
Fast Track Mandatory E-Filing Rule

Dear Judge Levi

Enclosed is a copy of the version of the amendment to Bankruptcy Rule 5005 that the Advisory Committee recommends to the Standing Committee for approval to publish for comment on a "fast track" basis The Advisory Committee approved the amendment at its meeting on September 9-10, and the Style Subcommittee of the Advisory Committee has now reviewed and revised the rule as is our custom We also had the benefit of comments on the proposal from Prof Kimble and Mr Spaniol prior to the Style Subcommittee's review

The Advisory Committee understands that the Standing Committee may proceed to publish this proposal (and parallel proposals of the Appellate, Civil, and Criminal Rules Committees) on an expedited basis, and we stand ready to respond as quickly as necessary to any public comments we may receive

Sincerely yours,

Jeffrey W Morris
Reporter, Advisory Committee on Bankruptcy Rules

Encl
cc Hon A Thomas Small
Hon Thomas S Zilly
Prof Daniel R Coquillette
Prof Patrick J Schiltz
Prof Edward M Cooper
Prof David A Schlueter
Prof. Daniel J Capra

RULE 5005. Filing and Transmittal of Papers

(a) FILING

* * * * * *

(2) FILING BY ELECTRONIC MEANS

A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code

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COMMITTEE NOTE

This amendment acknowledges that many courts have local rules that make electronic filing of documents mandatory The amendment recognizes that advances in technology have led the courts to adopt those local rules Electronic filing is used in many courts, and the amendment will encourage courts by local rule to proceed at their own pace towards a total electronic filing environment

In adopting local rules, courts can include provisions to protect access to the courts for those who may not have access to or the resources for electronic filing Given the variety of circumstances

presented to the courts, it is appropriate to allow each court to make these decisions, at least initially, on a local level

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

September 29, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Status of CM/ECF Project and Study of Cost-Savings Associated With It*

I have attached a report on the status of the Court Management/Electronic Case Filing project (CM/ECF) and a study containing information on cost-savings associated with the project.

The three-page report describes the status of the CM/ECF implementation in the federal courts as of June 2004. It is operational in 123 courts, including 75 bankruptcy courts and 48 district courts. "Another 16 bankruptcy courts and 29 district courts are in the process of rolling out the system." Attorney participation is impressive with 88,000 using it to make over 3 million docket entries. In general, the report gives the project a glowing stamp of approval.

In 2003 the Judicial Conference's Committee on Information Technology requested a study "to determine whether electronic public access fees impact specifically attorney's acceptance of the CM/ECF system." The study was conducted by a consulting firm, PEC Solutions, Inc. In determining whether assessing fees reduced attorney participation, the study examined the offsetting cost savings realized by attorneys using the system. A discussion of the attorneys' cost savings can be found on pages 8-9, 12, and 18-24.

The study provides some indirect information on the cost savings for courts. It documents the specific ways attorneys save money using the system, several of which likely will apply to the courts, while others likely will result in less work for the courts. A discussion of revenue enhancements derived from CM/ECF for the courts is also given on pages 36-40.

John K. Rabiej

Attachments

Status Report: Electronic Filing in the Federal Courts: 2004

by Sharon D. Nelson, Esq. and John W. Simek

Sharon D. Nelson, Esq. and John W. Simek are the President and Vice President of Sensei Enterprises, Inc., (www.senseient.com) a computer forensics and legal technology firm based in Fairfax, VA. They can be reached by email at sensei@senseient.com or phone at 703-359-0700.

A well deserved drum roll please! Without any fanfare, the Administrative Office of the U.S. Courts is quietly changing the way federal courts do business, court by court. When the AO first announced that it would have its case management/electronic case filing system (CM/ECF) operational in all federal courts by 2005, the pronouncement was greeted skeptically. After all, state e-filing projects were bogged down, the economy wasn't cooperating, and the whole project seemed extraordinarily massive. This is now the third report the authors have compiled on the status of electronic filing in the federal courts, and it looks as though next year's report will announce the completion of the AO's mission, on time and on budget

Here are the very impressive statistics: As of June 2004, CM/ECF was fully operational in 123 courts, including 75 bankruptcy courts and 48 district courts. Another 16 bankruptcy courts and 29 district courts are in the process of rolling out the system. CM/ECF is rolled out in waves, with nine courts being rolled out every two months. Remarkably, the timeline adopted at the initiation of this project in 1995 has remained largely in place Also, remarkably, the cost of instituting the system has dropped, to about $50,000 per court, while the speed of the system has more than doubled This is partly due to reduced equipment cost and the conversion to a Linux operating system.

Gary Bockweg, the AO's Project Director for CM/ECF, reports that the AO has encountered only one significant delay, with respect to electronic filing in the appellate courts. Because the appellate court functionality differs greatly from district court functionality, the appellate courts defined substantially different requirements for their case management system. Rather than merely modifying existing district court software, as had been planned, the developers had to create a wholly new system for the appellate courts. It is also true that the appellate courts have not shown the depth of interest in electronic filing manifested by the bankruptcy and district courts. This may have to do with the fact that appellate courts tend to be more traditional or that due to the differences in their processes, appellate courts may not expect the same benefits that the district and bankruptcy courts are seeing.

The e-filing statistics for May 2004 are really striking Some fourteen million cases were being handled by the CM/ECF system. A total of 88,000 attorneys were using the system, and 127,000 new cases were opened. Some 3,300,000 docket entries were made in May. On a humorous note, in this increasingly complex world, the AO found itself tagged by blacklists as a spammer when it sent out thousands of copies of the same e-mail notification in the Enron case. The AO spent some time trying to unravel the mess. But as is clearly evident from the stats, this is a well-oiled machine in constant use.

As the economy floundered, the federal courts continued to have funding available for their CM/ECF implementation through revenue generated by the judiciary's "PACER" (Public Access to Court Electronic Records) program, which generated approximately $27,000,000 in revenue last year. Where does all the money come from? Many people are surprised to find that court data is invaluable to many industries, including credit card companies, banks, realtors, marketing companies–the list goes on and on. While there are no added fees for those filing electronically or receiving their one free access to any new filing in their own case, the court information is also made available electronically to the public for a fee of

seven cents per page. Understandably, the AO is pro-PACER and its revenue generation This may well stir a privacy concern for those whose data is being sold, but at the moment, the public seems largely unaware that court data has become electronic gold. As Bockweg noted cheerfully, "We are pleased to have access to this money Congress has authorized the judiciary to assess reasonable user fees for its electronic public access program, and this has enabled us to keep the service going." In fact, much of this data gathering is automated, and has become so intense that it has occasionally threatened to bog the system down. In response, the AO has asked some of the most active data gatherers to adjust their procedures so that the activity is done at night, when normal system access is low. It remains to be seen whether privacy advocates will cry "foul" at this source of revenue.

Some elements of the federal e-filing system remain unchanged The AO's philosophy has been to make e-filing permissive rather than mandatory. While that once seemed worrisome, and skeptics fretted that participation would lag, this train is now moving so fast that everyone seems eager to jump on board.

Just as reported in previous installments, the AO is struggling mightily to stay current with the latest web browsers and doing a credible job, lagging only slightly behind the most up-to-date versions.

As also reported previously, the AO is playing a waiting game with XML and continuing to monitor its progress elsewhere. One element of the CM/ECF system that surprises some observers is that it still uses a user ID and password rather than digital signatures. As Bockweb notes, this simple system has been working just fine and has not thus far presented any security issues. Though he expects digital signatures to be adopted at some point in the future, there are no immediate plans for their adoption.

One major change is that electronic commerce has now been melded with the system, and more and more courts are permitting fees to be paid online

The universality of the system seems to appeal to all the courts using it, so fairly minimal use has been made of their ability to modify the code. More frequently, courts have supplemented the core code with their own set of local instructions, news, and procedures. If the core code is touched, the court modifying it is also responsible for handling the replication and maintenance of the code in the event of a disaster recovery event.

The "Public Access v. Privacy Rights" debate continues and Bockweb notes wryly that the AO is prepared to "shift with the winds" as dictated by the changing methodologies of balancing both rights. In 2001, the Judicial Conference issued its rules in civil cases, requiring that "personal data identifiers" such as Social Security numbers, dates of birth, financial account numbers, and names of minor children be modified or partially redacted Social Security cases were excluded from the system entirely. At that time, criminal cases were also generally excluded, but that has now changed.

Public Access to Electronic Criminal Case Files

In March, 2002, the Judicial Conference approved the establishment of a pilot project that would allow 11 courts, ten district courts, and one court of appeals, to provide remote electronic access to criminal case files. A study of these courts conducted by the Federal Judicial Center did not find any instances of harm due to remote access to criminal documents

After further study and deliberation, the Judicial Conference adopted new policies with respect to remote access to criminal case files in September of 2003. In general, the policy states that documents that can be accessed at the courthouse should be accessible remotely. There are some restrictions The policy states in part.

Upon the effective date of any change in policy regarding remote public access to electronic criminal case file documents, it is required that personal data identifiers be redacted by the filer of the document, whether document is filed electronically or in paper, as follows:

1. Social Security numbers to the last four digits;
2. Financial account numbers to the last four digits;
3 Names of minor children to the initials;
4. Dates of birth to the year, and
5. Home addresses to city and state

The following documents are not to be included in the public case file and are not made available at the courthouse or via remote electronic access.

1 Unexecuted summonses or warrants of any kind;

2. Pretrial bail or presentence investigation reports,

3. Statements of reasons in the judgment of conviction;

4 Juvenile records;

5 Documents containing identifying information about jurors or potential jurors,

6. Financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

7. Ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and

8. Sealed documents.

Courts maintain the discretion to seal any document or case file *sua sponte*.

Security remains a constant concern, exacerbated by the injection of terrorist activities as part of the daily culture. The AO works with the Department of Homeland Security and the National Security Agency to secure court records, and thus far, has been very successful. The federal system utilizes a "dirty" server accessible to the public with the court's data residing on a "clean" server protected by a firewall. Thus far, the system has foiled hundreds of thousands of "rattlings at the doorknob" though the AO is anything but complacent. As part of the national infrastructure, court records are potentially a valuable target for terrorists and the AO remains alert to the ever-morphing potential security vulnerabilities. Currently, court databases are replicated in Virginia and Missouri, and further replications are anticipated. It may actually be safer to have data for the Eastern part of the U.S. replicated in the West, and vice versa, a concept that is presently being studied. With current software, only a single replication is possible, but that software will shortly be replaced and multiple replications will then be possible, thereby further reducing security risks.

At one point, the Western District of Kentucky helped test the system by losing their outside server, and then activating the replicated data server. Their system failure resulted in a test of the AO's "failback" procedures, which raised concerns about the methodology used to return to a normal production environment following a failover The AO continues to work to make such transitions as smooth as possible. The AO has also allowed controlled "white hacking," in which security specialists attempted to hack into the CM/ECF system. While the results mandated some minor fixes, the AO breathed a happy sigh of relief when the experts were unable to effect any major intrusions.

Asked to sum up the general reaction, Bockweb notes happily, "It is rare to hear anything negative. Most courts seem to really enjoy the benefits and those who have already implemented are looking forward to getting more and more 'nice to have' features." Some states, stymied in their own e-filing efforts, have asked the AO for its CM/ECF system, but Bockweb notes that the AO can't afford to devote staff resources to working with the states. Also, because the system hasn't been packaged as an "off the shelf" system, it would be very hard for anyone else to bring it up state by state, or court by court, in accordance with local needs. Still, the AO is looking at the issues to see if it can ultimately assist the states. In the meantime, the "little engine that could" keeps chugging along, and it looks very much as though it will make it to the station on time. ●

Executive Summary

Background

In 2001, the Administrative Office (AO) conducted a study of the electronic public access fee and its impact on the use of CM/ECF. Although data from the Electronic Public Access (EPA) Fee Study performed in 2001 suggested that fees do not impact the use of CM/ECF, these findings were made early in the CM/ECF implementation process, and the survey set was comprised of PACER users (commercial entities, attorneys, and the general public). In 2003, the Committee on Information Technology asked the Electronic Public Access (EPA) Program Office to conduct a follow-up study to determine whether electronic public access fees impact specifically attorney's acceptance of the CM/ECF system.

The EPA Program Office contracted with PEC Solutions, Inc. (PEC), which conducted the 2001 fee study, to also conduct the research for this study, which consisted of a telephone survey, focus group meetings, and an analysis of electronic public access account utilization.

The objectives of the 2003 Fee Study were to assess the impact of fees on users' adoption and use of CM/ECF, and to determine the need to develop an alternate pricing method for electronic public access.

Methodology

In the telephone survey, PEC randomly selected 135 attorneys who use CM/ECF in either bankruptcy or federal district courts from 13 judicial districts divided into two pools: metropolitan statistical areas, which are populations over 50,000; and micropolitan statistical areas, which are populations under 50,000. The survey consisted of twenty-five questions concerning size and style of law practices, CM/ECF usage patterns, and opinions regarding the current fees and corresponding value of CM/ECF.

PEC personnel, along with AO staff, visited six different courts in four court locations: District of Columbia- District Court; Eastern District of Virginia- Bankruptcy Court; Western District of Missouri- District and Bankruptcy Courts; and Nebraska- District and Bankruptcy Courts. Each participating court contacted a cross-section of attorneys and firms who represented the most experienced users of CM/ECF. The number of participants varied from eight to fifteen persons per group meeting. Participants included attorneys and support staff from sole practitioners' offices, small and large law firms, local and remotely located attorneys, U.S. Attorneys and bankruptcy trustees.

The focus groups proceeded via open discussions, rather than the method of specified questions and answers used in the telephone survey. A facilitator guided the discussion through four topical areas, including: what impact the system has had on attorneys' practices; how fees and other

costs impact attorneys' use of CM/ECF; what benefits attorneys are deriving from the system; and what changes, if any, attorneys would prefer.

Participants discussed any topic or aspect of CM/ECF or PACER that they believed to be important. The openness of the forum allowed potentially contentious issues to surface without derailing the discussion. The unrestrained conversation resulted in less inhibited, more meaningful discussions than the telephone survey permitted. Nonetheless, the focus groups predominantly confirmed the telephone survey results and provided qualitative explanations corresponding to each topic of discussion.

At each focus group meeting, participants completed a time analysis worksheet to identify where and how CM/ECF changed their work processes, filing procedures, storage of data, case management, and other aspects of the work day. The worksheet divided an 8-hour day into time segments into which attorneys attributed their work procedures, both clerical and substantive, before and after the implementation of CM/ECF.

Results

The study results show that the current fee structure does not deter attorneys from adopting or using CM/ECF. Accordingly, the survey participants preferred the current fee plan more than a proposed per-document plan or a flat fee.

1. Fee Structure: Participants compared the current fee structure to both a per-document fee plan and a flat fee, and overwhelmingly preferring the current fee system. Most attorneys do not bother to bill clients for the fees, for two reasons: 1) the comparatively minuscule fees do not justify spending the time to track and recover them; and 2) under the current system, attorneys said it is difficult to efficiently attribute a particular fee to a particular client.

An overwhelming majority of attorneys surveyed, 86%, said the fee does not inhibit their use of CM/ECF. A few users, however, complained of paying fees to view case files for their own cases, even after the initial free copy is obtained. Some also complained of the billing mechanism, i.e., they found the billing transaction receipts annoying, but they challenge neither the need for the fee nor the amount of the fee. Other users suggested building the access fee into the filing fee or some other one-time fee associated with each case.

2. Advantages: Survey participants listed several benefits of CM/ECF, including cost savings, productivity and efficiency improvements, and enhancements to products and services. Users realized cost savings in postage, copying, paper usage, courier services, and travel to and from courts for filing and document retrieval. Time advantages include service and delivery efficiencies, document filing, and access to case information, which facilitates improved communications with clients, other case participants, and the courts.

Users also advise that because of the time savings, attorneys and staff alike are able to spend more time on substantive projects. Use of CM/ECF also results in increased workloads, more billable hours, and even product improvement. The attorneys cite the 24 x 7 access as an element of CM/ECF that benefits their professional work as well as their personal lives by providing greater flexibility of when and where attorneys could perform their work.

3. Disadvantages: Attorneys' most vocal complaint was the increase in email volume, especially bankruptcy notices. Some attorneys reportedly diverted resources to manage the barrage of emails. One predominant issue is the inability, under the current system, of the user to identify the source and subject of the emails, which necessitates the time-consuming tasks of opening and reading each individual email.

Attorneys also complained that filing and case management with CM/ECF required more highly skilled support staff. Although filing and noticing have been streamlined, skilled staff are required to operate the system and troubleshoot anomalies. Obtaining skilled staff required new recruitment and hiring efforts and training, and might require laying off other staff with inadequate computer skills.

Those who practiced criminal law disliked the restricted access in criminal cases. However, the Judicial Conference recently changed the policy regarding remote access to criminal cases.

4. Start-Up Costs: Attorneys acknowledged that they incurred considerable initial costs, which they recouped directly, through billing and less money expended on mailing and courier services, and indirectly, through increased operational efficiencies, allowing more time to be spent on substantive issues rather than clerical issues involved in filing of cases. Users also note that by requiring updated computer and word processing equipment, CM/ECF has forced firms to update computer equipment to the overall benefit of the firm. Therefore, users have recouped the start-up costs of CM/ECF while improving client services.

5. Case Management Tool: Almost all attorneys indicate that they have printed documents from CM/ECF, rather than saving them to disc. Users printed hard copies because of habit, practice peculiarities, security concerns, and court rules. Ultimately, both attorneys and support staff reported that they simply were more comfortable with a paper file than with an electronic file. Consequently, because users kept hard copies of CM/ECF documents, they were less likely to refer repeatedly to the system to review case documents. The attorneys have asserted, however, that the EPA fee is not the motivating factor that influences whether they use CM/ECF as their primary file system.

6. Revenue Projections: The number of CM/ECF courts increases dramatically each year, with a corresponding increase in EPA fee revenue. Nearly 50 CM/ECF courts are currently billing for EPA, and by the end of fiscal year 2004 this number should increase to nearly 90 courts, with 60 bankruptcy courts and 27 district courts implementing the system. The bankruptcy implementation is significantly closer to completion than is the district implementation. Consequently, the growth

rate for bankruptcy revenues is relatively flat, whereas the growth rate for district courts projects continued growth through 2005. Additionally, because bankruptcy revenue has historically accounted for most of the EPA revenue, and the bankruptcy statistical model is based on experience, the bankruptcy model supplies the principal dynamic in the projected growth of EPA. Nevertheless, analysis indicates that the current fee structure will provide increased revenues over time, continuing to provide for development, implementation, and operation of CM/ECF.

Due to the differences between bankruptcy and district courts, the researchers created separate forecasting models for each. For fiscal year 2004, expected total revenue is $35.0 million*; for fiscal year 2005, the expected revenue is $43.7 million**; and for fiscal year 2006, the expected revenue is $47.7*** million.

7. Cost-Benefit Analysis: Attorneys report that CM/ECF's benefits substantially outweigh the costs of start-up and operation. Attorneys using CM/ECF take advantage of saved time to improve services and increase billable hours, gaining competitive and thus economic advantage over those who do not use CM/ECF. Firms commonly write-off non-billable hours because they exceed reasonable costs for the period. Upon implementing CM/ECF, however, firms have reduced non-billable hours write-offs and have recovered the revenue corresponding with the regained hours. Users were able to pass savings on to clients, promoting client good will and further enhancing competitive advantage.

Summary

The 2003 Fee Study results show that the current fee structure does not deter attorneys or support staff from using CM/ECF. Although users do not typically use CM/ECF as their primary internal case management system, this is not related to the access fee. Instead, users choose to print documents for a variety of reasons related to historical practice, court requirements and security. Users have noted that start-up costs were moderate to substantial, but that they have recouped the costs through increased billable hours, expanded competitive advantage and enhanced client goodwill. Ultimately, the users overwhelmingly report that the value of CM/ECF substantially outweighs the burden of the access fee.

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* Between $29.1 million and $38.6 million

** Between $34.2 million and $48.2 million

*** Between $35.8 million and $59.0 million

TABLE OF CONTENTS

Section 1 – Introduction

1.1 Background

The Administrative Office of the U.S. Courts (AO) is at the approximate mid-point of implementing a new case management system for the federal judiciary. The new application is a Government-developed product called Case Management/Electronic Case Files (CM/ECF). The CM/ECF project replaces existing case management systems in the federal courts (e.g., the Integrated Case Management System (ICMS), NIBS) with a new case management system based on current technology, new software, and increased functionality requested by the courts. In addition to providing the courts with updated tools for managing their cases, this new system enables the courts to create electronic case files and implement electronic filing over the Internet.

Current Judicial Conference policy is that public access fees should be commensurate with the costs of providing existing services and for developing enhanced services. The fee for public access to electronic information was initially set at $1.00 per-minute. It was reduced twice, first to $.75, then to $.60 per-minute. As access began to be made available via the Internet, the Judicial Conference, at its September 1998 session, prescribed a $.07 per-page charge for Internet access to court documents. This charge, which was aimed at maintaining current public access revenues, while also introducing new technology to expand public access court information, was calculated to produce comparable charges for Internet and dial-up access for large users (charges are reduced for light users), and applies to all court types.

As a result of the Fee Study conducted by PEC Solutions in 2001, the Judicial Conference approved a per-document cap of $2.10 on case file documents accessed through the Public Access to Court Electronic Records (PACER) system. This cap was set based on user preference combined with the need to preserve revenue at a level sufficient to fund the EPA program, which relies exclusively on revenues derived from PACER. The PACER Service Center, located in San Antonio, TX, manages administration and billing for all electronic public access in the courts. While physical access to public records within the courthouse during regular operating hours is currently available to the general public free of charge, anything beyond this basic level has an associated charge, e.g.: $.50 per-page for copies of court documents; $20 for a search of the court records by the clerk; $4 for a sheet of microfiche; $20 for an audio recording of court proceedings; $7 for certification of a document; and $.10 per-page if printed from a public access terminal.

EPA revenues are used to fund not only the PACER program, but also the Appellate Bulletin Board System (ABBS), the Voice Case Information System (VCIS) and the Appellate Voice Information System (AVIS); the latter two of which are provided to the public without charge. In addition to VCIS, which has been an extremely popular service, the U.S. Party/Case Index, which allows users to perform nationwide searches, logged approximately 3,000,000 transactions last year. These revenues also provide courts with telephone lines and toll-free lines, as well as all of the hardware and software necessary for public access, including PACER-Net and infrastructure costs, and public

scanning stations, including a personal computer for free public access at the court in all offices with ten or more staff.

EPA revenues also fund the development and implementation costs of CM/ECF, whose operation has been integrated with, and indeed expanded the scope of PACER. PACER has been expanded to administer electronic access to documents filed in CM/ECF, in addition to docket sheets. CM/ECF is currently "live" in 60 bankruptcy courts and 27 district courts and is currently being implemented in 52 additional district and bankruptcy courts. Implementation of all federal courts is anticipated to be completed by the end of 2005.

1.2 Objectives

The objectives of the EPA Follow-up Fee Study are to assess the impact of fees on the adoption and use of CM/ECF by attorneys and to evaluate alternate pricing models for electronic public access and electronic filing for attorneys. The study reviews the benefits and disadvantages system users have experienced to determine the value that the system provides to attorneys.

1.3 Analytical Methods and Document Organization

The focus of this study is on the attorneys practicing in the U.S. Courts. A telephone survey of current, randomly selected, CM/ECF users, coupled with focus groups of attorneys in CM/ECF courts gathered users' opinions regarding the advantages and disadvantages of CM/ECF, and how the system has impacted practice. The survey and focus groups were performed in parallel; however, initial answers from the survey were used to direct questions and discussion during the later focus group sessions to help the PEC facilitators fully understand the issues arising from the implementation and use of CM/ECF by attorneys. EPA revenue forecasts extrapolated revenue trends using statistical regression models. The specific methodology is described in detail in Section 6, "Revenue Projection." These sources also contributed to estimates for Section 4, "Electronic Public Access Benefits and Costs."

The remainder of this document is organized into the following sections:
Section 2 - Data Collection Methodology
Section 3 - CM/ECF Impact on Attorney Practice
Section 4 - Electronic Public Access Benefits and Costs
Section 5 - Attorney Adoption of the CM/ECF System
Section 6 - Revenue Projection
Section 7 - Findings

Section 2 – Data Collection Methodology

This section describes the three primary data collection methodologies used to develop the information contained in this report. PEC performed a telephone survey of randomly selected attorneys, facilitated focus group meetings with current users of CM/ECF, and analyzed account and revenue data from the previous two years.

2.1 Overview

The timing of this study, at the mid-point of CM/ECF implementation, allows analysts to draw on actual experience using the system. The following data collection tools provided complementary insights into the experience of CM/ECF users:

- Telephone Survey - collect data regarding user demographics, usage patterns, and fee-related issues, as well as general information regarding the perceived value and costs of EPA.
- Focus Group Meetings - provide specific information regarding the effects of CM/ECF on attorney practice, the advantages and disadvantages of EPA, including quantifiable and non-quantifiable benefits experienced with the implementation of the system. In addition, issues raised from the telephone survey will be discussed to develop a complete understanding of reasons behind some of the answers.
- CM/ECF and PACER Account and Revenue Data - analyze usage data to develop models to forecast future usage and revenues, as well as development of possible alternative pricing models.

The following paragraphs describe these methodologies in detail.

2.2 Telephone Survey

2.2.1 Overview

The telephone survey was developed with input from the AO. The survey consists of twenty-five (25) questions developed to elicit responses which identify the user's law practice, CM/ECF usage patterns, and opinions regarding the current fees and value of EPA. Survey participants were randomly selected from lists of CM/ECF users from thirteen (13) judicial districts totaling approximately 15,800 attorneys. A total of 135 attorneys were surveyed, which provides an eight (8) percent error rate with a confidence interval of 90 percent.

2.2.2 Methodology

PEC chose a telephone-based survey because of the higher response rate and more in-depth issue exploration anticipated via telephone, as compared to e-mailed or printed questionnaires. To gain the maximum insight into the use of electronic documents from CM/ECF, the population was defined as the courts that have used the system for the longest time. Select additional courts with significant CM/ECF experience were added to provide a balance of "prototype" and later "wave" courts.

The courts represented CM/ECF courts of varying sizes covering different demographic areas in different regions of the country to enable participation and representation in the survey of areas with as many characteristics and court environments as possible. A particular interest in the survey was to ensure adequate representation of the views of attorneys who practice outside of large cities and metropolitan areas. To achieve a balance between metropolitan and non-metropolitan attorneys, the lists provided by the selected courts were divided according to their location into two groups representing larger and smaller population areas. The survey groups were defined as follows:

I. Those attorneys located in Metropolitan Statistical Areas (population >50,000) defined by the U.S. Census Bureau, and
II. Those located in Micropolitan Statistical Areas (population <50,000) and other small towns and sparsely populated areas.

Separation into two groups was necessary because the attorneys in micropolitan areas would represent a statistically insignificant group in a non-differentiated survey.

For each group, the attorneys were sequenced and selected to participate in the survey by matching the sequence number with a list of numbers provided by random number generator. This method supports the guiding principles that all participants have an equal chance of selection. The only records eliminated were those that contained erroneous and incomplete address and telephone contact information that prevented survey contact, or were duplicates.

2.2.3 CM/ECF User Pool for Survey

Thirteen (13) courts provided lists of their current CM/ECF attorney users for inclusion in the initial pool from which survey participants would be randomly selected (see Attachment D). The total pool of users provided by the participating courts totaled over 15,800 attorneys. As stated above, the users were then separated into metropolitan and micropolitan sub-groups to ensure representation of both user types.

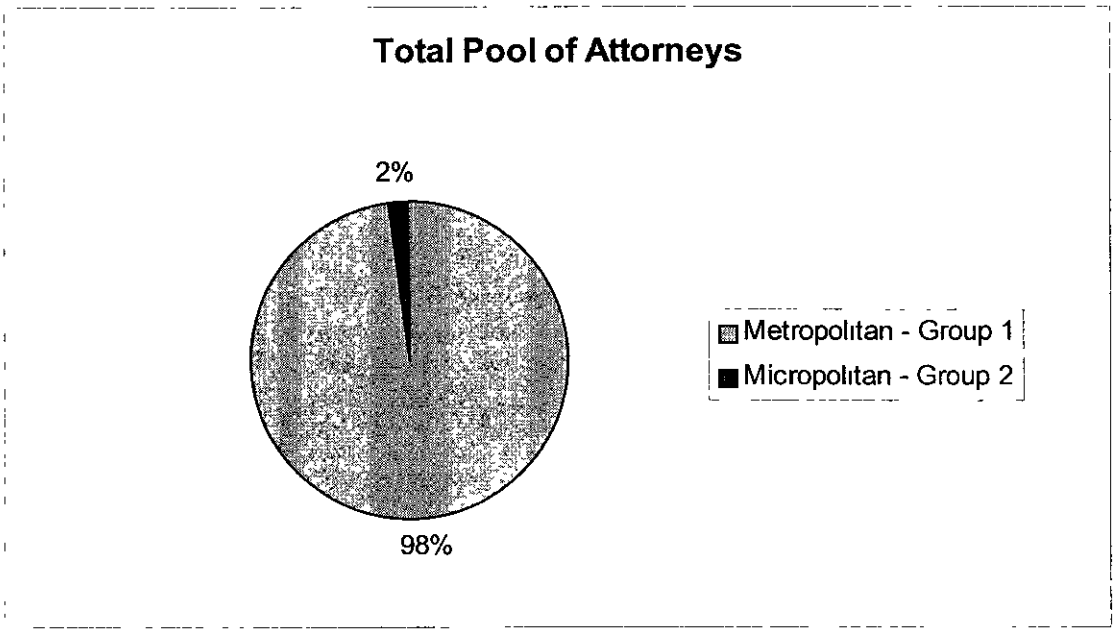


Exhibit 2.1: Pool of Attorneys by Location

Exhibit 2.1 shows the enormous disparity between the number of metropolitan and micropolitan users and illustrates the need to create two randomly selected groups. If all users were combined into one pool the odds of randomly selecting a sufficient number of micropolitan users to gather meaningful data would be extremely low.

2.3 Focus Group Meetings

2.3.1 Overview

The objective of the focus group meetings is to understand how the CM/ECF system is used by attorneys. Several areas are discussed with each focus group:

- What impacts has the system had on their practice?
- How do fees and other costs impact their use of CM/ECF?
- What benefits are attorneys receiving from the system? and
- What would they like to see happen with the system in the future?

The focus groups also allow the PEC team to delve deeper into certain issues that may have been identified during the telephone survey. For the most part, the focus groups confirmed and enhanced the survey results and provided the qualitative explanations underlying the quantitative results of the survey.

2.3.2 Methodology

The AO arranged for the PEC team to visit four court locations and a total of six courts which have been using the CM/ECF system for a significant period of time. The focus group courts included:

- District of Columbia - District Court
- Eastern District of Virginia - Bankruptcy Court
- Western District of Missouri - District and Bankruptcy Courts
- Nebraska - District and Bankruptcy Courts

Facilitation of the focus groups insured that:

- All participants had an opportunity to express their thoughts on EPA;
- Potentially contentious issues were surfaced without derailing the main items of discussion; and
- Conduct of the focus groups occurred in an efficient, decorous, and professional manner that reflected on the judiciary's concern for the user community and scrupulously respects the time constraints of busy attorneys.

Each focus group court arranged for the participation of a representative group of attorneys and support staff. The total number of participants in each session varied from eight to fifteen individuals. Sessions were attended by a cross-section of the CM/ECF attorney user community, which included sole practitioners, attorneys from small, medium (10 - 30 attorneys) and large firms (> 30 attorneys), remotely located attorneys, U.S. Attorneys, and bankruptcy trustees. Participants included attorney support staff (paralegal/legal secretary), who identified how the office environment has changed since the implementation of CM/ECF. Many attorneys do not use the system frequently, relying on their support staff to electronically file and receive documents. In addition, many of the anticipated benefits of the system are more clerical in nature and, therefore, the support staff may be significantly affected by the implementation of CM/ECF.

Lastly, a time analysis worksheet (Attachment C) was provided to each of the focus group participants to help identify where and how their work day has changed since the implementation of CM/ECF. Participants were asked to assume an eight hour work day and allocate those hours among the categories provided, both before CM/ECF and after its implementation. The time analysis was not a scientific study; rather, it provided indications of where and how CM/ECF is affecting practicing attorneys.

Section 3 - CM/ECF Impact on Attorney Practice

3.1 Overview

This section explores the impact CM/ECF has had on attorney practice. The impacts CM/ECF has had on the day-to-day practice of attorneys and what advantages/disadvantages attorneys have experienced are reviewed.

3.2 CM/ECF Impact on Attorney Practice

CM/ECF impacts practice in many different ways, such as staff requirements, costs, time allotment, productivity, client servicing, and access to information. The telephone survey results and focus group input both identify advantages and disadvantages experienced by attorneys and professional staff using the system. Overall, the input received about the system during the data collection activities is very positive.

The telephone survey asked several questions about how the CM/ECF system affects attorneys' practice. Question #22 asked users if they viewed the system positively or negatively in the following areas: Cost Control, Access, Reliability, Timeliness, Single Source of Data, and Change. For all areas approximately 90% of the survey respondents replied that they view the impacts from CM/ECF in a positive light. All of these aspects of the system were also identified as advantages by the focus groups and are discussed in greater detail in paragraph 3.3.1.

Similarly, Question 20 queried whether there was a positive or negative impact on "Research and/or Document Preparation", Filing/transmittal, Case tracking, and Post Case Follow-up. For the work areas of Research and Post-case follow-up there was an almost even split between those who believed that CM/ECF has had no impact and those who answered that the system has had a positive impact on practice. For the more clerical work areas of Filing/transmittal and Case tracking, close to 90% of the respondents believe there has been a positive impact.

A third question was asked regarding the perceived value that CM/ECF provides or will provide. Question #21 asked:

"In general, do you expect the overall long term impact of electronic documents to be:

a. Labor-saving
b. Burdensome
c. No impact
d. Other

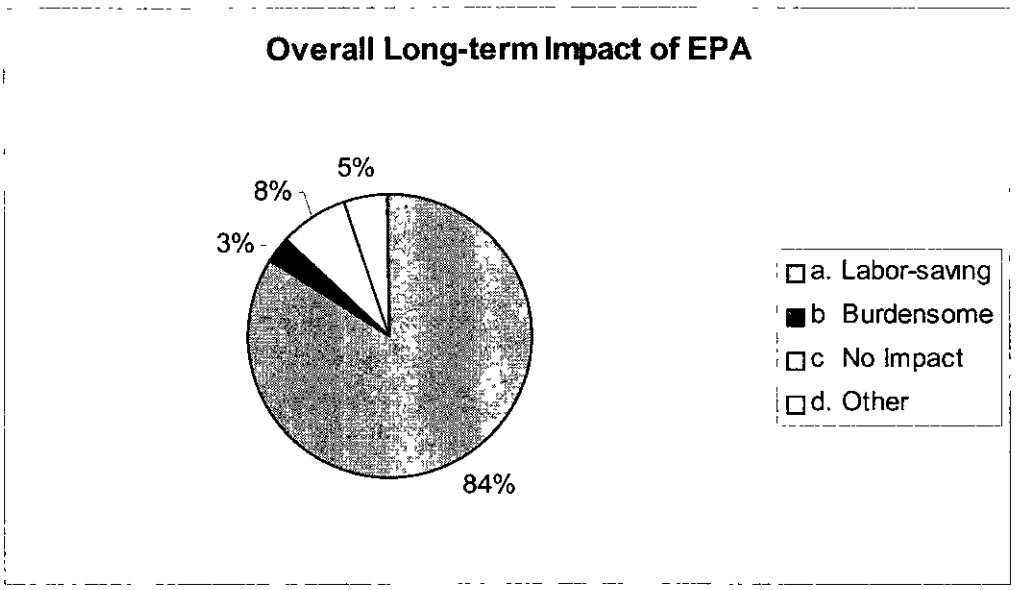


Exhibit 3.1: Long-term Impact of EPA

The results are consistent with overall views on the efficiency of using the system. Exhibit 3.1 shows that the overwhelming majority of system users believe that CM/ECF will provide labor-savings over the long term. Both metropolitan and micropolitan attorneys had the exact same percentage of users answer that the system will be labor saving.

3.2.1 Advantages

There were numerous advantages cited by the focus group participants; however, several were mentioned consistently throughout the meetings and telephone survey. The benefits can generally be divided into four categories: cost savings, efficiency/time savings, productivity gains, and quality of access improvements.

3.2.1.1 Cost Advantages

Cost advantages provided by the CM/ECF system are usually the first benefits mentioned by system users because they are readily apparent and can be significant. The cost advantages will be discussed in general terms in this section and quantified in greater detail in Section 4, Cost-Benefit Analysis.

Cost savings were identified primarily for clerical and delivery areas having to do with document production and delivery.

- **Postage** - CM/ECF shifts the burden for document service delivery from the submitting attorney to the Court because the system automatically forwards the documents to parties in the case via e-mail. For large bankruptcy and multiple

defendant civil/criminal cases the number of mailings could run into the hundreds or even thousands of documents over the life of a case. Attorneys are no longer required to send hard copies of court documents (in most cases) and, therefore, save a considerable amount of money.

- **Copying/Paper** - Similar to the postage savings, with electronic delivery of court documents the submitting attorney has shifted the cost of making multiple hard copies of documents, which can be hundreds of pages in length, to send to the parties in a case. Considering that the normal cost attributed to paper and copier usage is estimated at approximately $.05 per-page, for every 100 pages not copied an attorney's office saves $5.00. Although a relatively small amount initially, during the course of litigation thousands of pages per-case can be saved, resulting in significant savings. One focus group member commented that, "Copying costs alone are down 60%."

- **Courier** - Before CM/ECF submission of documents in a timely manner to the court required either a mailing or a courier delivery to the courthouse. Since documents can be filed electronically at any time, day or night, the need for courier delivery and the urgency to meet a 5 o'clock deadline have been eliminated.

- **Travel** - Like courier expenses, travel expenses necessary to deliver or retrieve documents from the court have been significantly reduced or eliminated. Attorneys remotely located from the court particularly benefit from reduced travel costs. The current government reimbursement rate for auto travel is $0.36 a mile. If an office is required to send someone to deliver a document or travel to retrieve a document and they are located 100 miles away, the office can save $72 in auto costs, plus the hourly labor costs for the person making the trip.

- **Storage Space** - Offices have the potential of saving money on storage space for areas currently used for physical files because the files can be stored electronically. However, since attorneys are still printing documents, they are not taking full advantage of this potential benefit.

3.2.1.2 Efficiency/Time Advantages

Efficiency and time advantages consist of changes in how particular tasks are performed, reducing the amount of time required or providing more flexibility for the user.

- **Service/Delivery** - CM/ECF has drastically reduced the amount of time it takes to prepare and deliver documents to case parties for support personnel. Time copying, binding, and mailing documents has been eliminated because the documents are sent to all necessary recipients with immediate delivery. Conversely, notification and

acceptance of delivery on the receiving end is almost immediate. Parties no longer have to wait several days to receive a document via mail.

- **Internal Document Filing/Retrieval** - Time associated with filing or retrieving hard copy documents from file rooms has been reduced or, in some cases, eliminated. Although hard copies are normally made, in many instances copies of documents are also saved electronically on the user's computer system. Users have instant access to the document via CM/ECF or through their own computer files. This is especially important when a client calls and the attorney does not have to waste time finding the file and then calling the client back with the information, he or she can respond almost instantly. Some attorneys noted that the organization of their files is better when they save them electronically.

- **Immediate Access to Information** - CM/ECF provides users with almost immediate access to their own case files, as well as information regarding current cases in the federal judicial system. Attorneys can check the docket at any time to ensure their case files are complete. With immediate delivery and receipt of court documents, it was noted that many simple court actions are completed much quicker. Case history is more readily available, especially for closed/permanent records, along with easier access to exhibits. In addition, client background checks regarding their litigation history can now be done quickly and discretely by attorneys.

- **Improved Communication** - All parties are more aware of what is going on in the case because the access to the docket and case files. This improves efficiency of the entire process and allows practitioners to potentially handle more cases.

3.2.1.3 Productivity Gains

Productivity gains include advantages such as increased case load and reduced "busy" work.

- **More Substantive Work** - CM/ECF has reduced the need for clerical support and has freed up support staff and attorneys to work on more substantive projects. This is especially important for sole practitioners or small offices where clerical support is at a premium. A focus group member commented that it, "liberates support staff of menial and time consuming tasks." By eliminating much of the clerical "busy" work (copying, delivery preparation, etc.), an office can be more productive.

- **Increased case load/billable hours** - Because of the reduced clerical work and increased efficiency, several attorneys commented that CM/ECF allows them to increase their billable hours and/or handle a larger case load.

3.2.1.4 Quality Improvements

Quality improvements include both attorney product quality, but also work/life quality.

- **Product Improvements** - The time savings and efficiency improvements mentioned above allow attorneys to spend more time doing substantive work, such as legal research and quality assurance. One type of research that is now available is the access to pleadings in other cases. Attorneys can now use ideas and arguments from other cases which they may not have had easy access to previously. This results in a better work product and better client support and servicing. The ability to file documents up until midnight the day they are due allows attorneys to do last minute quality checks on documents before they are filed (see also disadvantages).

- **Remote and 24 x 7 Access** - The CM/ECF system allows access via the internet, twenty-four hours a day, seven days a week. The ability to access the system and file documents at any time, from any location with internet access provides considerable flexibility to attorneys. Attorneys can now access case files while they are away from the office.

  Remotely located attorneys, such as those in the micropolitan areas are particularly advantaged by the access CM/ECF provides. Remote attorneys now have the same access to documents as attorneys that are located next to the courthouse. One sole practitioner stated, "The system is a boon for me - it allows me to be more efficient and independent."

  Some quality of life issues are also improved by the 24 x 7 access allowed by CM/ECF. An attorney noted that the ability to file documents at his leisure (up to midnight) allows him flexibility to attend family functions, such as a child's softball game, and still file timely afterwards, often from home.

3.2.2 Disadvantages

Participants in the focus groups and the telephone survey were asked to identify disadvantages of using CM/ECF. Respondents named as disadvantages particular facets of using the system that were actually needed system improvements, which are listed as "Attachment A." Several disadvantages were repeatedly identified, such as e-mail volume and naming of docket entries, time increases, and start-up costs, among others. Below are the most common disadvantages cited by the focus groups and survey participants.

- **Volume of e-mails** - The volume of e-mails that some users receive, especially in bankruptcy, can be overwhelming. In contrast to paper copies of documents delivered via U.S. mail, documents served electronically prove more difficult to quickly review for relevance, especially in light of the naming convention issue. Moreover, attorneys are now receiving e-mail notification for every action taken in a particular case, whether or not it is relevant to their client. This is true for

bankruptcy cases where there are multiple creditors and civil cases with multiple defendants. Some attorneys indicated that they spend more time trying to review their e-mails than they used to spend going through their regular mail.

- **Naming convention for docket entries** - The naming convention for e-filing in CM/ECF does not always identify the exact type of document being submitted. CM/ECF users are having difficulty identifying important e-mails because of this, causing them to waste time going through every e-mail received.

- **Higher skilled staff** - Due to the complexities of attorney practice and the growing number of e-mails, staff that is more highly skilled is required to identify important documents, rather than using purely clerical staff. As a result the individual cost per support person has increased. Most indicated, however, that they require less personnel overall, so the costs appear to balance out.

- **Start-up costs** - Start-up costs are an issue for a few of the smaller offices and sole practitioners. The costs of upgrading computers, purchasing scanners and software, and installing a high speed connection could be relatively high.

- **Lack of consistency** - The way CM/ECF is implemented varies from jurisdiction to jurisdiction. Similar rules for using the system would simplify training for multi-jurisdictional practices.

- **Information Access** - A few criminal attorneys commented that they could not access some documents on-line that they were able to access by going to the court. The restrictions reflect current Judicial Conference policy.

- **Staff time has increased in some areas** - Scanning of documents, especially exhibits[1], has increased considerably, along with the formatting of documents to be filed electronically. Getting documents prepared for PDF conversion and delivery has balanced out time savings in other areas for some staff.

- **Accounting** - The credit card bills that the law offices receive for their filing fee via CM/ECF are not detailed which causes increased time for the attorney and/or accounting personnel to figure out the bills for each client.[2]

- **24 x 7 Availability** - Although constant access to the system is advantageous in many respects, it has also extended the day for some attorneys and staff. In many

[1]Not all courts require exhibits to filed electronically.

[2]This is a function of the credit card company billing practices, not CM/ECF or PACER.

instances, the staff person is the only person who knows how to use CM/ECF, so they must stay with the attorney to file the document.

- **Technical Difficulties** - Participants noted sporatic difficulties with electronic service delivery and other aspects of the CM/ECF system and their own internal systems.

- **Less opportunity to catch errors** - A few attorneys found the electronic filing processes provided fewer or briefer reviews before filing the documents. As a result, they were concerned that they occasionally submit the incorrect version of an electronic file.

- **Shift in costs to trustees** - Printing/paper costs have shifted from the debtor to the bankruptcy trustees. This was mentioned in two focus groups, but not specifically identified as a disadvantage to the system.

3.2.3 Time Shift Analysis

During the focus group meetings participants were provided a sheet which listed broad work categories likely to be affected by the implementation of CM/ECF. Each broad category had several more specific categories beneath it. Participants were asked to assume an eight-hour day and allocate those eight hours among the categories of work before CM/ECF was implemented and after. The individuals filling out the sheet could fill it out from their own perspective (attorney/paralegal/secretary) or from the perspective of the firm. If attorneys believed that the work areas were more appropriate for support staff, they were asked to fill it out from that perspective. The Time Analysis Template is included as Attachment C.

While the analysis does provide a general indication of how CM/ECF is affecting certain practice areas, the analysis certainly could not be considered a scientific study of how work performance has changed. The four broad work categories are: Delivery, Case Management, Clerical, and Legal Research.

Many attorneys commented that the categories were more applicable to support staff and filled out the sheet from that perspective. A large number of participants also noted that the overall time during their workday has not changed, but what they are doing has shifted somewhat. After tabulating the results from the worksheets, there was a clear indication that time had been reduced in more areas than increased in others since the implementation of CM/ECF. Consistent with advantages cited earlier, the additional time was used to improve work product through additional quality assurance and research, as well as additional client services.

Below are the results of the time shift analysis, broken down by attorney time and staff time.

- **Delivery** - this category included travel/driving, service delivery to multiple recipients, follow-up/service confirmation, and wait time at the courthouse.
    - Across the board, the reduction in time required since the implementation of CM/ECF was by far the greatest.
        - Average attorney time decreased by 1.0 hours
        - Average staff time decreased by 1.49 hours
- **Case Management** - this category included logistics/coordination, internal document retrieval, internal document filing, preparation for submission, and docket checking.
    - The results in this category were mixed. Submission preparation and docket checking increased for many, while document retrieval and filing fell significantly.
        - Average attorney time decreased by 0.78 hours
        - Average staff time increased by 0.5 hours
- **Clerical** - this category included copying, delivery preparation, mail sorting/document processing, and billing.
    - The total time in this category decreased for both attorneys and staff, though scanning was written in by several participants as an increase in time. Copying was significantly reduced. Time spent sorting mail stayed the same or increased for many because of the volume of e-mails and time spent on billing increased for those who bill their clients for CM/ECF charges.
        - Average attorney time decreased by 0.76 hours
        - Average staff time decreased by 0.27 hours
- **Legal Research** - this category includes specific judge rulings, searches of similar cases, key word searches, and travel to courthouse.
    - The total time for each labor category decreased.
        - Average attorney time decreased by 0.37
        - Average staff time decreased by 0.19
- **Other** - this category was filled in if the above list did not include a category which experienced change for a particular participant.

- A few attorneys spent more time with their clients.
  - Average attorney time increased 0.05 hours
  - Average staff time increased 0.29 hours

- **Total Time Change**:
  - Attorney: -3.08 hours
  - Staff: -0.98 hours

Section 4 – Electronic Public Access Benefits and Costs

The telephone survey and the focus group meetings described above served as the basis for assessing benefits and costs. Attorney users having a wide variety of practices conveyed their perceptions of the system's impacts, which included many benefits, such as decreased costs, increased effectiveness, and improved work product. The general benefits of the system were discussed in Section 3. This section presents a comparison of quantifiable benefits with the estimated costs users incur to use CM/ECF.

4.1 Overview

CM/ECF has been implemented in approximately half of the courts in the federal Judiciary and has been in use for several years in some court jurisdictions. The costs and benefits in the jurisdictions that have experience using CM/ECF have been recognized by the users and are beginning to take full effect.

4.2 Methodology

The format for collecting information included the focus group meetings and telephone surveys with CM/ECF attorney users. Wherever possible, specific quantifiable costs and benefits were identified and calculated using assumptions regarding use and time periods. Although not a scientific study, the time shift data gathered during the focus groups identified specific changes in time spent on activities by the attorney and staff users, as detailed in the preceding section. Since CM/ECF has been in use in some jurisdictions for several years, this experiential data yields an approximate idea of the savings to be realized from using CM/ECF.

4.3 Quantifiable vs. Non-quantifiable Benefits

Quantifiable benefits are those where a direct association can be established between some particular component of CM/ECF and a cost reduction. Other activities that are linked to improvements made by the system, are considered to be non-quantifiable. For example, alleviating the necessity to retrieve a document physically from the courthouse corresponds to a quantifiable cost savings of salary or courier fees. In contrast ensuring that a document has been received timely is a non-quantifiable, though important, benefit. Another example of an important non-quantifiable benefit is the ability to produce better work products due to the efficiencies gained in other areas.

4.4 List of Benefits

The benefits/advantages identified by system users are generally explained in Section 3.3. Below is a table listing all EPA benefits identified by the system users during the focus groups and telephone survey. The quantifiable and non-quantifiable benefits are specified.

Table 4.1: Quantifiable and Non-Quantifiable Benefits

Functionality/ Factors	Benefits	
	Quantifiable	Non-Quantifiable
1. Time Savings		
1. Travel time (to Courthouse)	✓	
2. Wait time (in line in Courthouse)	✓	
3. Wait time (for mail or courier)	✓	
4. Document processing time (opening mail, sorting, etc.)	✓	
5. Copy time (to generate copies)	✓	
6. Filing time (internal manual file handling)	✓	
7. Filing time (court document submission)	✓	
8. Legal research time (searching court files)	✓	
9. Legal research time (judges' rulings)	✓	
10. Legal research time (marketing, competitive analysis, client checks)	✓	
11. Search time (document retrieval)	✓	
12. Search time (to find information for clients)	✓	
13. Document production time (reduced data "rekeying")	✓	
2. Increased Availability		
1. Case files available 24X7 (not only during Courthouse hours)		✓
2. Information available immediately (without getting up from computer)		✓
3. Information is available from anywhere (remote users have same access)		✓
4. Greater flexibility (adjust schedule)		✓

Functionality/ Factors	Benefits	
	Quantifiable	Non-Quantifiable
3. Increased Effectiveness		
1. Better work product (more time for quality assurance)		✓
2. Increased billable hours	✓	
3. Increased case load	✓	
4. Better case filings (electronic access to successful filings)		✓
5. Better communication between parties		✓
6. Fewer misfiled documents		✓
7. More effective use of time (time shift)	✓	
4. Increased Efficiency		
1. Lower internal copy costs (fewer hard copies)	✓	
2. Lower postage costs (fewer mailings)	✓	
3. Lower court copy costs (fewer hard copies)	✓	
4. Lower travel costs (mileage and time)	✓	
5. Lower storage costs (less hard copy storage)	✓	
6. Lower courier costs (fewer trips to court to file)	✓	
7. Reduced case management time (for manual or automated case management)	✓	
8. Better market analysis (of competition)	✓	

4.5 Estimation of Benefits and Costs

This section quantifies the benefits and costs associated with the CM/ECF system. Benefits derive primarily from the time-saving features and reduced resource usage described previously in this report. The costs are primarily associated with fees for electronic public access. The necessary hardware, software, training, and other costs of becoming proficient in the CM/ECF application delay some users' achievement of the benefits ultimately available from document access in CM/ECF. Many users noted the initial investment required to achieve proficiency, terming it a

"learning curve" or "adjustment period." The vast majority of CM/ECF users expected that the return on the investment from using the system will far outweigh the initial implementation costs.

Projection of the estimated benefits for particular classes of CM/ECF users is produced from the information gained from the telephone survey and focus group meetings. Using the survey breakdown of metropolitan and micropolitan attorneys, a definition of "small" and "large" law offices could be produced. The average number of attorneys in each group was calculated and used to compute associated time benefits. The Time Shift Analysis was used to estimate time savings for various categories of work and provides a break down for staff and attorney time.

Table 4.2: Time Shift Analysis

Work Category		Attorney	Staff
Delivery			
	Travel/driving	(0 58)	(0 86)
	Multiple recipients	(0.11)	(0 23)
	Follow-up/service confirmation	(0.14)	(0.12)
	Wait time at courthouse	(0 21)	(0.29)
	Other -	(0 06)	
	Other -	0 07	
	Other -	0 04	
	Total	**(0.99)**	**(1.49)**
Case Management			
	Streamlined logistics/coordination	(0 26)	0.04
	Internal document retrieval	(0 43)	(0 11)
	Internal document filing	(0 11)	0 01
	Preparation for submission	0 04	0 10
	Docket Checking	(0 04)	0 21
	Other -	0 02	0 25
	Other -		
	Other -		
	Total	**(0.78)**	**0.50**
Clerical			
	Copying	(0 57)	(0.48)
	Delivery prep	(0.37)	(0.27)
	Mail sorting, document processing	(0 28)	0 51
	Billing	0 25	(0 13)
	Other -	0 18	0 03

	Other -		0 07
	Other -		
	Total	**(0.79)**	**(0.27)**
Legal Research			
	Specific Judge rulings	(0.03)	0.02
	Similar cases currently in the system	0.09	(0.10)
	Key-word search	(0.11)	0.01
	Travel to courthouse	(0.52)	(0 11)
	Other		(0 04)
	Total	**(0.57)**	**(0.23)**
Other			
		0.05	**0.29**
Total Time Increase (Reduction)		**(3.08)**	**(0.98)**

Benefit/Cost Computation for Small Law Office (Micropolitan)

Assumptions for small law office (3 attorneys and 5 support):

Billing: $150/hour for attorney; $40/hour for support (clerical and paralegal)
Workdays: 250 days/year
Courthouse: 1 visit/week

The following tables detail the Benefits to a Small Law Office using CM/ECF.

Annual Savings by Attorneys	
Delivery	**.99 hours/day**
Case Management	**.78 hours/day**
Clerical	**.79 hours/day**
Legal Research	**.57 hours/day**
Other (cost)	**-.05 hours/day**
Total saved per-day (average office)	**3.08 hours/day**
Adjustment for small office (25% of average office)	**.77 hours/day**
Total Attorney Dollars Saved/year (.77 x 250 x $150)	**$28,875.00**

Annual Savings by Support Personnel	
Delivery	**1.49 hours/day**
Case Management (cost)	**-.5 hours/day**
Clerical	**.27 hours/day**
Legal Research	**.23 hours/day**
Other (cost)	**-.29 hours/day**
Total saved per-day (average office)	**.98 hours/day**
Adjustment for small office (25% of average office)	**.25 hours/day**
Total Support Dollars Saved/year (.25 x 250 x $40)	**$2,500.00**

Other annual estimated costs avoided by reliance on CM/ECF information	
Reproduction costs for 5 documents per-day (assuming 5 pages/document) (25 pages/day x 250 days/year x $.05 /page)	**$312.50**
Postage costs for 1 document per-day and 4 recipients (1 docs/day x 4 recipients x 250 days x $.37 stamp)	**$370.00**
Vehicle/transportation costs from avoided trips to courthouse (assuming 10 miles/trip) (10 miles x 52 trips/year x $.36/mile)	**$187.20**
Courier costs for 1 trip per-week (1 trip x 52 weeks x $15 per trip)	**$780.00**
Reproduction charge for each courthouse visit (assuming 50 copies @ $.25 per copy 50 copies x 52 weeks x $.25 per copy)	**$650.00**
Annual Total Other Costs	**$2,299.20**

Summary Table

Total Annual Benefits to Small Law Offices	
Total Attorney Time	**$28,875.00**
Total Staff Time	**$2,500.00**
Total Other	**$2,299.20**
Total Annual Benefits	**$33,674.20**

Costs of CM/ECF to Small Law Offices

Cost of CM/ECF access is estimated based on accessing 10 documents/per day. This basis is larger

than the total hard-copy documents estimated in the savings calculation above due to the fact that additional CM/ECF documents are accessed for reasons of research, quality assurance, and simple convenience. However, as the survey indicated, attorneys only go back to a document once or twice after their first free electronic copy. The propensity expressed by attorneys for using hard-copy documents requires the additional assumption that the electronic documents will be printed for review and filing. Many attorneys indicated that multiple copies are made in some instances for several attorneys.

Annual Costs of CM/ECF to Small Law Offices	
CM/ECF Fee (10 documents x 5 pages/doc x 250 days x .07)	**$875.00**
Printing Costs [15 documents x 5 pages/document x 250 days x .05 (paper/printer ink)]	**$937.50**
Total Annual Cost To Small Law Office	**$1,812.50**

Benefit/Cost Computation for a Large Law Office

The following calculation projects the annual benefits derived from access to CM/ECF information for a large law office (78 attorneys and 75 staff personnel):

- Estimated parameters are the same as for the preceding small law office example. Application to large law office case is made on the basis of savings per office with a 25% increase over the medium firm.

Annual Benefits to Large Law Firm (detail omitted)	
Total Attorney Time [(3.08 hours x 1.25) x 250 x $150]	**$144,375.00**
Total Staff Time [(.98 hours x 1.25) x 250 x $40]	**$12,250.00**
Total Other	**$5,748.00**
Total Benefits	**$162,373.00**

Annual Costs of CM/ECF to Large Law Offices	
CM/ECF Fee (50 documents x 5 pages/doc x 250 days x .07)	**$4,375.00**

Printing Costs [75 documents x 5 pages/document x 250 days x .05 (paper/printer ink)]	**$4,687.50**
Total Annual Cost To Large Law Office	**$9,062.50**
Net Annual Benefit(Cost) to Large Law Office	**$153,310.50**

4.6 Constraints on Achieving Benefits

A number of reasonable, implicit assumptions formed the basis of the preceding estimates, as is typical with "bottom-up" parametric estimates. However, these estimates may overlook factors that can limit the actual benefits received. The time savings were calculated from the Time Analysis Worksheet handed out during the focus group meetings and filled out by attorneys and staff personnel. Participants estimated based upon their actual experience or their opinion of what is being saved or what areas increased. The way the worksheets were filled out was not always consistent and assumptions had to be made in some instances. In many cases, attorneys were estimating changes in time of their support personnel because the work categories were more likely to be in the support area.

4.7 Cost-Benefit Estimate

Table 4.2 identifies the Benefit-Cost Ratio for the two example law firms (small and large law offices) . It is important to recognize the issue of how much of presumed benefits actually save attorneys money, since they usually pass these costs on to their clients. The primary consideration is that attorneys risk losing business to more efficient firms if they fail to take advantage of saved time. Hence, savings are real even if they are realized by clients because attorneys who do not use more efficient methods will be negatively impacted. This is most clearly true when attorneys charge fixed fees. This is extremely relevant for federal courts because most of the PACER business is bankruptcy, for which debtors are charged on a fixed fee basis (and very competitively). Whether or not the savings are passed along to the clients in the form of lower fees, the firms who adopt electronic documents have an economic advantage, so CM/ECF provides a benefit. Moreover, it is a common situation to have written-off hours that the firms do not bill because they exceed reasonable costs for that product. Savings that result in fewer hours written off because lawyers work more efficiently are real benefits (in reclaimed revenue). As in the other cases, some benefit may be shared with clients but firms still benefit either from reclaimed revenue, client goodwill, or competitive advantage.

User Group	Estimated Benefit (saved labor and other cost)	Estimated Cost	Benefit Cost Ratio
Large Law Office	**$162,373**	**$9,062.50**	**17.9**
Small Law Office	**$33,674.20**	**$1,812.50**	**18.6**

Exhibit 4.3: Benefit Estimates for CM/ECF

The benefits listed in Table 4.3 apply specifically to electronic access. Because CM/ECF had been in use for some time in the majority of the courts in the focus groups and the survey pool, the estimates of time savings are thought to be relatively reliable. Almost all respondents indicated that actual work hours had not changed and, in fact, had increased in some instances because of the increased availability. The responses on the Time Shift Worksheet were consistent with the comments made during the focus group meetings. Many attorneys, especially in small offices or sole practitioners indicated that the attorney savings were significant because they no longer had to do clerical work or non-billable "busy" work. The larger offices also commented that attorney benefits were significant and in many instances the support staff day was increased due to the volume of e-mails, file preparation, and extra hours worked to file later at night. Some respondents noted that the start-up (sunk) costs were relatively steep; however, the vast majority believed the benefits of the system far out weighed the initial costs. While the courts may not take into account the short-term costs to attorneys and other users for their changing business processes associated with electronic filing, the long-term benefits and savings greatly outweigh the short-term costs. The access to electronic documents afforded by CM/ECF offers a savings in time and cost to those who embrace the new technology.

Section 5 - Attorney Adoption of CM/ECF

5.1 Overview

This section analyzes possible impediments to fully adopting the CM/ECF system experienced by attorneys practicing in the federal courts. Issues such as the impact of the current electronic public access fee structure, attorney demographics, and the initial costs of implementing the system within the firm are factors which are explored. A primary issue of this study is to identify whether the current EPA fees are affecting whether attorneys are using the system and, more importantly, whether some attorney groups are disadvantaged by the access fees. The telephone survey was essential in gathering data for this section regarding attorney demographics and specific usage, which was enhanced with input from the focus groups. Issues regarding how the system is used and how practice is impacted are addressed in Section 3.

5.2 Fee Impact on CM/ECF Adoption

5.2.1 Current Environment

The current electronic public access (EPA) fee schedule provides for a $.07 per-page fee with a per-document cap of $2.10 on case file documents accessed through the electronic public access systems. The per-page fee structure was preferred by CM/ECF user groups, including attorneys, and is designed to preserve system revenue at a level sufficient to fund the EPA program, including implementation and development costs of CM/ECF, which relies exclusively on revenues derived from EPA.

Attorneys of record are provided one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. As part of this initial access, users have the opportunity to print or save the document to their own computer system for future use. Attorneys are charged the public access fees for all subsequent access. In addition, users are provided $10 worth of free usage per calendar year.

Many of the judicial districts which have implemented CM/ECF require or strongly encourage use of the system to electronically file to the court docket. Therefore, most attorneys that practice in federal courts which have implemented CM/ECF file electronically, regardless of their location, size of firm, or level of federal practice.

5.2.2 Fee Impact on Attorneys

The telephone survey asked participants several questions regarding how the current fee structure impacts their use of the CM/ECF system, as well as how other fee structures might impact their usage or satisfaction with the system. In addition, during the focus group meetings, the question of whether the current fees deterred individuals or organizations from using the system was specifically asked of the participants. ***Approximately 88% of attorneys answered that the current public access fees do not influence their use of CM/ECF.***

A prime example of the responses received from the study groups were the answers to the following question from the telephone survey:

- #11. If you download CM/ECF documents to your computer, why do you do so?
  a. To avoid fees
  b. To maintain your own record
  c. Other, specify

Overwhelmingly, the answer to question #11 was "To maintain your own record." Exhibit 5.1 identifies the breakdown of responses. It should be noted that for the majority of respondents, when referring to "downloading" documents, they are actually printing the documents for hard copies, rather than saving it to their computer. The reasons behind this issue are discussed in greater detail in Section 3.

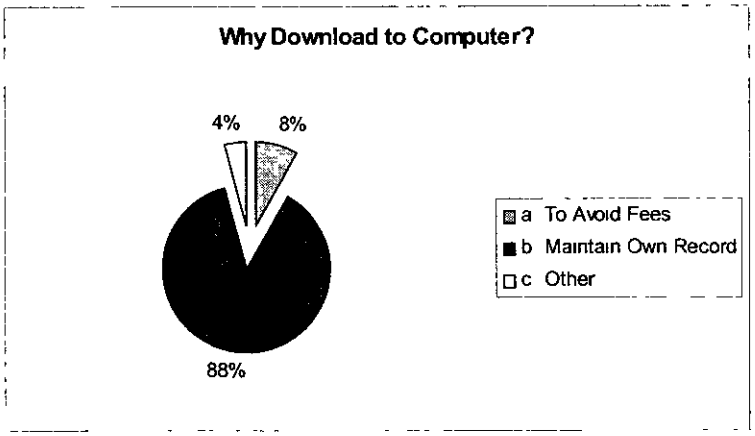


Exhibit 5.1: Survey Question #11

The results of question #11 did not vary between micropolitan and metropolitan attorneys. However, when asked if they capture the incurred CM/ECF fees to bill their clients, 77% of micropolitan attorneys answered that they do not bill their clients for CM/ECF charges (see Survey Question #15), while a smaller percentage of metropolitan attorneys, approximately 53% of the offices, do not bill their clients.

The focus groups included attorneys located in remote locations relative to the federal courthouse and they were specifically asked if the fees are an impediment to their use of CM/ECF. Almost unanimously, they answered that the benefits provided by the system far outweigh the minimal fees they incur. The remotely located members of the focus groups and the micropolitan attorneys surveyed by phone stated that CM/ECF has increased their ability to provide services to local clients and has put them on equal footing with attorneys located near the courthouse. The information accessibility, and travel, postage, and time savings for the remote attorneys far exceed the fees that are incurred while using CM/ECF. Further discussion of the impact on attorney practice is contained in Section 4.

5.2.2.1 CM/ECF as the Primary Case File

The majority of CM/ECF users do not use CM/ECF as their primary or official case file; however, the fees appear to have almost no influence on this issue. During the telephone survey, PEC asked several questions regarding system usage and what users do with documents after accessing their free copy. The following questions were asked of survey participants:

- Question #10 - We are interested in learning if the system is used to access documents more than once, or if users are using their "one free look" and saving documents to their internal computer system for future access. When you use the system, do you:

    a. Access the document for your one free look and save it to your system for future use?

    b. Go back to the CM/ECF system to look at documents when they are needed again?

    c. A combination of the above? Specify when you save vs. re-retrieve.

Exhibit 5.2 shows that all attorney groups are inclined to use their initial access without charge to save or print the document.[3] A minority of attorneys, however, indicated that they also go back to the CM/ECF system for subsequent retrieval. Most of the attorneys who subsequently retrieve documents gave the reason that they believed the document was not important and they could save space by not "saving". This issue was also raised during the focus group meetings and many attorneys indicated that they subsequently retrieved documents from CM/ECF when clients called and requested information. The convenience of having the document immediately available is highly valued because it provides better client service and saves time not having to search through their files. Almost all attorneys in the focus groups printed the document to hard copy during their initial access, rather than downloading it to their computer system.. The internal hard copy file still appears to be considered the users' primary case file.

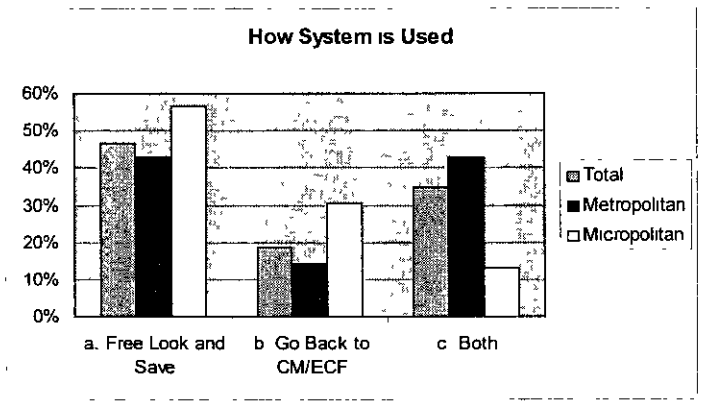


Exhibit 5.2: Document Retrieval Preference

- Question #14 - On average, how often do you retrieve documents from your cases on the CM/ECF system after your first free look?

    a. 1 time or less
    b. 1 - 2 times
    c. More than 2 times, but less than 5 times
    d. 5 times or more

[3]Almost all attorneys when asked if they save the document, indicated that they print the document rather than save it to their own computer system for future use. The reasoning behind printing the document is discussed in paragraph 5.2.2.3.

In response, 65% of the respondents answered 1 time or less and an additional 25% indicated that they retrieved documents from CM/ECF only 1 or 2 times. Therefore, 90% of CM/ECF users retrieve documents subsequently 2 times or less from EPA. The next question inquired if the fee influenced this decision.

- Question #13 - Does the current fee structure discourage your use of CM/ECF as your primary file system?
  A. Yes
  B. No

Exhibit 5.3 illustrates that 80% of CM/ECF users stated that the current fee structure does not influence their decision whether or not to use the CM/ECF system as their primary file system. As illustrated in Exhibit 5.1, 88% of the CM/ECF users printed or saved the document to maintain their own record, rather than to avoid fees (8%).

5.2.2.2 Focus Group Responses

Focus group answers were entirely consistent with the survey results on this matter and the meeting participants provided several explanations for their hesitancy to rely solely on CM/ECF as their primary file system. These include:

- **Custom/habit**. The most common reason attorneys do not use CM/ECF as their primary filing system is custom or habit. Almost all firms/attorneys are used to working with hard

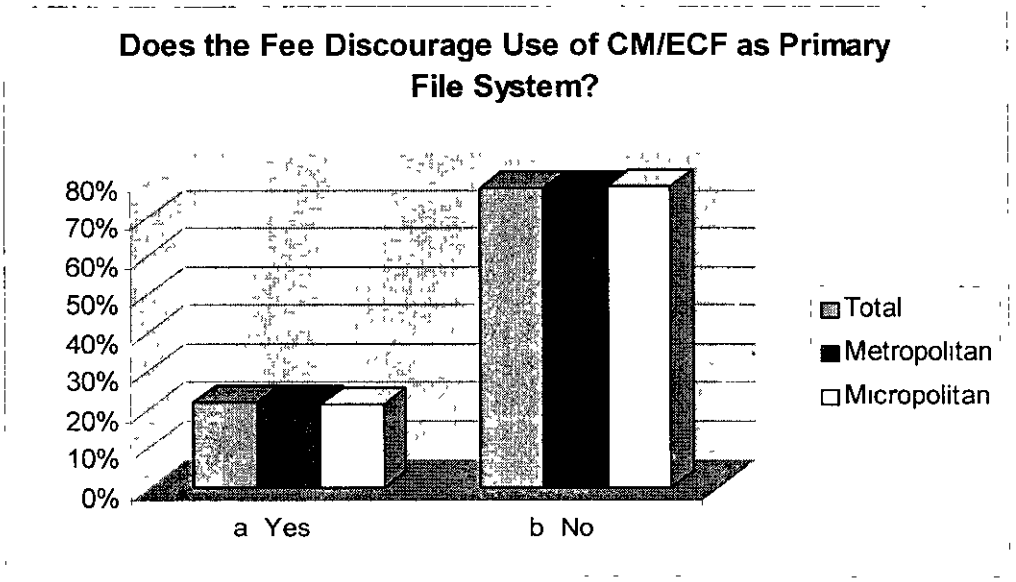


Exhibit 5.3: Fee Impact on File System

copy files and have proven filing systems. Some attorneys indicated that they look forward

to having just electronic files; however, until a large portion of senior staff turns over, the current processes are likely to stay in place.

- **General Practice.** Since most attorneys have a portion of their practice outside of the federal courts, the majority of which are not using electronic filing systems, they have to keep hard copy files anyway. So, for consistency they keep all files under the same type of filing system.

- **Security Concerns.** The primary issue with security is in regard to the stability of CM/ECF and their own internal computer systems. If either of the systems were to crash, become infected with a virus, etc., the hard copy file is still available for use. Another consideration is the actual security of the on-line system and the possibility of someone gaining access to information and tainting it in some manner. Malpractice insurance concerns are also an issue because some insurers require attorneys to keep complete files in their office.

- **Court Rules.** Some court documents still require original signatures or initials, especially in bankruptcy practice, and must be kept in hard copy. In addition, some documents are required to be submitted in hard copy, such as evidentiary exhibits. Some bankruptcy creditors do not have internet access and are not required to get access, and must have documents delivered in hard copy. Lastly, most courts are not currently allowing electronic devices in the courtroom during trial, so the attorneys must print hard copies anyway.

- **Court Consistency.** Not all federal jurisdictions have implemented CM/ECF. Attorneys with multi-jurisdictional practices must conform to the rules in each jurisdiction and, therefore, keep all files in hard copy for consistency purposes.

5.2.2.3 Fee Impact on "Paperless" Office

As illustrated above in paragraph 5.2.2.1, attorneys and law offices primarily print court documents for hard copy use, rather than use electronic documents. The survey and focus group results cited above in reference to the use of CM/ECF as a primary file system, also apply to why a "paperless" office has not been realized, except in very few cases. Habit, practice peculiarities, security concerns, and court rules all influence why attorneys print court documents. The EPA fee, however, does not have a significant influence over whether or not users print documents. Although some CM/ECF users may consider the fee and dislike the fee, their decision to download or print a document is independent of the fee because they view the cost as relatively insignificant.

Attorneys and staff personnel in the focus groups provided several additional comments on the reasons for printing documents rather than using the electronic files.

- Hard copies are easier to use, especially when comparing large documents. Users can put notes and tabs on hard copy documents and easily line up documents side-by-side for comparison.

- Support personnel receive the electronic copy and print it out for several attorneys within the office.

- Some attorneys noted that they can check their mail much more quickly in hard copy than trying to click through e-mails to see the documents.

Although there are significant roadblocks to realizing a paperless office, the CM/ECF system has had a positive influence on how some attorneys view other processes around their offices. A comment was made by a focus group member that they have become more selective on what they print and are conscious of other ways to reduce paper around the office environment.

5.2.2.4 Fee Level

EPA fees are considered de minimus. The focus groups provided insight into why some attorneys were not capturing EPA expenses to bill to their clients. The principal reaction was that the costs were so minor, it would take more time and expense to develop a bill for each client for the EPA charges than they would be recouped. As one focus group member commented, "The cost of billing clients would be more than the bills themselves." Focus group participants estimated that average total quarterly fees incurred range between $15 and $150, with one attorney noting that they have incurred $350 in fees in one month. Considering that the average attorney rates are between $100 - $300 per-hour, the EPA user fees are relatively insignificant. In addition, clerical hourly costs generally range between $25 - $60 per-hour, which in many instances would cause the cost of bill preparation to be higher than the amount billed.

Larger firms are more likely to capture EPA fees because they have pre-existing internal infrastructure (e.g. dedicated accounting department) to more effectively identify client charges. In addition, the total incurred fees per billing period in larger firms are greater due to the volume of people using the system and the number of cases handled.

5.2.2.5 Fee Structure

The current fee structure is considered fair, affordable and provides a high level of satisfaction. Attorneys were asked during the telephone survey (Question #23) about the current fee structure and two possible alternatives: a per-document plan and flat fee per-user plan. The per-document plan would consist of a specified charge per document, similar to or less than the current $2.10 ceiling, regardless of the page count. The flat fee per-user plan would establish a document or page threshold for a period of time, a month, quarter or year, and the user would pay a set fee, somewhat like current cell phone plans.

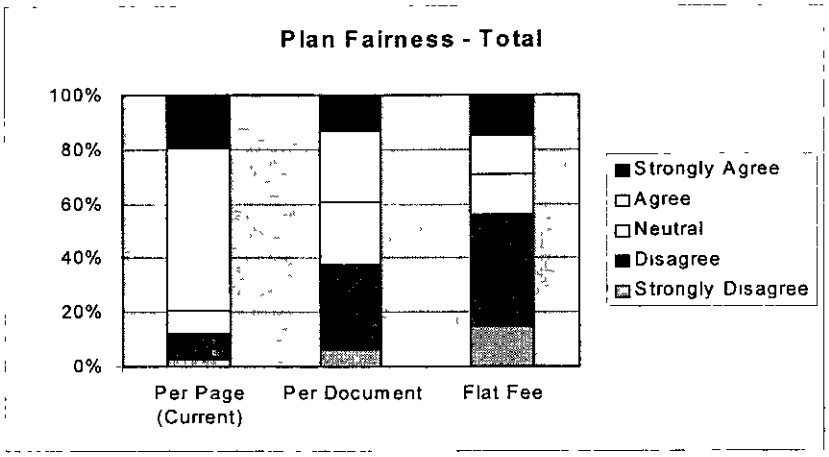


Exhibit 5.4: Fee Structure Fairness

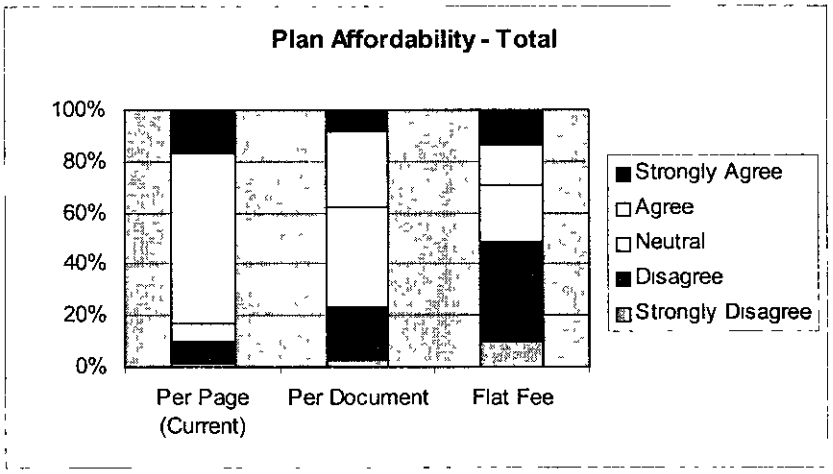


Exhibit 5.5: Fee Structure Affordability

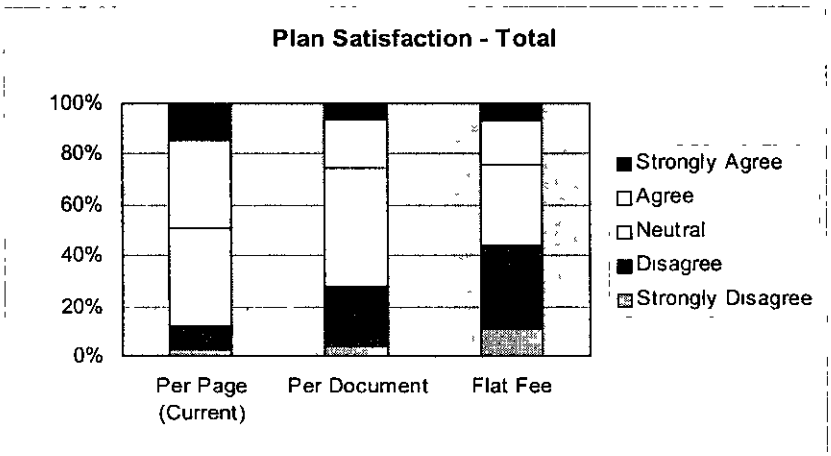


Exhibit 5.6: Fee Structure Satisfaction

The responses clearly identified the current fee system as the most desirable. Exhibits 5.4, 5.5, and 5.6 show the responses regarding attorney opinions on the fairness, affordability, and perceived satisfaction. Over 80% of the survey participants agree that the current fee structure is fair and affordable. In regard to plan satisfaction, approximately 50% agree that the current plan increases their satisfaction with CM/ECF, but only 15% disagreed. In contrast, the per-document and flat fee plans had significantly higher ratios of negative responses. It should be noted, however, that the two alternative fee plans received a higher percentage of "neutral" responses. This could be because the participants do not have the experience working with those plans, as they do with the per-page plan

The results were relatively consistent between the metropolitan and micropolitan survey groups. The micropolitan group found the current fee structure to be slightly more desirable than the metropolitan participants. Although most micropolitan attorneys do not bill for CM/ECF charges, they are conscious of the fees they incur. Therefore, the per-page plan allows them to pay for only what they need. The metropolitan, while preferring the current plan, also liked the concept of the flat fee because it

would allow for greater use, but would make it even more complicated to attribute specific client charges for billing purposes.

5.3 Minority Opinion on the Electronic Public Access Fees

As described above, the majority of CM/ECF attorney users believe the current fee level and structure is fair and reasonable, and does not impede their adoption or use of the system. However, some responses from the survey and participants in the focus groups expressed concerns, dislikes, and issues with the PACER fees. Although the total number of negative responses was small, they were fairly consistent within each of the focus groups and the telephone survey. In most instances, the participant making the negative comment also stated that the value provided by the system outweighs the costs or negative aspects.

Below are the issues which were identified during the data collection phase of the study.

- A complaint raised by a few of the participants regarding the PACER fees was in regard to charges parties incur to view documents in their own case. Some questioned why they had to pay for something they could go to the courthouse to look at for free.

- Some attorneys do not like the psychological aspect of seeing the fee each time a document is accessed. They stated that they understood that their overall costs have declined, but it is an issue of finding the transaction receipt "annoying" and "irksome," rather than a deterrent to system use. One suggested alternative fee structure is to include PACER fees as an up front cost, which would remove the psychological affect of the per-page fee and it would be easier to attribute costs to specific clients.

- A few attorneys did state that the fees inhibit their use of CM/ECF. They indicated that their looking at documents was slightly curtailed and in one case a firm had instructed its attorneys not to go back and look unless it was absolutely necessary. The attorneys who made these comments did not come from one specific group (micropolitan vs. metropolitan) or a particular practice area.

- The final comment regarding the fees is a technical issue. There were several comments from survey and focus group participants that they would like the ability to only view a portion of a document, thereby saving money in fees. Attorneys commented that there are some documents that contain a significant number of pages that are not relevant to their client, yet they have to pay to download all of the pages. The current fee cap of $2.10 per-document helps to reduce the total fees incurred; however, attorneys, especially from the micropolitan group, would just like to pay for the pages relevant to their client

As a confirmation that the fees do not play a significant role in deterring acceptance of the electronic public access is a quote from a participant of one of the focus groups:

"I don't like the fee, but I'd pay double to use the system."

5.4 User Demographic Impact on CM/ECF Adoption

This section investigates whether demographic issues, such as location, size of firm or area of practice, influence individual attorneys' adoption and use of CM/ECF.

5.4.1 Current Environment

As described in Section 2.2.3, the vast majority (98%) of CM/ECF users are located within metropolitan areas, based upon Census Bureau definitions. Although there are practices with a wide range of sizes within both survey groups, data from respondents in both groups show that the size of the firm is highly dependent on location and population centers. The majority of large firms are located in metropolitan areas, whereas firms in the micropolitan group tend to be smaller. This difference in size between the user groups is highlighted in the average number of attorneys (partners and associates) in the firms surveyed. Survey data shows that the average number of attorneys for firms in the metropolitan group is 78 attorneys per firm, while the average number of attorneys for firms in the micropolitan group is slightly less than 3 attorneys per firm.

Attorney location has a minor impact on the proportion of federal work attorneys practice (see Exhibit 5.7). Forty-five (45%) percent of metropolitan firms responding to the survey said that over half of their practice is performed in the federal courts; whereas, only thirty (30%) percent of the micropolitan firms have more than 50% of their practice in the federal arena.

Lastly, the areas of practice vary considerably within both survey groups, but also between the metropolitan and micropolitan survey participants. The most common area of practice for both survey pools is bankruptcy; however, for the micropolitan attorneys bankruptcy is the primary practice area for 58% of the respondents compared to 27% of the metropolitan group. The next most common practice areas identified by the metropolitan attorneys were Contract, Labor/Employment, and Personal Injury, each with 14%. The micropolitan respondents identified Civil Rights (including Habeas cases) as the second most common primary practice area (13%), with no other practice area making up more than 4%.

5.4.2 Impact of Firm Size on Individual Usage of CM/ECF

Firm size has a significant impact on who within the firm actually uses CM/ECF. Exhibits 5.8 and 5.9 show that attorneys in the micropolitan group (i.e. smaller firms on average) are much more likely to use CM/ECF themselves. Attorneys with smaller firms and especially sole practitioners, are more likely to perform required clerical functions on a day-to-day basis around the office due to the reduced availability of support resources. A natural progression with the implementation of CM/ECF is for the sole proprietor or small firm attorney to take on the responsibility of using

CM/ECF. Metropolitan attorneys are more inclined to have support personnel, secretaries and/or paralegals, file and retrieve documents using CM/ECF.

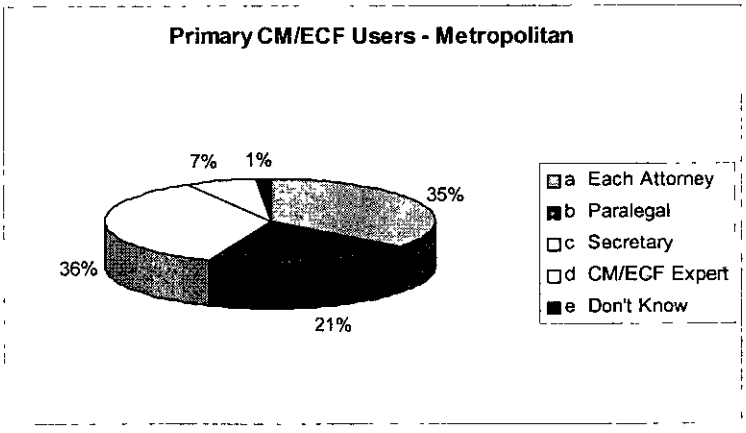


Exhibit 5.8: Metropolitan Users

Data gathered from the focus group meetings indicates that sole practitioners are a group that experienced a significant benefit in time savings since the implementation of CM/ECF. EPA has reduced the copying, mailing, and delivery time required for document submission, as well as travel time required to pick up documents from the courthouse. Sole practitioners do much of this work themselves and CM/ECF has provided additional time to do more substantive work (see Section 3).

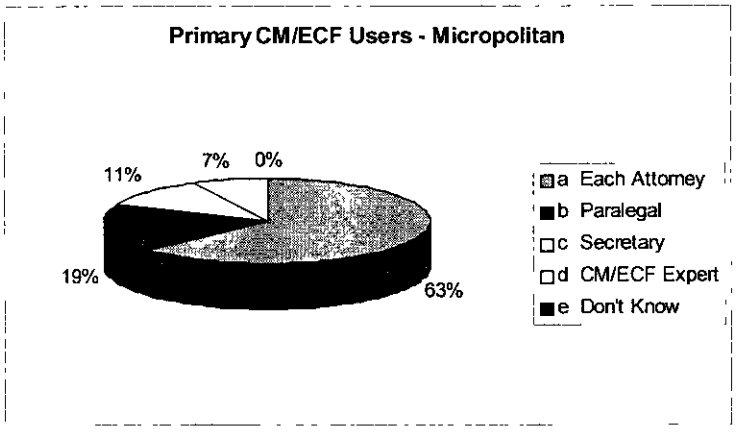


Exhibit 5.9: Micropolitan Users

Results indicate that attorneys in large firms, particularly senior attorneys, are less likely to actively participate in the use of CM/ECF. There are two primary reasons why these attorneys take a less active role in the adoption of the system:

1 Skilled support personnel are more readily available; and

2. Senior attorneys are less likely to be technically proficient and can rely on more junior attorneys in the firm to ensure proper filing and document review.

5.5 Impact of Initial Start-up Costs on Adoption of CM/ECF

Costs to implement CM/ECF in the office environment generally do not hinder adoption of the system. Responses during the focus group meetings to questions regarding the initial costs to get started with CM/ECF varied considerably. The primary costs to equip an office for effective use of CM/ECF generally include a relatively recent generation of computer, Adobe Acrobat software, scanning equipment, a high speed internet connection, and system training. How individual offices meet these requirements ranged from the purchase/upgrade of their current equipment costing several thousand dollars to using current equipment in an innovative manner and thereby not spending a significant amount of money to implement the system. For instance, one sole practitioner was able

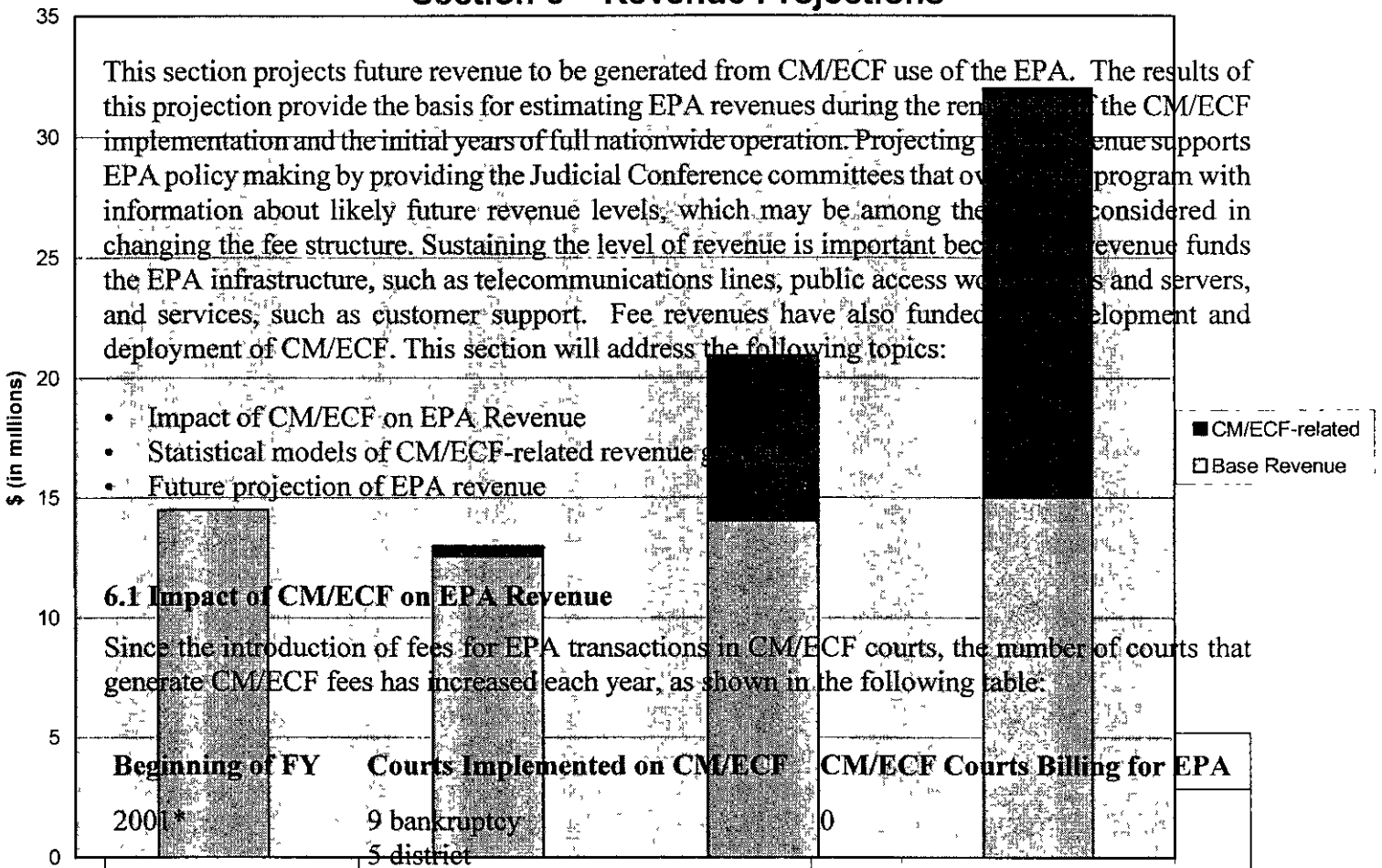
to use his fax machine to fax documents to his computer to create scanned versions of court documents rather than purchasing a separate scanner.
Larger firms tended to have less of a problem with costs associated with CM/ECF implementation because they were already equipped with sufficient resources to handle the new requirements. Sole practitioners and small offices, on the other hand, have incurred relatively greater expenses up front to upgrade their offices. However, virtually all of the attorneys present at the focus groups believed that the return on investment from the system will be positive in a relatively short period of time because of the savings being realized in other areas of their practice. See Section 4, Cost-Benefit Analysis for further discussion of this topic.

One practice area that may be disadvantaged partly by the implementation costs of CM/ECF is the casual bankruptcy practitioner. It was mentioned in two separate focus group meetings that there is a considerable chance that the implementation of CM/ECF would cause the elimination of the casual (i.e. a few cases a year) bankruptcy attorney. The focus group attorneys cited the initial implementation costs as a significant reason, as well as the on-going requirements of electronic filing, because they would not have the volume of cases to receive a positive return on investment.

Section 6 – Revenue Projections

This section projects future revenue to be generated from CM/ECF use of the EPA. The results of this projection provide the basis for estimating EPA revenues during the ren[illegible] the CM/ECF implementation and the initial years of full nationwide operation. Projecting [illegible]enue supports EPA policy making by providing the Judicial Conference committees that ov[illegible] program with information about likely future revenue levels, which may be among the [illegible]considered in changing the fee structure. Sustaining the level of revenue is important bec[illegible]evenue funds the EPA infrastructure, such as telecommunications lines, public access wo[illegible]s and servers, and services, such as customer support. Fee revenues have also funded [illegible]elopment and deployment of CM/ECF. This section will address the following topics:

- Impact of CM/ECF on EPA Revenue
- Statistical models of CM/ECF-related revenue g[illegible]
- Future projection of EPA revenue



6.1 Impact of CM/ECF on EPA Revenue

Since the introduction of fees for EPA transactions in CM/ECF courts, the number of courts that generate CM/ECF fees has increased each year, as shown in the following table:

Beginning of FY	Courts Implemented on CM/ECF	CM/ECF Courts Billing for EPA
2001*	9 bankruptcy 5 district	0
2002**	11 bankruptcy 6 district	11
2003	39 bankruptcy 10 district	49
2004 (estimated)	60 bankruptcy 27 district	87

* CM/ECF bankruptcy courts did not bill for EPA transactions until 7/1/2001

** CM/ECF district courts did not bill for EPA transactions until 7/1/2002.

Exhibit 6.1: Increase in CM/ECF Courts Generating EPA Fees

The increased number of CM/ECF courts has resulted in a corresponding increase in EPA revenue, as demonstrated by the graphic depicting the growth of overall revenues and the increasing proportion due to CM/ECF courts.

Exhibit 6.2: Recent Trend of Base and CM/ECF-Related EPA Billings

The CM/ECF-related growth in EPA revenue has been driven primarily by bankruptcy courts. In the first ten months of FY2003, for example, district courts accounted for approximately six percent of CM/ECF-related EPA revenue. While this disparity is due in part to the faster implementation of CM/ECF in the bankruptcy courts, fee revenue historically has come disproportionately from the bankruptcy courts.

6.2 Statistical Models of CM/ECF-Related Revenue Growth

The model for CM/ECF-related revenue associates the level of EPA fees (excluding dial-up access) in CM/ECF courts to the factors that drive that growth. Separate models for bankruptcy and district courts are required because of the difference in underlying business practices and the different implementation patterns. These distinct patterns are evident in Exhibit 6.1, which shows far more bankruptcy courts receiving CM/ECF during the initial years of the project. Bankruptcy courts also began charging fees earlier, yielding more historic billing information. As a result, bankruptcy courts offer many more data points from which to develop a revenue model. Moreover, as noted above, bankruptcy courts account for a much greater proportion of CM/ECF-related revenue than district courts. For all of these reasons, a specialized model tailored to the particular usage patterns of each case type provides greater capacity to predict future CM/ECF-related revenue than a general model combining all case types.

The statistical models developed in this section are based on regression analysis, which calculates coefficients (multipliers) for explanatory factors–called independent variables By multiplying the coefficients times the values of the independent variables and adding a constant, an estimate is calculated for the value of the result in question–called the dependent variable. A regression model is presented in the following format:

$$\mathbf{Y = A + B_1X_1 + B_2X_2 + \ldots + B_nX_n + error}$$

In the preceding formula, "Y" is the dependent variable, "A" is the constant, "$X_1, X_2, \ldots X_n$" are the independent (explanatory) variables, and "$B_1, B_2, \ldots B_n$" are the coefficients multiplied times the corresponding independent variables. "Error" is not a calculated component of the formula, but represents the difference between the estimated and actual value of the result (dependent variable) for each occurrence of the data.

The regression algorithm computes coefficients that minimize the error of the estimates, as measured by the "least squares" of the differences between actual and estimated value. The success of the model–its "goodness of fit"–is measured by the correlation coefficient, symbolized by R^2. This measurement is the variation in the dependent variable successfully estimated by the model as a the proportion of the total variation, so the closer R^2 is to 1, the better the model.

6.2.1 Statistical Model for Bankruptcy Courts

The most successful model for explaining the revenue growth resulting from bankruptcy courts' adoption of CM/ECF uses caseload and experience with CM/ECF as the explanatory factors that are

most closely associated with the level of revenue. Caseload was modeled both as a combined variable (filings) and as separate measures for business and non-business filings. A model using separate measures performed much better. The formula for this model is presented below:

revenue = -73170 + 64812 * experience + 1494 * business filings – 24 * non-business filings

In the preceding formula, *revenue* is defined as the annual revenue (excluding dial-up) for a court adopting CM/ECF, *experience* is defined as the quarters since billing began for CM/ECF transactions in the court, and *business filings* and *non-business filings* are the annual reported filings on the "F-2 Table" in the Annual Report of the Director on the Judicial Business of the U.S. Courts.

The correlation coefficient, or R^2, for the model described above has a very high value: **.71**. This result indicates significant predictive power by the model, considering that nearly three-quarters of the variation in court-by-court revenue over time is explained by experience and caseload. The positive association between revenue, experience, and business filings follow intuitive reasoning. It is to be expected that revenue should increase as the EPA user community gains more experience with the information that is available through CM/ECF and greater facility in using the system over time. High volumes of business filings indicate that caseload is composed of highly complex cases with many parties, which should correlate with greater access of EPA information.

The negative association between non-business filings and revenue is counterintuitive, however, it is important to realize that factors do not operate "in a vacuum." A possible explanation for the opposite effects of business and non-business filings is that revenue growth is faster than average for courts with a higher proportion of business filings (examples of such courts are Delaware and the Southern District of New York) and correspondingly slower than average for courts where non-business filings predominate. The quantity of parties and complexity that characterize business filings would explain why this type of caseload accelerates CM/ECF-related revenue, while consumer-intensive caseload retards it. The actual reasons underlying the relationships between the variables cannot be discovered by the regression methodology. Experimentation at a court-by-court level, using control observances, is required to determine cause and effect.

Regardless of the explanation for the discrepancy between business and non-business filings, the impact of experience is the crucial result. Whatever the level of revenue predicted by the particular caseload characteristics of an individual court, the positive effect of experience predicts that revenue will continue to rise over time. Conservatism dictates that this predicted effect not be extended perpetually. Because charging for EPA transactions through CM/ECF is a relatively recent occurrence, the period of time that supports same-quarter (annual) comparisons varies from six months to one year and a half, depending on the court. Projecting the impact of the experience factor into the future based on such abbreviated usage history is problematic. The resulting risk of under- and over-estimation necessitates that the revenue model use different thresholds for the maximum experience period that courts will realize fee increases. The results of these different thresholds are incorporated into the estimates presented in Paragraph 6.3 In no case should projected increases extend further into the future than the duration of the historical trends on which the increases are based, which indicates that the effects of increased CM/ECF experience should be fully realized in

all courts by FY 2006. Accordingly, the revenue projections contained in Paragraph 6 3 extend only through FY 2006 because subsequent revenue increases will be attributable only to caseload changes.

6.2.2 Statistical Model for District Courts

The most successful model for explaining EPA revenue in the district courts uses caseload as the explanatory factor most closely associated with the level of revenue. Caseload was modeled using filings, terminations, and pending cases as the candidate measures for caseload. Terminations performed slightly better than filings and much better than pending cases. Only civil case statistics were used because much of the data came from courts that operated only the civil component of CM/ECF during the period of analysis. The formula for this model is presented below:

revenue = 23785 + 13 * civil terminations

In the preceding formula, *revenue* is defined as the annual revenue (excluding dial-up) for a court adopting CM/ECF and *terminations* are the annual reported filings on the "C Table" in the Annual Report of the Director on the Judicial Business of the U.S. Courts.

The correlation coefficient, or R^2, for the model described above has a significant value: **.56**. This result indicates that the model accounts for slightly more than half of the variation in district court revenue. The short period since the beginning of billing eliminates experience as a factor to be included in the district model. There may be such an effect, as is evident in the bankruptcy courts, but a longer period of time will be required before it appears. In lieu of a statistically generated projection, the best estimate of EPA program managers for the revenue increases due to district court cases–approximately $1 million per year–will be used to represent the estimated growth of revenue attributable to the district courts.

6.3 Future Projection of EPA Revenue

The bankruptcy-related revenue supplies the principal dynamic in the projected growth of EPA revenue. The reasons for this are twofold: the revenue from bankruptcy cases has historically accounted for most of the EPA revenue; and the bankruptcy model developed above includes an experience-based multiplier that increases projected revenue as the bankruptcy court user community gains more experience with CM/ECF. There has not been a statistically significant basis for demonstrating the impact of experience in the district court user community, although such a factor may appear in the future.

The projection of revenue is based on two components: the bankruptcy case projection and the base EPA revenue that comprises current district, appellate, and case-party index transactions. The district portion of the EPA revenue is projected to increase by $1 million per year based on program manager estimates rather than using the model based on terminations (described above), which projects flat revenues. The bankruptcy-related revenue projections are based on the experience-based and caseload-based model, and therefore reflect significant increases over the three years that are estimated. The revenue projections are provided in the following table:

Range of Estimates	FY 2004	FY 2005	FY 2006
[1]Expected revenue	$35.0 million	$43.7 million	$47.7 million
[2]Lower bound	$29.1 million	$34.2 million	$35.8 million
[3]Upper bound	$38.6 million	$48.2 million	$59.0 million

[1]Based on 4 quarters' growth in revenue due to CM/ECF experience
[2]Based on 2 quarters' growth in revenue due to CM/ECF experience
[3]Based on 6 quarters' growth in revenue due to CM/ECF experience

Exhibit 6-3: Projection of EPA Revenue for FY 2004 through FY 2006

The impact of the experience multiplier is substantial, accounting for a nearly 50 percent increase in revenue over the current level in three years. While dramatic, the magnitude of these increases is plausible given that the previous two years have seen approximately 50 percent increases per year. Given the trend of steadily increasing revenues, the lower bound representing an approximately 10 percent decrease in next year's revenue may seem unrealistic. Given the important role that "mega-cases," such as the WorldCom, Enron, and airline bankruptcies, played in generating large revenue increases during the period of the historical trend analysis, a revenue decrease coinciding with the conclusion of several mega-cases is plausible, although not expected.

A number of assumptions are factored into the projections provided above, of which three are crucial for determining their reliability. The major assumption is that the experience of the courts that have been implemented in the last year and those implemented in the future will be comparable to those implemented within the first 2 years of the project, which served as the basis for the model. This assumption, which is the basis for experienced-based revenue growth, is essential for the revenue levels projected in Exhibit 6-3 to be realized. While significant, this assumption is reasonable based on the common practices–founded in law, rules of procedures, and professional standards–across jurisdictions. The second major assumption is the stability of caseload. As described above, the bankruptcy model is sensitive to significant changes in caseload. The final major assumption is that the revenue increase due to experience will subside within four quarters after implementation. If the experience impact is sustained, then actual results may exceed the expectation. Another possible effect with the ability to increase the actual result beyond the projection is the positive impact of experience, should it materialize in the district courts. The projections above reflect only nominal increases in the revenue from the district courts. The combined effect of these assumptions is to estimate conservatively wherever possible.

Section 7 - Summary of Findings

The objective of the Electronic Public Access Follow-up Fee Study was to answer three primary questions regarding attorney use of the system.

1. Does the current fee structure deter CM/ECF users from adopting and using the system?

No, the current fee structure does not deter adoption of CM/ECF. The current fee structure consists of a $.07 per-page fee with a cap of $2.10 per-document. Although some attorneys do not like the fees, they are considered de minimus. It was estimated by the focus group members that average quarterly costs for CM/ECF use per attorney range between $15 and $150. One participant estimated a high of $350 for one month; however, considering that attorney hourly rates are between $100 and $300 and the support staff costs are between $25 and $60, the CM/ECF costs are minor. In fact, it was identified that a large portion of the attorney users do not bill their clients for the incurred EPA fees because the cost of producing a bill would be higher than the amount of the bill.

The current fee structure was compared to two other alternatives and found to be considered the most fair, affordable, and it provides the greatest level of satisfaction. The two alternatives presented to the telephone survey participants were a Per-Document plan and a Flat Fee for a period time. The survey participants were asked several questions regarding the three plans and in all instances the current fee structure was preferred.

2. Does the current fee structure inhibit attorney users from using the system as their primary case file system?

Consistent with the first question, CM/ECF users are not influenced by the fees when deciding how to use the system. Most users do not use CM/ECF as their primary file system; however, the reasons behind their decision have to do with habit, rather than cost. Almost every attorney surveyed or asked during the focus groups indicated that they print a hard-copy of the document during their first free look and keep hard-copy files. The most common explanation is that they are used to working with hard-copy documents and they are easier to use for comparison and note taking. In addition, users noted that court rules do not allow them to go completely paperless, even if they wanted to. Some bankruptcy documents still require an original signature or initials, many exhibits have to be filed in hard copy, some malpractice insurance requires it, and there is no consistency between federal jurisdictions or federal and state courts regarding electronic filing. As a result, most offices have to have hard copy files.

3. Does CM/ECF provide value to the attorney users?

Yes. The impacts that CM/ECF has had on attorney practice were discussed during the focus group meetings and the majority of users have found the system to be beneficial in many different ways. Eighty-three percent (83%) of the survey participants stated that the system will provide a long term reduction in labor. In addition, cost reductions for copying, travel, postage and courier expenses have been experienced, as well as time/labor savings for copying of pleadings for submission,

document preparation, and internal file retrieval. The efficiencies cited have provided more time for attorneys to concentrate on their client services and the quality of their work product. Other benefits of the system include the instant access to information and the ability to access the cases remotely.

CM/ECF users noted disadvantages to the system as well. The volume of e-mails that come over the system are overwhelming some offices, especially in the bankruptcy practice. Attorneys are having to hire more skilled staff to work with the system, but they are able to reduce the total number of staff required, so it balances out. The scanning that is required and the formatting of documents for submission have increased staff support time in many instances. Attorneys also have problems identifying documents when they come through the e-mail system because the document categories are too broad or there is no standard naming convention. Lastly, although the 24 x 7 anywhere access to information is an advantage, it is also a disadvantage because it can become intrusive on an attorneys' off hours.

The following is a partial list of positive and negative quotes from the focus groups:

Positive Quotes	Negative Quotes
"The system has allowed me to be more billable."	*The fee transaction receipt is "annoying" and "irksome."*
"It liberates my support staff of menial and time consuming tasks."	*"I now have support personnel rotate checking the e-mails that are coming in all day."*
"I don't like the fee, but I'd pay double to use the system."	*"Should be able to get documents on-line that we can view at the courthouse (criminal docs)."*
"Copying costs alone are down 60%."	*"Each court is different on how they want filing, especially exhibits - they need continuity."*
"24 x 7 access provides flexibility to attend family functions and file something later."	*"Nights and weekends are no longer off limits."*
"The system is a boon for me - it allows me to be more efficient and independent "	*"The casual bankruptcy attorney is likely to disappear."*
"The cost of billing clients would be more than the bills themselves."	*"I'm relying on technology that I don't fully understand."*

Exhibit 7.1: Focus Group Quotes

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Proposed Amendment to Rule 11(c)(1); Questioning Defendant Regarding Plea Agreement Offers**

DATE: **September 30, 2004**

Attached is a letter from Judge David Dowd, a former member of the Committee Judge Dowd recommends that the Committee propose an amendment to Rule 11 concerning the problem of defendants arguing in habeas proceedings that they were never apprised of the fact that the government made a plea offer to the defense counsel His letter is accompanied by a November 2003 opinion, which addresses that issue

The Committee considered similar proposals at its Fall 2003 and Spring 2004 meetings Both proposals were rejected. The proposal considered at the May 2004 meeting would have required the judge to inquire whether a government plea offer had been disclosed to the defendant This proposal has apparently been modified to grant the trial court the discretion to question the defendant about whether an offer was disclosed

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

United States District Court
Northern District of Ohio
United States Courthouse
2 South Main Street
Akron, Ohio 44308

03-CR-6

David D. Dowd, Jr.
Judge

November 20, 2003

(330) 375-5834
Fax: (330) 375-5628

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)))

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

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

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

END OF DOCUMENT

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

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

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

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

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.

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

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

> 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

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

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

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

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

> 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

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

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,

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

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

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

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

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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: **Rules 11 & 16; Report of Subcommittee on Proposed Amendments Regarding Disclosure of *Brady* Information**

DATE: **October 5, 2004**

The Brady Study Subcommittee, chaired by Mr. Goldberg, has continued its study of the proposed amendments from the American College of Trial Lawyers. Mr. Goldberg's report on the subcommittee's study is attached.

The Federal Judicial Center completed its study of *Brady* material in federal and state local rules, orders, and policies. A copy is attached. Also, *Brady* proposals considered by the committee in 1978 and the early 1990's is also attached.

This item is on the agenda for discussion at the Committee's meeting in Santa Fe.

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September 30, 2004

Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Re: **"BRADY" STUDY**

Dear Judge Bucklew:

I write to report upon the activity of the "Brady" subcommittee considering codification of the disclosure of favorable information under Federal Rules of Criminal Procedure. You will recall that the subject was first brought before our Advisory Committee at the request of the American College of Trial Lawyers whose well-considered position paper on this important subject had been adopted by the College's Board of Regents. While there did not appear to be sufficient sentiment at the Monterey meeting to adopt it as presented, what the College has to say does carry very special weight, and when many of us added our own "Brady" horror stories, Judge Carnes reconstituted the "Brady" subcommittee and charged us to consider the matter further. We have done so in a lengthy conference call which included the entire sub-committee (sans Deborah Rhodes, but including John Wroblewski) and also John Rabiej, Peter McCabe and Professor Schlueter. While no votes were taken on any of the issues considered, there did seem to be general agreement upon where the sub-committee and the Federal Judicial Center might best direct future efforts:

1. The College's proposal which required disclosure soon after indictment and also before any guilty plea needed to be narrowed if there was to be any further consideration of it. A much less ambitious, but also significant, amendment to Rule 16 along the following lines was put forward:

> At least 14 days prior to trial, the government shall make available to the defendant upon request all information known to the government which may be favorable to the defendant either because it tends to be exculpatory or impeaching.

As part of Rule 16, this new addition would be subject to regulation under Rule 16(d)(1) which provides that:

> At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

2. This more limited proposal is intended to meet some of the concerns met by the College's proposed amendment to Rule 16 with regard to timely disclosure and the materiality standard (Tab A). Sample expressions of the same concerns are appended under Tabs B and C. The College's proposal to amend Rule 11 to require disclosure before pleas of guilty has been abandoned.

Brady and its progeny impose a constitutional duty on the prosecution to disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment[.]" See Brady, 373 U.S. at 87. Brady does not, however, require the prosecution to disclose all exculpatory and impeachment information; it need disclose only that which is material. In the context of Brady, evidence is material only where there is a reasonable probability that the result of the proceeding would have been different absent the government's suppression. United States v. Bagley, 473 U.S. 667, 682 (1985).

It is logical for a rule that examines the evidence post-conviction to provide for reversal only upon a showing that the suppressed information was material to the defendant's case. It seems counterintuitive, however, to allow prosecutors to make disclosure decisions by predicting pre-trial what favorable evidence will prove material post-trial. With that in mind, the draft proposal contains no requirement of materiality to trigger disclosure pre-trial. The College's proposal was the same in this regard.

This draft proposal also sets the point of timely disclosure at 14 days before trial rather than the College's suggestion of 14 days after indictment. Absent local rules, there is now no uniformity whatsoever as to when federal defendants receive exculpatory information.

3. While there was no vote and not even tentative positions taken on the Rule 16 amendment proposed here, there was general recognition that if we were to move forward

with it or anything like it, we would be taking a very substantial step and should do so only after careful consideration of:

a. The need for such an amendment. I agreed to circulate a 2001 summary of successful Brady cases received from the Defender's Office in Washington, DC It is several years old, however, and I personally found it to be incomplete, but it is set out under Tab D. Most recently, we have seen the government's high profile terrorism convictions in Detroit vacated because Brady evidence was suppressed. The District Court's opinion in that case is appended under Tab E.

While examination of reported cases evidencing the need for any addition to the discovery rules is perhaps worthwhile, these decisions are only the "tip of the iceberg." Most of the time, when prosecutors withhold evidence, no one finds out about it. Because the prosecutor alone can know and weigh what is undisclosed, a rule of criminal procedure that simplifies that serious responsibility can only provide welcome guidance. Press reports such as the New York Times headline expose' of such misconduct in the New York area say little for our justice system:

> Misconduct by prosecutors has become a national concern in recent years, highlighted last month in a United States Supreme Court decision [Dretke] to throw out a Texas inmate's death sentence because prosecutors had deliberately withheld critical evidence.

The New York Times, March 21, 2004.

b. The Federal Judicial Center will review all federal local district rules and all state criminal discovery rules to identify those that have dealt with Brady related issues. The Center will also report on the history (as far back as the 70's) of all earlier proposals to amend the federal discovery rules.

c. The Justice Department will report upon training within the Department and procedures for disciplinary action against prosecutors who violate Brady.

d. The Federal Judicial Center will also examine the likelihood that the proposed amendment will conflict with the Jencks Act and/or the congressional intent behind it. The article appended under Tab C touches upon these issues and the federal local district rule in Massachusetts designed to avoid the conflict.

As you can see, there is a great deal to be done if we are to continue considering any addition to the discovery rules, and nothing possibly ready for a formal vote until our Spring,

2005 meeting. It would, however, be helpful to know whether the full committee is of the view that we should continue our work -- the sense of the subcommittee is that we should.

Sincerely,

Donald J. Goldberg

DJG:amk

cc: Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Lucien B. Campbell, Esquire
Deborah J. Rhodes, Esquire
Jonathan Wroblewski, Esquire
Professor David A. Schlueter
Peter G. McCabe, Esquire
John K. Rabiej, Esquire ✓

APPENDIX "A"

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 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

[110] U S S.G § 3B1 1

[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)

disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

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.

* * *

APPENDIX "B"

33 MCGLR 643
(Cite as: 33 McGeorge L. Rev. 643)

C

McGeorge Law Review
Summer, 2002

Essay

*643 FALLEN SUPERHEROES AND CONSTITUTIONAL MIRAGES: THE TALE OF BRADY v. MARYLAND

Scott E. Sundby [FNa1]

I. INTRODUCTION

In the constitutional world of criminal procedure, a handful of Warren Court cases have taken on superhero status. Gideon, [FN1] Miranda, [FN2] Mapp, [FN3] Duncan, [FN4] and Katz [FN5] are all cases in which the Court not only announced an important procedural right, but did so in ringing moral terms that forever associated the right with the case. These opinions possess special rhetorical power because they are expressly founded upon fundamental values like equality, human dignity, morality of government, protection of the oppressed, and privacy. Indeed, one suspects that the fervor with which decisions like Miranda and Mapp often are defended arises in part because of the sense that larger values and judgments are at stake.

This essay focuses on another criminal procedure superhero from the Warren Court, the case of Brady v Maryland. [FN6] Brady is often heralded as the Supreme Court case that granted the criminally accused a constitutional right to discovery. Like the other members of the pantheon, the Brady Court announced its holding with a strong tone of moral authority.

> We now hold that the 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 The principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. 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. An inscription on ***644** the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." [FN7]

From this Olympian perspective, Brady was the constitutional superhero that not only would ensure that a criminal defendant had access to all important exculpatory evidence before facing the State at trial, but also embodied the prosecutor's ethical duty to pursue "justice" and not simply victory in the courtroom.

Certainly when I first started teaching Brady, I taught it from this heroic viewpoint. To the extent that the criminal defense bar and legal commentators complained that exculpatory material was not forthcoming prior to trial, I attributed such failures not to Brady, but to prosecutors failing to live up to their constitutional duties. Lately, however, I have begun to wonder whether, like my childhood heroes, Brady is not the constitutional superhero that I once thought. [FN8]

This essay examines the failed promise of Brady and argues that while Brady undoubtedly sets forth an important constitutional right, its significance lies primarily outside the realm of pre-trial discovery. In other words, if anyone else has shared the belief that Brady sets forth an important constitutional right for discovering exculpatory evidence prior to trial, it is time that we re-examine Brady and realize that its superhero powers are far more limited In fact, although it sounds provocatively odd to state, I will suggest that under the Court's current Brady doctrine, an ethical prosecutor arguably should never be in the position of turning over Brady material prior to trial.

Before that last statement triggers an avalanche of outraged comments, let me make clear that this essay is not an apologia for prosecutors who fail to turn over important discovery material to the defense. Rather, the essay's purpose is to highlight the point that if academia, the courts, and lawyers are pointing to Brady as a means of ensuring that defendants are receiving "favorable" evidence prior to trial, they are largely pointing to a mirage. [FN9] While part of the difficulty may be that some prosecutors are not fulfilling their duties under Brady, this essay suggests that a significant part of the problem also lies with the Supreme Court's decisions: the Court's development of Brady's holding destined the doctrine to become less of a pre-trial discovery right and more of a post-trial remedy for prosecutorial and law enforcement misconduct

***645** Now, it may be that most lawyers, judges, and legal observers never fell under Brady's constitutional spell and did not believe that the case possessed significant discovery powers. To the extent that Brady's mystique has transfixed others, however, the danger exists that a Brady mirage is obscuring a clear-eyed evaluation of whether current discovery standards are effectively granting defendants access to exculpatory evidence. In other words, if we do not expressly recognize Brady's limitations as a discovery doctrine, we may erroneously be tempted to dismiss or downplay complaints that discovery rules are inadequate because of a misguided belief that Brady ultimately will ensure that nothing important slips through. This essay's bottom-line message, therefore, is that if Brady provides a sense of security that defendants are constitutionally entitled to broad discovery, that sense of security is a false one. If there is legitimacy to the arguments that defendants should receive broad discovery (and I do not attempt to resolve that debate in this essay), then either Brady must be dramatically altered or the criminal justice system must turn to other avenues to accomplish that goal, avenues such as statutory discovery rights and the rules of criminal procedure.

II. THE EVOLVING MATERIALITY STANDARD AND THE FALLEN SUPERHERO

In Brady, the Court announced "that the 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." [FN10] In the ensuing decades, the Court has built upon this standard and extended Brady's reach to include impeachment evidence, [FN11] evidence that the defendant has not specifically requested, [FN12] and evidence that is in the control of government actors other than the prosecutor. [FN13] Examined in the light of these cases, Brady appears to be an expanding doctrine into which the Court has injected flexibility to reflect the realities of criminal prosecutions.

As Brady's scope has been expanding to cover a broader range of government behavior and evidence, however, the Court simultaneously has been contracting the Brady right on another front, that of materiality. The Court's decisions defining what constitutes "material" evidence are particularly important because they have changed the very nature of how Brady operates in practice. Indeed, it is the Court's materiality decisions that essentially have robbed Brady of any pre-trial superhero powers and transformed the doctrine from a pre-trial discovery right into a post-trial remedy for government misconduct. Thus, while ***646** the breadth of Brady's coverage may have expanded to cover matters like impeachment evidence, that expansion is somewhat illusory because the compass of

impeachment evidence that actually would qualify as material under Brady is now so circumscribed.

To understand the role of materiality in shaping Brady, it is helpful to briefly retrace how the Court arrived at the current definition of what constitutes material Brady evidence. Recall the basic standard that Brady announced: "[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." [FN14] If one goes back and reads Brady, it is a little surprising to find that while the adjective "material" is used to describe the evidence which is covered by the new right, no definition of what constitutes "material" is given.

Indeed, one perfectly plausible reading of "material" within the context of the opinion is that it means "relevant," such that the prosecution would be obligated to turn over all relevant favorable evidence. [FN15] At one point in his Brady opinion, for instance, Justice Douglas stated the obligation in words that resonate with the idea of relevance: "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." [FN16] Moreover, without any signal of disapproval, the Brady majority opinion quoted the state court's rationale for reversing Brady's death sentence, a rationale that suggests a relatively low materiality standard for reversal:

> There is considerable doubt as to how much good [the co-defendant's] undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. [The co-defendant], according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or [the co- defendant's] hands that twisted the shirt about the victim's neck .... It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.
>
> ***647** Not without some doubt, we conclude that the withholding of this particular confession of [the co-defendant] was prejudicial to the defendant Brady. [FN17]

Finally, while the Court agreed with the state court that Brady was entitled only to a new sentencing hearing and not to a new guilt trial, its reasoning was not that the co-defendant's confession would have had no material effect on the jury's guilty verdict, but that the confession would have been inadmissible at the guilt trial under state law. [FN18] The Court's holding, therefore, while not expressly embracing a relevance standard, was consistent with the idea that the exculpatory evidence simply had to be relevant (and admissible) to be material.

If the Brady doctrine had eventually grown into this interpretation, then the doctrine very well may have taken on the heroic qualities that I once attributed to it. And there was a voice on the Supreme Court arguing for such a vision. Justice Marshall maintained that if Brady was to fulfill its due process aspirations of ensuring that a defendant had a fair chance of meeting the State's allegations, then the State must be required to turn over "all information ... that might reasonably be considered favorable to the defendant's case." [FN19] This view, as we will see, would likely have turned Brady into a far more vibrant channel of pre-trial discovery.

Instead, the Court ultimately rejected the heroic view through a series of decisions that gradually defined Brady's materiality requirement with increasing strictness. As noted before, this gradual contraction of Brady's reach was often partially masked because it took place in cases where the Court was at the same time extending Brady's applicability to new fact situations With the benefit of hindsight, we can trace how Brady became more of a post-trial remedy than a pre-trial discovery right.

The process began with United States v Agurs, [FN20] decided thirteen years after Brady. The case reflects precisely the phenomenon of the Court expanding Brady's reach to new situations, while at the same time narrowly circumscribing through the materiality requirement the actual evidence which becomes subject to discovery. In Agurs, the Court for the first time expressly held that Brady extended to exculpatory evidence even if the defendant had not specifically requested the evidence. [FN21] However, bringing such evidence within Brady's coverage also necessarily raised a question that brought materiality to the fore: if no defense request is necessary to trigger Brady, how is a prosecutor in reviewing her file to know ***648** what evidence she must turn over to avoid constitutional

sanctions? In Agurs, the Supreme Court understood the lower court's opinion as essentially holding that prosecutors must turn over any evidence that "might affect the jury's verdict"--a standard that the Court believed for all practical purposes would mean that "the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." [FN22]

While the Court encouraged "prudent prosecutor[s to] resolve doubtful questions in favor of disclosure," [FN23] it also firmly clarified that Brady disclosure was not a discovery right as such, [FN24] but an obligation that dealt "with the defendant's right to a fair trial mandated by the Due Process Clause." [FN25] While tacitly acknowledging that the original Brady opinion was ambiguous in its intended use of the word "material," [FN26] the Court disavowed the view that would have equated "material" with "relevant." The Court stated that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." [FN27] The opinion later made clear that "of sufficient significance" means that "the omitted evidence creates a reasonable doubt that did not otherwise exist." [FN28]

In crafting its materiality standard, the Agurs majority was attempting to ensure that prosecutors would not run afoul of Brady simply because they did not turn over all of the government's evidence to the defendant. This concern was highlighted because Agurs was formally extending Brady to information about which the prosecutor did not have "notice" from the defendant that it might be important. By contrast, in prior Brady cases, the prosecutor had been on notice because the defendant had specifically requested the information, [FN29] or because the prosecutor realized or should have known that perjured testimony was being presented at trial--a situation that involved such "fundamental unfairness" that any prosecutor would be aware of the need to take corrective action. [FN30] Where a *649 specific request has not been made, however, the majority reasoned that the notice to the prosecutor of the need to turn information over must come from the nature of the exculpatory evidence itself. "[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." [FN31]

While the Agurs Court's concern over "notice" led it to adopt a stringent definition of materiality for cases where the defendant had made no request or only a general request, it indicated that a more lenient standard would apply to specific request cases because "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." [FN32] In United States v. Bagley, [FN33] however, the Court moved even further in characterizing Brady's materiality standard as merely one aspect of the Court's general "fair trial" right rather than treating it as a constitutional obligation with a distinct lineage. Relying on opinions dealing with ineffective assistance of counsel and unavailable defense witnesses, [FN34] the Bagley Court announced that a one-size-fits-all materiality standard would now govern Brady cases, regardless of whether the defendant had made a specific request, a general request, or no request at all: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." [FN35] In the later case of Kyles v. Whitley, [FN36] the Court placed a further functional gloss on the meaning of "reasonable probability" by stating that the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." [FN37]

The extent of Bagley's movement towards a "result-focused" standard [FN38] for determining whether Brady had been violated was driven home in Strickler v. Greene. [FN39] While the Court did not alter the test for materiality, the majority opinion seemed aware that a perception had arisen that Brady compelled a prosecutor to turn over important exculpatory evidence even if the evidence *650 would not by itself undermine the verdict. The Court thus went out of its way to distinguish "so-called Brady violations" from "true Brady violation[s]."

> [T]he term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence--that is, to any suppression of so-called "Brady material"--although, strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. 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. [FN40]

Consequently, although the government had not disclosed powerful impeachment evidence in Strickler, [FN41] the majority concluded that a Brady violation had not occurred because the "petitioner ha[d] not shown that there [was] a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." [FN42]

III. THE MATERIALITY STANDARD MEETS THE ETHICAL PROSECUTOR

While the Court's emphasis in Strickler on clarifying what constitutes "true" Brady material did not change the law, it does effectively highlight a largely unexplored tension between Brady and the prosecutor's ethical duties. The Court's clarification between "true" Brady and "so-called" Brady material seems to be aimed at guarding against "ethical creep"--the temptation to use ethical norms to define the constitutional standard regulating discovery. In other words, the Court seems to be saying that a distinction must be maintained between what is ethically desirable as prosecutorial discovery and what is constitutionally required

This position does have a bit of an odd feel to it given that the Brady opinion itself reminded prosecutors in thunderous tones that their duty is "not to achieve victory but to establish justice." [FN43] Since Brady, however, the Court has ***651** consistently cautioned that Brady's discovery obligation does not stretch as far as a prosecutor's ethical duty. Recall that the Agurs Court emphasized that it was not going to allow Brady to be used as a means of smuggling a de facto open-file policy into the Constitution. [FN44] More pointedly, in Kyles, the Court expressly acknowledged that, "the rule in Bagley (and, hence, in Brady) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." [FN45] This refusal to extend Brady's constitutional obligation as far as the prosecutor's ethical duties is not unusual, of course, as the Court frequently admonishes that constitutional duties are to be interpreted independently of what might constitute wise or desirable public policy. [FN46]

Yet, while the untying of the constitutional standard from underlying ethical norms is not particularly remarkable, it is still important to ask what Brady means for the ethical prosecutor. This is especially true because Brady, despite the Court's later attempts at severance, remains intimately associated in both legal and public minds with notions of prosecutorial ethics. And if we undertake this inquiry of what Brady asks of the ethical prosecutor, the answer is quite interesting and perhaps a bit startling.

Let us conduct the inquiry by placing our prosecutor in a pre-trial situation where she receives a piece of evidence that she must evaluate under the Court's materiality standard For the Brady obligation to be triggered, she would have to hold the evidence in her hand and think:

This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence. Under Brady, therefore, I need to turn this evidence over to the defense. Then, once I turn the evidence over and satisfy my constitutional obligation, I can resume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.

Viewed through this scenario, the Court has set Brady's materiality threshold at a point where we should be raising an ethical eyebrow at the prosecutor who actually declares that she has "true" Brady material that she must turn over to the defense. If the Court's materiality standard is taken literally, far from indicating that we are dealing with an ethical prosecutor, a prosecutor turning over Brady ***652** evidence should make us pause and wonder: why is she still pursuing prosecution after acknowledging that evidence exists creating a reasonable probability that an innocent defendant may be convicted? Is not the prosecutor who turns over Brady evidence prior to trial, therefore, identifying herself as precisely the type of prosecutor condemned by the Brady Court as someone more interested in "achiev[ing] victory" than "establish[ing] justice?"

It is in this sense that I suggested at the essay's beginning that if the Court is serious about its materiality standard for Brady, then arguably an ethical prosecutor should never have Brady material to turn over to the defense.

Instead, a conscientious prosecutor faced with "true" Brady evidence--material so exculpatory that it would make her question the reliability of a guilty verdict--should move for dismissal of the charges that no longer are supported by the evidence.

Several possible responses come to mind. First, the ABA standards ethically allow a prosecutor to proceed with a prosecution supported only by probable cause. [FN47] Under these standards, a prosecutor could find "true" Brady material and still proceed, confident that the case has not fallen below the probable cause standard needed for indictment. Without attempting to indict the ABA rule itself, [FN48] I would suggest that even a believer in the ABA probable cause threshold would have serious ethical pangs as she zealously asked a jury to convict someone about whom she entertained serious doubts as to his or her guilt. More subjectively, I would argue that most prosecutors generally do wish to pursue "justice" rather than "victory," and "justice" would not include convicting an individual about whom they harbor serious doubts as to guilt. Consistent with this view, prosecutorial guidelines, such as the U.S. Attorneys' Manual, call for the prosecutor to evaluate the strength of the evidence as measured against the reasonable doubt standard and not that of probable cause. [FN49]

Moreover, even if one takes a less charitable view of prosecutorial motives and sees prosecutors as primarily motivated by the desire for victory, a prosecutor ***653** faced with "true" Brady evidence in our scenario would be likely to seek dismissal of the charges. Prosecutors evaluating a case are acutely aware that eventually the case must be proven beyond a reasonable doubt, [FN50] and while it may be possible to indict a ham sandwich before a grand jury with a probable cause standard, convicting a defendant on evidence beyond a reasonable doubt before a petit jury is a far more daunting task. As every prosecutor knows, it is a rare case that does not develop unanticipated weaknesses or holes (like the key witness who suddenly becomes inarticulate on the witness stand). To proceed to trial knowing that the defense is already armed with powerful exculpatory evidence, therefore, would seem to be inviting an adverse verdict. And while prosecutors may foremost be "ministers of justice," [FN51] their reputation (or lack thereof) as successful trial attorneys is likely to have an impact on professional advancement within the prosecutor's office or on the later availability of opportunities in the private sector.

There is, however, another scenario which theoretically would allow the prosecutor to adhere to an ethical standard that requires her to believe that the defendant is guilty beyond a reasonable doubt while still turning over "true" Brady material. This prosecutor could look at evidence and have the following internal monologue:

I can see how a trier of fact might take this piece of evidence in such a way as to disbelieve my key witness, which would likely then lead them to find a reasonable doubt. Now, I certainly believe the witness, and I think that I can convince the jury that he is telling the truth because of the evidence corroborating his testimony. Still, I could see how if the jury did not hear this evidence, a court later could say that because the jury didn't have a chance to consider the impeaching evidence, the reliability of the guilty verdict is undermined. Therefore, this is true Brady material and I must turn it over.

This prosecutor, then, would appear to satisfy both the ethical mandate of pursuing only cases in which she believes in the defendant's guilt while also finding "true" Brady material to disclose.

If this is the only scenario that allows us to find ethical prosecutors who will be turning over "true" Brady material prior to trial, however, we have identified a narrow band of cases indeed. First, the thought process posits a prosecutor who is ***654** capable of a Zen-like state of harmonizing objective and subjective beliefs, simultaneously recognizing that the evidence objectively creates a reasonable probability that a reasonable jury will entertain a reasonable doubt while still subjectively believing that continued prosecution is warranted. Justice Marshall, in particular, believed that asking prosecutors to make such a "dual" assessment was to ignore "the realit[ies] of criminal practice:" [FN52]

At the trial level, the duty of the state to effectuate Brady devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing Brady. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of Brady, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his

case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith ...

....

The prosecutor surely greets the moment at which he must turn over Brady material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether evidence is favorable, and must decide on which side to err when faced with doubt. In his role as advocate, the answers are clear. In his role as representative of the state, the answers should be equally clear, and often to the contrary. Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact. [FN53]

***655** Justice Marshall's view of the "realities of criminal practice" would appear to have a firm grounding in research on "cognitive conservatism," research which consistently shows that individuals are resistant to changing an existing view of facts and, consequently, try to incorporate new information in a way that confirms the pre-existing view [FN54] If Justice Marshall's view is correct, it may well be that most prosecutors who actually went through the thought process depicted in the monologue bubble would, in their own minds, ultimately conclude that the impeaching evidence did not generate a realistic probability of reasonable doubt. If the prosecutor chose to disclose the evidence, then, she would be doing so to "to be on the safe side," rather than out of a belief that disclosure was constitutionally required. Because of his concerns that prosecutors would have difficulty engaging in such a dichotomous thought process, Justice Marshall advocated a materiality standard that did not require the prosecutor to assess the likelihood that the evidence would undermine a guilty verdict.

But even if Justice Marshall underestimated most prosecutors' abilities to overcome the cognitive dissonance inherent in the Bagley standard, the scenario underscores how high the materiality bar has been placed. To both trigger pre-trial Brady disclosure and remain ethical, the prosecutor simultaneously must believe that she possesses exculpatory evidence that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in [a guilty] verdict," [FN55] and that continued prosecution is still warranted despite the strength of the exculpatory evidence. Such a case is likely to be a rare one, and, of course, if Justice Marshall's psychoanalysis of prosecutors is correct, they will also need to possess the self-enlightenment necessary to avoid rationalizing (not necessarily out of conscious bad faith) that the evidence really is not so exculpatory as to make it probable that a jury would find a reasonable doubt.

Thus, while we can find a scenario where prior to trial a prosecutor can be both ethical and disclose "true" Brady evidence, the scenario is a narrow one. And even in that situation, discovery of evidence so exculpatory that its "suppression ... [would] portend such an effect on a trial's outcome as to destroy ***656** confidence in its result," [FN56] may start to bring the prosecutor uncomfortably close to pursuing a prosecution where she entertains significant doubts as to the defendant's guilt. Most importantly, what becomes evident is that the Brady materiality standard when applied in the pre-trial discovery context is in serious tension with Brady's very idea of prosecutors pursuing "justice" rather than "victory:" the closer we come to finding that certain evidence is sufficiently exculpatory under Brady that it must be turned over, the closer we come to finding that the next ethical step is not disclosure, but dismissal of the charges. If the standard for materiality is this high, then it should be of little wonder--and we in fact should be pleased--that Brady triggers relatively little pre-trial discovery.

At this point, let me confess to having engaged in a bit of rhetorical gamesmanship. I am not seriously suggesting that prosecutors who turn over evidence under the auspices of Brady should be investigated by the state ethics commissions. Quite to the contrary, a prosecutor turning over exculpatory evidence is likely to feel that she should be heralded for acting in a highly ethical manner. I would suggest, however, that the vast majority of the material turned over in these situations is what the Strickler Court labeled "so-called" Brady material: that is, evidence which the prosecutor believes could be seen as exculpatory and therefore discloses the evidence to be on the safe side or out of ethical considerations (or both), but which the prosecutor does not actually believe could objectively undermine confidence in a guilty verdict if not revealed [FN57] In turning over such evidence, then, the prosecutor is doing so as a matter of judgment and ethical duty rather than out of a constitutional obligation.

Indeed, despite its constitutional stinginess in defining materiality, the Court has in various ways actively encouraged the turning over of "so-called" Brady evidence. For although the Court has carefully distinguished between "true" and "so-called" Brady evidence for remedial purposes, it also has been cognizant of the difficulties that it created by crafting a pre-trial disclosure obligation based on a post-trial conclusion that the evidence would have created a reasonable *657 probability that the outcome would be different. In Agurs, for example, the Court acknowledged that "there is a significant practical difference between the pre-trial decision of the prosecutor and the post-trial decision of the judge" but then advised that "the prudent prosecutor will resolve doubtful questions in favor of disclosure." [FN58]

Twenty years later, the Court dispensed similar advice but in stronger rhetorical terms. In Kyles, the State requested an even higher materiality standard than the Bagley standard, arguing that it is "'difficult . to know' from the 'perspective [of the prosecutor at] trial ... exactly what might become important later on.'" [FN59] With a stern lecturing tone, the Court strongly rejected the State's argument for more "leeway" in deciding whether to disclose evidence·

.... At bottom, what the State fails to realize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act .... Unless, indeed, 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 .... This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." And it 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. [FN60]

The Court's solution, therefore, for the prosecutor's difficulties in applying a "result-affecting test" [FN61] before the result is known has been to cheerlead "the prudent prosecutor" to disclose evidence and to give a warning scowl to the prosecutor who would "tack ... too close to the wind." [FN62]

The Court's holdings and rhetoric thus present a somewhat curious and conflicted view of Brady's core values. The Court appears to want prosecutors to view themselves as under an obligation to turn over "so-called" Brady, implying that on some level it does perceive the turning over of such material as necessary *658 for ensuring fair trials. At the same time, the Court is unwilling to place a constitutional imprimatur on the pre-trial disclosure of such evidence because it does not want to provide a post-trial remedy unless it is convinced that serious doubts exist as to the defendant's guilt Brady's inability to gain a firm constitutional foothold as a pre- trial right, therefore, can in part be attributed to the Court's concerns with post-conviction relief, resulting in a somewhat odd and circular spectacle: a pre-trial obligation that is defined through speculation on a post-trial result, a result which itself ultimately may be influenced by the pre-trial decision of whether or not to disclose.

IV The Realities of Brady as a Discovery Device

Once we unmask the realities of how Brady matches up with the ethical prosecutor's duties, the limits of Brady's pre-trial reach become apparent. While we all can readily state the materiality test for Brady, it may still have come as something of a surprise to actually apply the standard in a pre-trial context. I suspect this surprise results because many lawyers, judges and law professors still reflexively tend to think of Brady in "so- called" Brady terms rather than in "true" Brady terms. This tendency is perhaps unintentionally reinforced by the judiciary's proclivity for speaking of Brady in language such as: "Brady does not require a prosecutor to divulge every scintilla of evidence that might conceivably inure to a defendant's benefit." [FN63] While true, this type of statement also carries the implication that Brady has a fairly far reach and that the courts must, therefore, guard against letting its tendrils spread so wide that it is used to reach "every scintilla of [favorable] evidence." In reality, though, as the Strickler Court's expression of the distinction reminds us, far from threatening to sweep every "shred of [favorable]

evidence" [FN64] within Brady's constitutional scope, the doctrine's pre-trial discovery reach is really quite limited

Moreover, **Brady**'s doctrinal limitations as a pre-trial discovery mechanism are magnified by the realities of criminal practice Close to ninety percent of all cases on both the federal and state levels are resolved through guilty pleas, and the Court has indicated that **Brady** will have little, if any, role to play during plea bargaining. In United **States** v. Ruiz, [FN65] the Court unanimously reversed a Ninth Circuit case which had held that **Brady** gave a defendant the right to disclosure of material impeachment information prior to entering a guilty plea. [FN66] While the Supreme Court cautiously did not declare that **Brady** could never apply to a ***659** guilty plea, [FN67] the Court also repeatedly emphasized that **Brady** was a trial- related right distinct from the decision to plead guilty. [FN68] Consequently, the fact that nine out of ten cases are resolved by guilty pleas ensures that **Brady** plays a minimal role in triggering prosecutorial **disclosure** of **exculpatory** evidence. Indeed, even in the small percentage of cases that do proceed to trial, the courts have understood **Brady** as not requiring disclosure until the trial itself, unless the failure to disclose earlier rendered the trial unfair. [FN69]

Once Brady's development as a constitutional law doctrine is coupled with the realities of criminal practice, it should not be surprising that Brady has not generated a large amount of pre-trial discovery. Assuming the case even proceeds to trial, it will be--and perhaps ethically should be--a rare case where a prosecutor will possess evidence that she believes objectively raises serious questions about the defendant's guilt and yet decides to still pursue a conviction at trial The Court, in other words, has defined "true" Brady in such a way that prosecutors in their daily practice should not be consistently finding such material in the files of the cases that they are taking to trial.

It is important, therefore, to recognize Brady as less of a discovery mechanism and as more of a post-trial due process safety check where information surfaces after trial that exculpatory evidence was suppressed. [FN70] Perhaps Brady's most important pre-trial function is that it stresses the prosecutor's responsibility for and the need to be aware of all evidence within the government's possession. [FN71] By ***660** making the prosecutor responsible for all of the government's evidence, Brady provides legal leverage to both courts and prosecutors to ensure that the police or investigating agencies have fully revealed to the prosecutor both the favorable and unfavorable evidence that they have collected. Because the evaluation of evidence as "material" under Brady rests with the prosecutor, she is constitutionally obligated to ensure that the police and other investigating bodies are showing her all of the evidence that they have gathered, whether or not the police believe the evidence to be materially exculpatory. In this sense, Brady does enhance pre-trial discovery by making the police subject to a due process obligation to provide all evidence and information to the prosecutor so that she in turn can fulfill her constitutional obligations. [FN72]

Otherwise, Brady's primary impact on pre-trial discovery would seem to be the sub-constitutional effect of encouraging prosecutors to turn over "so- called" Brady evidence. From this perspective, while declining to give constitutional status to the ABA standards for prosecutorial disclosure, Brady can be seen as helping to foster an atmosphere consistent with their compliance. To the extent that this sub-constitutional side effect exists, it is laudatory, and at least one survey indicates that prosecutors often do voluntarily fill the void left by formal discovery obligations [FN73]

What cannot be known without further study, of course, is whether prosecutors are turning over "so-called" Brady material with the same frequency that they would if they were under a formal constitutional obligation. Certainly the most significant difference is that a prosecutor who declines to disclose "so- called" Brady material knows that the defendant will not have a remedy, even if the non-compliance constitutes a serious ethical violation. [FN74] While many prosecutors are likely to turn over "so-called" Brady to be on the safe side and out of a sense of ethical obligation, cases like Strickler v. Greene send the message that even powerful exculpatory evidence is unlikely to cause the prosecutor to run afoul of Brady. In Strickler, the majority went so far as to say that "[t]he District Court [which had found a Brady violation based on 'potentially devastating ***661** impeachment material' that had not been disclosed] was surely correct that there is a reasonable possibility that either a total, or just a substantial, discount of the [eyewitness's] testimony might have produced a different result, either at the guilt or sentencing phases," but proceeded to deny relief because the evidence did not establish "a reasonable probability of a different result "

[FN75]

If Brady is simply a tool for appellate courts to double-check the guilt of the defendant where suppressed evidence comes to light after conviction, then the Court's fashioning of Brady seems appropriate and any turning over of "so-called" Brady evidence is merely ethical icing on the due process cake. But this, of course, brings us back to the original point of the essay: making transparent that Brady is not a discovery doctrine but instead a means of remedying police and prosecutorial misconduct or, in certain cases, unintentional but highly prejudicial non-disclosures. And we also should not forget that an alternative view of the "Brady ideal" was possible: an interpretation that saw Brady as a pre-trial right aimed at ensuring that a criminal trial is a full adversarial airing of evidence before the jury.

V. Final Thoughts on Brady and Discovery

When the Court was first crafting the materiality standard, Justice Marshall expressed a view that very well might have led Brady to assume more of a superhero status when it came to pre-trial discovery. In Agurs, Justice Marshall first began to voice his view that the Court's materiality standard was frustrating Brady's purposes. [FN76] By the time of Bagley, he had come to believe that a prosecutor should have to "turn over to the defendant, all information known to the government that might reasonably be considered favorable to the defendant's case." [FN77] He advocated the "reasonably favorable" standard because he believed that the due process obligation should focus on ensuring that a defendant had all of the material necessary to effectively mount a defense to the State's use of the prosecutorial power at trial. [FN78] In other words, what the Strickler Court termed "so- ***662** called" Brady material would have become "true" Brady under Justice Marshall's standard, and failure to disclose it would have required reversal unless the prosecutor could satisfy the harmless error standard of Chapman v. California. [FN79]

The "reasonably favorable" standard, therefore, almost certainly would have led Brady to play a far greater role as an avenue of pre-trial discovery, in part because it adopts a forward-looking pre-trial perspective instead of using the current post-conviction reversal standard. Rather than requiring the prosecutor to step into the shoes of a hypothetical juror and speculate whether the evidence would cause a juror to have a reasonable doubt in a yet-to-be- heard case, Marshall's standard would have placed the prosecutor in the far more familiar role of a lawyer and asked a far easier question: can I see how, if I were the defense attorney, I would be able to use this information to advance my client's argument for acquittal? Like all lawyers, prosecutors are trained to look at how evidence can be used to poke holes in their case so that they can anticipate how to respond to any weaknesses. By asking the prosecutor to engage in this familiar exercise as the means of fulfilling her Brady duties, the "reasonably favorable" query would thus have presented a standard that would have been far easier for the prosecutor to apply prior to trial. [FN80]

Such an inquiry would also relieve the ethical tension that this essay has argued underlies the Bagley standard. As we have seen, Bagley requires the prosecutor to achieve a state of cognitive separation where she can simultaneously recognize that a piece (or pieces) of evidence objectively can create a reasonable doubt for the jury while still believing that the case warrants prosecution. The "reasonably favorable" standard, by contrast, would not require the prosecutor to obtain this Zen-like state of simultaneously harmonizing objective and subjective beliefs, but only would require that she understand how the evidence could be viewed by the defense as helpful to her case; in other words, under Marshall's standard, Brady would be triggered far before a prosecutor would have to engage in any serious ethical questioning of whether she should still be pursuing the case because the exculpatory evidence exists. And, as we have seen, part of Justice Marshall's argument for the easier-to-satisfy "reasonably favorable" standard was his belief that the psychological realities of a prosecutor's practice would render it difficult for a prosecutor to engage in the cognitive separation that the Bagley standard now asks of prosecutors.

***663** Whether the "reasonably favorable" standard ultimately would have been a wise constitutional rule is open to debate on a variety of constitutional and policy grounds. [FN81] In a number of constitutional areas, not just

with Brady, the Supreme Court deliberately has "underenforce [d]" constitutional rights because of institutional concerns. [FN82] Beyond debate, however, is the conclusion that Justice Marshall's approach would have brought Brady far closer to superhero status in the discovery context.

Brady remains an important constitutional doctrine and, indeed, a constitutional superhero, in certain contexts: the doctrine can ensure that a defendant has a post-conviction remedy if police or prosecutorial misconduct is uncovered, [FN83] even if the suppression was inadvertent. [FN84] Nor can one downplay the importance of Brady's moral message to every government actor that they are responsible not only for collecting evidence of guilt, but also for being vigilant as to the existence of exonerating evidence. As this essay has attempted to highlight, however, it also is important to keep in mind that when it comes to debating whether defendants have adequate access to discovery prior to trial, Brady's superhero credentials are distinctly human

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[FN1] Gideon v. Wainwright, 372 U.S. 335 (1963).

[FN2] Miranda v. Arizona, 384 U.S. 436 (1966).

[FN3]. Mapp v. Ohio, 367 U.S. 643 (1961).

[FN4]. Duncan v. Louisiana, 391 U.S. 145 (1968).

[FN5]. Katz v. United States, 389 U.S. 347 (1967)

[FN6]. 373 U.S. 83 (1963).

[FN7]. Id. at 87.

[FN8]. Such a reassessment perhaps should not be limited to Brady, Commentators increasingly are calling into question the continued viability of the Supreme Court's landmark decisions in the criminal procedure area. See, e.g , William J Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1 (1997).

[FN9] The mirage metaphor has occurred to at least one other commentator writing about Brady. See M. Shawn Matlock, The Mirage of Brady in Wyoming: How Far Will the Wyoming Supreme Court Allow a Prosecutor to Go?, 35 LAND & WATER L. REV. 609 (1999).

[FN10]. 373 U.S. at 87

[FN11]. United States v. Bagley, 473 U.S. 667, 676 (1985).

[FN12]. United States v. Agurs, 427 U.S. 97, 107 (1976).

[FN13]. Kyles v. Whitley, 514 U S. 419, 438 (1995).

[FN14]. 373 U.S at 87.

[FN15] Justice Marshall made a similar observation in his dissent in Bagley, 473 U.S. at 703 n 5 (Marshall, J., dissenting) (pointing to case citations within the Brady opinion that "provide strong evidence that Brady might have used the word [material] in its evidentiary sense, to mean, essentially, germane to the points at issue."). See also Strickler v. Greene, 527 U.S. 263, 298 (1999) (Souter, J., dissenting) ("Brady itself did not explain what it meant by 'material' (perhaps assuming the term would be given its usual meaning in the law of evidence ....)"); United States v. Coppa, 267 F.3d 132, 141 (2d Cir. 2001) ("[T]he [Brady] Court appears to be using the word 'material' in its evidentiary sense, i.e., evidence that has some probative tendency to preclude a finding of guilt or lesser punishment, cf. Fed. R Evid. 401.").

[FN16]. Brady, 373 U.S. at 87-88 (emphasis added).

[FN17]. Id. at 88 (emphasis omitted). While the Court's use of the state court's language is consistent with a relevance-based definition of materiality, fairness requires acknowledgment that the Court was not using the quotation to explain materiality. Rather, it was using the quotation as a prelude to explaining why even if the evidence might be material under Maryland's law, the confession would have been inadmissible at the guilt trial, so Brady was entitled only to a new sentencing hearing.

[FN18]. Id. at 90.

[FN19]. Bagley, 473 U.S. at 695-96 (Marshall, J., dissenting).

[FN20]. 427 U.S. 97 (1976).

[FN21]. Id. at 97.

[FN22]. Id. at 108-09.

[FN23]. Id. at 108.

[FN24] Id. at 107 ("We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights.").

[FN25]. Agurs, 427 U.S. at 107.

[FN26]. In Agurs, Justice Stevens seemed to acknowledge the potential ambiguity when he stated: "A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." Id. at 104 (emphasis added)

[FN27]. Id. at 108.

[FN28] Id. at 112. The Court also stated, however, that the defendant need not demonstrate that the suppressed evidence "probably would have resulted in acquittal," the standard for a new trial based on newly discovered evidence. Id. at 111. The Court reasoned that not requiring this extra step provided recognition of the "special significance" that the evidence had been in the government's possession and was not found in a "neutral source." Id. Justice Marshall in his dissent could not see the difference, since "[s]urely if a judge is able to say that evidence actually creates a reasonable doubt as to guilt in his mind (the Court's standard), he would also conclude that the evidence 'probably would have resulted in acquittal.'" Id. at 116 (Marshall, J., dissenting).

[FN29]. Brady's attorney specifically asked to see any statements by the co- defendant.

[FN30]. The perjury line of cases significantly predates the Brady decision. See, e g., Mooney v. Holohan, 294 U.S. 103 (1935). However, it is now characterized as a type of Brady violation. Agurs, 427 U S. at 103.

[FN31] Agurs, 427 U.S. at 107.

[FN32]. Id. at 106.

[FN33]. 473 U.S. 667 (1985).

[FN34]. See United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (due process is violated when testimony is made unavailable through government deportation of a defense witness); Strickland v. Washington, 466 U S. 668 (1984) (ineffective assistance of counsel requires reversal when outcome reliability is undermined). Strickland, in turn, relied upon Agurs in defining its reversal standard. Id. at 694.

[FN35]. Bagley, 473 U.S. at 682. The Bagley majority apparently envisioned that a lower standard of materiality would continue to apply to the prosecution's use of perjured testimony because of its seriousness as "a corruption of the truth-seeking function of the trial process." Id. at 680 (quoting Agurs, 427 U.S. at 104). In the perjured testimony category, the evidence is "considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Id.

[FN36]. 514 U.S. 419 (1995).

[FN37]. Id. at 435.

[FN38]. Bagley, 473 U.S. at 714 (Stevens, J., dissenting).

[FN39]. 527 U S. 263 (1999).

[FN40]. Id. at 281-82 (footnote omitted).

[FN41] The Court rejected the Fourth Circuit's cursory characterization of the disputed impeachment evidence as "provid[ing] little or no help " Id. at 289. The majority, however, found that, at most, the impeachment evidence created a "reasonable possibility" of a different result rather than the requisite "reasonable probability." Id. at 290-91.

[FN42]. Id. at 296. The dissent believed that the suppressed impeachment evidence created a reasonable probability that a different sentencing verdict, a life rather than a death sentence, would have resulted. Justice Souter also proposed restating the materiality standard in terms of a "significant possibility" rather than "reasonable probability," because of his belief that the "term 'probability' raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not.'" Id. at 298 (Souter, J., concurring and dissenting).

[FN43]. Brady, 373 U.S. at 87 n.2.

[FN44]. Agurs, 427 U S. at 109.

[FN45]. Kyles, 514 U.S. at 437 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3 11(a) (3d ed. 1993), MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1984)).

[FN46]. See, e.g., Strickland, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides."); United States v. Ash, 413 U.S. 300, 320-21 (1973) ("The primary safeguard against abuses of [photo arrays] is the ethical responsibility of the prosecutor .... We are not persuaded that the risks inherent ... are so pernicious that an extraordinary system of safeguards is required."); Cuyler v. Sullivan, 446 U.S. 335, 346 n.10 (1980) (although the Sixth Amendment does not require state trial judges to inquire about conflicts-of-interest where multiple representation exists, "[a]s our promulgation of Rule 44(c) [of the Federal Rules of Criminal Procedure] suggests, we view such an exercise of the supervisory power as a desirable practice.").

[FN47]. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION 3- 3.9(a) (3d ed 1993) ("A prosecutor should not institute, or cause to be instituted, or to permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.").

[FN48] Interestingly, after setting out the probable cause standard, the ABA standard appears to back away from using probable cause to justify prosecution, stating that "[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." Id. The ABA standards also provide that "[a] prosecutor should not be compelled by his or her

supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused " Id. 3-3.9(c).

[FN49]. The U.S. Attorneys' Manual recognizes that "[t]he probable cause standard is ... a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions." U.S. ATTYS' MANUAL 9-27.200 cmt. (U.S. Dep't of Justice 2002). The Manual proceeds to state that "both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." Id. 9-27.220 cmt.; see also STANDARDS FOR NAT'L PROSECUTION (Nat'l Dist. Attys' Ass'n., 2d ed. 1991) (amended 1999) ("The prosecutor shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial.").

[FN50]. Cf. U.S. ATTYS' MANUAL 9-27.300 cmt.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.
Id.

[FN51]. MODEL RULES OF PROF'L CONDUCT R. 3 8 cmt. (2002); see also Berger v. United States, 295 U.S. 78, 88 (1935).

[FN52]. Justice Marshall's emphasis on "the realities of criminal practice" is consistent with his general emphasis on the necessity of recognizing that the Court's holdings would be implemented in the real world: "His legal positions, ... seem to have been rooted, not in any overarching ideology of limited government, but in an intense awareness, based upon long experience, that those who wield the authority of the state are but human actors." Bruce A. Green & Daniel Richman, Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure, 26 ARIZ. ST. L.J. 369, 370 (1994). For a penetrating look at the realities of how federal prosecutors exercise their discretion, especially in relation to interacting with agents, see Daniel Richman, Prosecutors and Their Agents-Agents and Their Prosecutors (forthcoming) (on file with the author).

[FN53] Bagley, 473 U.S. at 696-98 (Marshall, J., dissenting). Justice Marshall illustrated his argument with a "telling example, offered by Judge Newman when he was a United States Attorney."

I recently had occasion to discuss **[Brady]** at a PLI Conference in New York City before a large group of State prosecutors .... I put to them this case: You are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a line-up, and they have said, "This is the man." In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, "This is not the man."

The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said "that is not the man"? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case--the clearest case for **disclosure** of **exculpatory** information! Id. at 697 (citing J. Newman, A Panel Discussion before the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), reprinted in Discovery in Criminal Cases, 44 F.R.D. 481, 500-01 (1968))

[FN54]. See Donald C. Langevoort, Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud, 46 VAND. L. REV. 75, 100-01 (1993) (examining how cognitive conservatism can impede a lawyer's ability to recognize client fraud).

[FN55] Kyles, 514 U S. at 419.

[FN56]. Id. at 439.

[FN57]. As a small sliver of anecdotal evidence, during the year that I served as a Special Assistant United States Attorney, I came across what the Strickler Court would now label "true" Brady evidence on only two occasions (this hindsight assessment assumes, of course, that I am accurately overcoming any cognitive dissonance). In one case, after the exonerating evidence came to light, the charges were dismissed based on a government motion for dismissal. In the other case, the Brady evidence came to light mid-trial and essentially matched the second scenario described above (i.e., I strongly still believed that the defendant was guilty, but I could also see how the evidence might make the jury doubt a key witness's testimony); the defense attorney made effective use of the evidence on cross-examination and the jury hung. During that year, however, I generally did not draw a distinction between "true" and "so-called" Brady, in part because Strickler had not yet been decided, and in part because the section in which I worked strongly endorsed the turning over of any evidence of an exculpatory nature. As a matter of course, therefore, I turned over evidence which we might now term "so- called" Brady evidence but which was not constitutionally compelled. Although beyond the scope of this essay, my observations during that year strongly confirmed the idea that the norms and expectations of a prosecutor's office will influence the behavior of its lawyers beyond the strict letter of the law. Cf. W. Bradley Wendel, Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities, 54 VAND. L. REV. 1955 (2001).

[FN58]. Agurs, 427 U.S. at 108.

[FN59]. Kyles, 514 U.S. at 438.

[FN60]. Id. at 439-40 (citation omitted).

[FN61] United States v. Coppa, 267 F.3d 132, 143 (2d Cir. 2001) (recognizing that the Brady disclosure standard requires "[a]n assessment ... best made after a trial is concluded.").

[FN62]. Kyles, 514 U.S at 439.

[FN63]. United States v. Reyes, 270 F.3d 1158, 1166 (7th Cir. 2001) (quoting Lieberman v. Washington, 128 F 3d 1085, 1092 (7th Cir 1997)).

[FN64]. Smith v. Sec'y of N.M. Dep't of Corr., 50 F.3d 801, 823 (10th Cir. 1995).

[FN65]. 122 S.Ct. 2450 (2002)

[FN66]. Because the Ninth Circuit concluded that Brady applied to plea agreements, it proceeded to find that the government could not lawfully require defendants to waive their right to Brady information. United States v. Ruiz, 241 F 3d 1157, 1167-69 (9th Cir. 2001).

[FN67]. The majority expressly noted in its opinion that the plea agreement in issue had obligated the government to turn over "any information establishing the factual innocence of the defendant" and that the evidence at issue was impeachment evidence. Ruiz, 122 S.Ct. at 2455-56. One possible inference is that Brady might apply to guilty pleas if a plea agreement did not contain a rough equivalent to Brady or if the exculpatory evidence at issue more directly proved the defendant's innocence than impeachment information. Id. at 2457 (Thomas, J., concurring). This possible interpretation led Justice Thomas to write a special concurrence to clarify his view that Brady is "not implicated at the plea stage regardless." Id. See also Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000) (suggesting that Brady may not apply to guilty pleas).

[FN68]. The majority opinion used italics not once but twice in expressing the view that Brady impeachment material relates to "the fairness of a trial, not ... to whether a plea is voluntary." Ruiz, 122 S.Ct. at 2455 "[T]he need for this information is more closely related to the fairness of a trial than to the voluntariness of the plea." Id. at 2457.

[FN69]. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 5:13-:15 (2d ed 2000).

[FN70]. Possible Brady violations can surface in a variety of ways, ranging from an ethical prosecutor learning of a problem and disclosing it, Imbler v. Pachtman, 424 U.S. 409, 413 (1976) (prosecutor revealed newly discovered evidence "from a belief that 'a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented'"), to the defense filing a Freedom of Information Act request, United States v. Bagley, 473 U.S. 667 (1985) (FOIA request uncovered contracts with government witness which contradicted pre-trial claims that no "deals, promises or inducements" had been made).

[FN71]. See, e.g., Kyles, 514 U.S. at 437 The Court's encouragement of voluntary disclosure coupled with its expansive view of what is exculpatory offers defense counsel an opportunity to seize the initiative by filing Brady-Kyles motions specifically requesting evidence that might be exculpatory in their case. Kyles suggests that defense counsel should think broadly, citing evidence like that at issue in Kyles' evidence calling into question the credibility of non-witnesses, internal police documents providing the basis for claiming the police were negligent in their investigation, or evidence comparable to the list of license numbers of the cars in the crime scene's parking lot. See William S. Geimer, Pretrial Kyles, 1998 Annual Criminal Law Seminar (Virginia Trial Lawyers Association) (on file with author). While specific requests are encompassed with Bagley's one-size-fits-all materiality standard, they still are more likely to yield a finding of materiality because they put the prosecutor on notice that the defendant views the information as potentially exculpatory. Bagley, 473 U.S. at 682-83

[FN72]. See generally Robert Hochman, Brady v. Maryland and the Search for Truth in Criminal Trials, 63 U. CHI. L. REV. 1673, 1700-05 (1996).

[FN73]. See, e.g., Wm. Bradford Middlekauff, What Practitioners Say About Broad Criminal Discovery Practice, CRIM JUST , Spring 1994, 14, 55 (stating that seventy-six percent of responding Assistant U.S. Attorneys in a 1984 ABA survey stated that they provide extensive discovery beyond what is required by the Federal Rules of Criminal Procedure and forty-two percent adopt an open- file policy). See also Laurie L Levenson, Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors, 26 FORDHAM URB. L.J. 553, 562-63

(1999) (establishing how prosecutors have ethical obligations to fill in the "gaps" in areas such as discovery).

[FN74] Unless state law provides for a new trial where failure to disclose falls shy of a Brady due process violation, the defendant will not be entitled to a new trial at which he can use the exculpatory evidence. Even the chances of a disciplinary proceeding against the prosecutor for violating the ethics rules are slim. One commentator found that "disciplinary charges have been brought infrequently and meaningful sanctions rarely applied" against prosecutors for violating the ethical rules governing discovery. Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. REV. 693, 697 (1987).

[FN75] Strickler, 527 U.S. at 291.

[FN76]. See Agurs, 427 U.S. at 119 (Marshall, J., dissenting) (stating that the defendant should be entitled to a new trial if he shows "there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.").

[FN77]. Bagley, 473 U.S. at 695-96 (Marshall, J., dissenting).

[FN78]. Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked. By requiring full disclosure of favorable evidence in this way, courts could begin to assure that a possibly dispositive piece of information is not withheld from the trier of fact by a prosecutor who is torn between the two roles he must play. A clear rule of this kind, coupled with a presumption in favor of disclosure, also would facilitate the prosecutor's admittedly difficult task by removing a substantial amount of unguided discretion.
Id. at 698.

[FN79]. Id. at 704 (citing Chapman v. California, 386 U S 18 (1967)). Chapman would require "revers[al] unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial." Id. Justice Marshall acknowledged the criticism that the harmless error standard could be applied so as to make little practical difference, but he believed that by making clear that the duty to disclose extended to "all" favorable evidence and not just "some," his standard would engender greater disclosure. Id. at 705.

[FN80]. Justice Marshall argued that this standard acknowledged that "[n]o prosecutor can know prior to trial whether such evidence will be of consequence at trial; the mere fact that it might be, however, suffices to mandate disclosure." Id. at 702-03.

[FN81] Canada's experience with prosecutorial discovery offers an interesting counter-example to the United **States** Supreme Court's chosen route Canada adheres to a standard of **disclosure** more closely attune to Justice Marshall's approach, requiring "**disclosure** of all relevant information" with relevance being defined as having a reasonable probability that it will be useful to the accused; no distinction, however, is made between inculpatory and **exculpatory** evidence. See Regina v. Stinchcombe [1991] S.C.R. 326. For a defense of the United **States** Supreme Court's "reasonable probability" standard, see Corinne M. Nastro, Strickler v. Greene· Preventing

Injustice By Preserving the Coherent 'Reasonable Probability' Standard to Resolve Issues of Prejudice in **Brady** Violation Cases, 60 MD. L REV. 373 (2001).

[FN82]. Robert C. Post & Reva B. Siegel, Equal Protection by Law Federal Antidiscrimination Legislation After Morrison and Kimel, 110 YALE L.J. 441, 467 (2000); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1218 (1978).

[FN83]. See, e.g., In re an Investigation of W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501 (W. Va. 1993) (relying on Brady to provide system-wide relief where crime lab investigator engaged in widespread misconduct that was not discovered until after numerous trials)

[FN84]. Brady, 373 U.S. at 87.

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APPENDIX "C"

24-JUN CHAMP 49
24-JUN Champion 49
(Cite as: 24-JUN Champion 49)

Champion
June, 2000

Column

***49** WHITE-COLLAR CRIME

Kathryn Keneally [FNa1]

Two Trial Courts Differ on the Requirements for Timely Disclosure of Impeachment Materials

Defense counsel routinely request pretrial disclosure of information and materials that may tend to provide a defense or to exculpate the defendant. In the Southern and Eastern Districts of New York, as I am certain occurs elsewhere, the equally routine answer from the government is that "it is aware of its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny and will comply with them." [FN1]

As part of the routine pretrial disclosure requests, defense counsel will ask for the production of prior statements and impeachment materials of witnesses that the government intends to call at trial. In the Southern and Eastern Districts of New York, the routine answer is that such material will be "supplied sufficiently in advance of their cross-examination to allow defendants to make appropriate use of such statements." [FN2]

The government does not, however, merely ask that defendants and the courts have confidence in the prosecution to determine how far in advance the materials must be produced to permit "appropriate use" by the defense. The government in these districts, certainly as a matter of policy and also as its contention of the law, asserts that the materials need not be produced prior to the time for the production of other materials under the Jencks Act Thus it is the government's position that impeachment material contained in prior statements to government witnesses need not be made available to the defense until after the witness testifies at trial. [FN3] While as a courtesy in some cases, at the government's discretion, or more often with the strong encouragement of the judge who does not wish to see mid-trial delays, impeachment materials might be produced in advance of trial, many prosecutors' offices routinely assert and reserve their purported rights not to do so.

Recently, these routine government responses, and their underlying assumptions, have been subject to increasing challenge. Foremost, NACDL life-member Jay Goldberg set out an articulate, well-reasoned argument against blithely accepting the government's positions in an article in the September/October 1998 issue of The Champion. [FN4] Soon thereafter, in rules effective December 1998, the U.S District Court for the District of Massachusetts

promulgated detailed provisions for automatic disclosure in criminal cases, and specifically required that certain impeachment materials produced no later than 21 days before a scheduled trial. [FN5]

Now, two recent decisions have directly addressed, to opposite results, whether impeachment materials must be produced when timely Brady disclosure is due, or rather may be held back and produced only under Jencks Act deadlines.

Eastern District of New York Holds Impeachment Material Must Be Disclosed Pre- Trial

In United States v. Shvarts, [FN6] the defense requested pretrial disclosure of information that may be used to impeach government witnesses. While promising to provide "'material' impeachment evidence sufficiently in advance of a witness' testimony so as to be of use to the defendant," the government asserted that the defense was mistaken in believing that impeachment materials must be disclosed before trial. [FN7]

The trial judge disagreed: "The Court's reading of the relevant authorities leads it to conclude that it is the government and not the defendants that is mistaken." [FN8]

The court began its analysis with the long-standing rule set out by the Supreme Court in Giglio v. United States [FN9] that evidence affecting the credibility of a witness falls within the rule of Brady. The court further took note of subsequent Supreme Court decisions that "'disavowed any difference between exculpatory and impeachment evidence for Brady purposes." [FN10] The court found these pronouncements to be unambiguous and unequivocal, and squarely grounded on the demands of due process. [FN11]

The court then turned to the government's reasons for resisting the defense's right to the timely disclosure of impeachment materials. The court noted that the government based its "confidently asserted resistence ... [and] seeming justification" ***50** at least in part on "two frequently stated propositions," specifically: "(1) There is 'no general constitutional right to discovery in a criminal case and Brady did not create one'" ... and (2) as a general matter, a defendant has no constitutional right to receive either Brady or Giglio material prior to trial." [FN12] The court took each in turn.

First, the court reiterated that Brady and its progeny create the obligation of the government to disclose exculpatory evidence, including and in particular impeachment evidence, and that the obligation is of constitutional dimension. The court continued: "That constitutional obligation of the government to disclose creates a corresponding right in the accused to receive " [FN13] Thus while the government routinely asserts, and the court in Shvarts acknowledged, that there is no general constitutional right to discovery in criminal cases, the court concluded that "it must also surely be correct to declare that there is a specific constitutional right in the defendant to requested discovery of impeachment and exculpatory evidence favorable to him." [FN14]

As to the second prong of the government's contentions, that the defendant does not have a right to receive Brady or Giglio material in advance of trial, the district court in Shvarts quoted the language of Brady itself: "'A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpated him or reduce the penalty, helps shape a trial that bears heavily on the defendant '" [FN15]

The court then noted that in Weatherford v. Busey, the very case that the government routinely cites for the proposition that there is no general constitutional right to discovery in a criminal case, the Supreme Court also stated that, under Brady, the prosecution has the duty under the due process clause to disclose evidence favorable to the defense "'upon request.'" [FN16]

The court in Shvarts next directly took on the "conflation of Brady and the Jencks Act." [FN17] Section 3500 of Title 18, the Jencks Act provides in part that "no statement or report in the possession of the United States which

was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." [FN18] Reasons given for the enactment of the Jencks Act include concerns for the safety of witnesses and confidentiality interests of the prosecution. [FN19]

The issue, as the Shvarts court identified, is "whether the timing of Brady or the Jencks Act was controlling." [FN20] Conceding that courts are far from unanimous in their view of this issue, and indeed citing a number of district court decisions that have held that witness statements are not required to be produced prior to the time set by the Jencks Act, [FN21] the court in Shvarts nonetheless found that the more persuasive position was that when Brady and Giglio materials are contained in witness statements, they are to be produced on request, prior to trial.

The district court in Shvarts took its reasoning expressly from the decision by the District of Massachusetts in United States v. Snell. [FN22] The court in Snell reasoned that the statutory provisions of the Jencks Act should not be found to supersede the constitutional requirements of decision in Brady and its progeny. [FN23] As the Snell court summarized: "Put otherwise, in seeking to harmonize the Jencks Act and Brady, it makes no sense to indulge in a crabbed interpretation of a constitutional right, like Brady, and an expansive interpretation of a statutory one like Jencks." [FN24] Notably, the court in Shvarts also observed that the Brady decision followed the Jencks Act by some six years. [FN25]

Thus the court in Shvarts held on the motions before it: "As to exculpatory or impeachment evidence, it being the view of the court that the constitutional obligations imposed upon the prosecutor by Brady, Giglio, Agurs and Bagley must prevail over the Jencks Act where the two collide, the government is hereby directed to make such evidence known to the defendants." [FN26]

In apparent recognition of the concerns that originally gave rise to the enactment of the Jencks Act, the court allowed that, if the government believed that immediate disclosure of impeachment evidence might jeopardize witness safety, the court would consider an ex parte application for modification of its order to address those concerns. Quoting United States v. Agurs, the court nonetheless admonished that "'the prudent prosecutor will resolve doubtful questions in favor of disclosure.'" [FN27]

So. District of New York Disagrees, Adheres to the Jencks Act Timetable

Less than two weeks after the decision in Shvarts, a trial judge in the Southern District of New York considered the same issues in United States v. Jacques Dessange, Inc., [FN28] and reached the opposite conclusion.

The defense in Jacques Dessange requested pretrial disclosure of all government witness interviews, regardless of whether the government intended to call the witnesses at trial, and also specifically sought the reports concerning certain individuals that had been employees of the corporate defendant. The court in was made aware of the decision in Shvarts, and summarized that the court in the prior case "reasoned that, since Brady material must be produced 'on demand,' and Giglio material is Brady material, Giglio material must also be produced pretrial if demanded." [FN29]

***51** The court in Jacques Dessange began its analysis with the premise that the government, to meet its Brady obligations, must disclose "sufficient information to the defendant to insure that the defendant will not be denied access to exculpatory evidence known only to the Government." [FN30] The court built on this premise to conclude that the government "may fulfill its Brady obligation by directing the defendant's attention to witnesses who may have exculpatory evidence," and continued by observing that "[o]nce the defendant is made aware of the existence of such witnesses, he may attempt to interview them to 'ascertain the substance of their prospective testimony,' or subpoena them if the Government does not intend to call them as witnesses at trial." [FN31]

Setting aside the obvious problems that witnesses may not make themselves equally accessible to the government and the defense, that indeed the government has been known actively to discourage its witnesses from making themselves available to the defense, and that the government has uniquely persuasive incentives such as immunity, plea bargaining, and grand jury subpoena powers, the Jacques Dessange decision drew a line between exculpatory evidence and impeachment evidence that is not supported by the Supreme Court case law. Thus the court speaks not of material under Brady and Giglio and their progeny, but separately of Brady or Giglio material." [FN32] Concluding that Brady does not require that the requested government reports of witness interviews be turned over as exculpatory evidence, the court only then considered the government's obligations concerning impeachment material.

Accepting the government's contention that witness statements containing potential impeachment material need not be disclosed pretrial, the court in Jacques Dessange flatly stated: "Giglio material is customarily produced in this District with Section 3500 material in recognition of the fact that this type of Brady material does not ordinarily require any independent investigation in order to use it effectively at trial." [FN33] Again, the opinion in Jacques Dessange failed to consider the real world view of the defense.

It may be customary for the local prosecutors to believe that there is a distinction in the pre-trial usefulness of impeachment evidence and other exculpatory material It is not hard for defense counsel, however, to see myriad ways in which access to information that tends to impeach a government witness might be better developed through the type of independent investigation that Brady intended to safeguard, and may be put to more effective use if disclosed before a trial begins rather than after the witness testifies. As Giglio, Bagley, and the other cases that comprise Brady's progeny have repeatedly recognized, impeachment evidence is not a thing different from, but merely a form of, exculpatory evidence And the disclosure of exculpatory evidence, including impeachment evidence, allows the defendant to test the essential truth of the government's charges, including by testing the credibility of the government's witnesses The point, as recognized in Shvarts and given too short shrift in Jacques Dessange, is that the timely disclosure of impeachment material serves both the government and the defense, because it serves due process.

***52 Massachusetts Rules Present A Compromise Worth Considering**

As noted above, effective December 1998, the U.S. District Court for the District of Massachusetts promulgated a set of rules for automatic disclosure in criminal cases. Rule 116.2(B)(2) expressly addresses the disclosure of impeachment material, and requires its production not later than 21 days before the trial date.

Impeachment material is defined to include (a) information that tends to cast doubt on the credibility or accuracy of government witnesses, (b) inconsistent statements by government witnesses concerning the alleged criminal conduct, (c) statements by other persons that are inconsistent with the statements of government witnesses concerning the alleged criminal conduct, (d) information concerning bias or prejudice of a government witness, (e) federal offenses subject to prosecution and known by the government to have been committed by its witnesses, (f) prior conduct of government witnesses that may be admissible to challenge credibility, and (g) information concerning any mental or physical impairment that may cast doubt on the credibility of the government's witnesses. [FN34]

Notably, when the impeachment material is defined to include statements, such as the prior inconsistent statements of the government's witnesses, the pre-trial disclosure obligation may be met by providing "a description of such a statement" rather than the statement itself. [FN35] The Massachusetts local rules also contain express provisions to allow a party to decline to make disclosure if to do so would be "detrimental to the interests of justice," and for motion practice, including possible ex parte review and appropriate protective orders. [FN36] The report of the judicial members of the committee that established the Massachusetts local rules recognized and declined to resolve the issue of whether a court should order pre-trial disclosure of witness statements that might

otherwise be subject to the Jencks Act disclosure requirements [FN37] Rather, through the specific provisions of the local rules, the judges of the District of Massachusetts sought a mechanism to balance the government's proprietary and genuine security interests in its witness's statements and the defendants' need to obtain information in sufficient time to prepare for trial.

Readers with ideas, comments, information, etc. are welcome to contact.

White-Collar Crime

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[FN1]. See, e.g , United States v. Shvarts, 2000 WL 245308, at *6 (E.D.N.Y. March 1, 2000) (Glasser, J.).

[FN2]. See, e.g , United States v Jacques Dessange, Inc., 2000 WL 280050, at *8 (S.D.N.Y. March 14, 2000) (Cote, J.).

[FN3]. See 18 U.S.C. § 3500(a).

[FN4]. Goldberg, Jay, Your Clients' Brady-Giglio Rights Are Not Protected, THE CHAMPION, Sept/Oct 1998 at 41.

[FN5]. See NACDL News: Massachusetts District Court Issues Bold New Federal Discovery Rules, THE CHAMPION, Jan/Feb 1999 at 8.

[FN6]. 2000 WL 245308, at *6 (E.D.N.Y. March 1, 2000).

[FN7] Id. at *6

[FN8]. Id

[FN9]. 405 U.S. 150 (197).

[FN10]. Shvarts, 2000 WL 245308, at *6, quoting Kyles v. Whitley, 514 U.S. 419, 433 (1995); accord United States v. Bagley, 473 U.S. 667 (1985).

[FN11]. Id. at *6-7.

[FN12]. Id. at *7 (citations omitted).

[FN13]. Id.

[FN14]. Id.

[FN15]. Id. at *7, quoting Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

[FN16]. Id. at *7-8, quoting Weatherford v. Busey, 429 U.S. 545, 559 (1977).

[FN17]. Id. at *8.

[FN18]. 18 U S.C. § 3500(a).

[FN19]. Id. at *9. The court in Shvarts briefly traced the history of Section 3500, which was enacted in response to the Supreme Court's decision in Jencks v. United States, 353 U.S. 657 (1957). In the Jencks decision, the Court held that criminal charges must be dismissed when the government refused to comply with an order to permit inspection by the defense of statements and reports concerning government witnesses "touching upon the subject matter of their testimony at trial." Id. at 672.

[FN20]. Id. at *9.

[FN21]. See, e.g., cases cited in Shvarts at *7, 8, 10. The court in Shvarts took care to note that its research had uncovered no case in which the issue was "squarely addressed" by the Second Circuit. The court further noted, however, that in United States v. Leung, 40 F.3d 577, 582 (2d Cir. 1994), the Second Circuit had made the following observation: "It is well established that upon a request by a defendant, the Government has a duty to turn over all material exculpatory evidence in its possession, ... including material impeachment evidence relating to government witnesses." See Shvarts 2000 WL 245308, at *10.

[FN22]. 899 F. Supp. 17 (D. Mass 1995) (Gertner, J)

[FN23]. Id. at 21.

[FN24]. Id. Both Shvarts and Snell also quoted from the decision in United States v. Poindexter, 727 F. Supp. 1470, 1485 (D.D.C. 1989), which stated: "The Brady obligations are not modified merely because they happen to arise in the context of witness statements. The government therefore has the obligation to produce to defendant immediately any exculpatory evidence contained in its Jencks materials, including exculpatory impeachment material."

[FN25]. Shvarts, 2000 WL 245308, at *9.

[FN26]. Id. at *10.

[FN27]. Id., quoting United States v. Agurs, 427 U.S. 97, 108 (1976).

[FN28]. 2000 WL 280050, at *8 (S.D.N.Y. March 14, 2000) (Cote, J.)

[FN29]. Id. at *7. Indeed, the defense teams in Shvarts and Jacques Dessange included at least one common counsel.

[FN30]. Id. at *8.

[FN31]. Id.

[FN32]. Id. at *9 (emphasis added).

[FN33]. Id.

[FN34]. Local Rules for the United States District Court for the District of Massachusetts Concerning Criminal Cases, Rule 116.2(B)(2).

[FN35] Id., Rule 116.2(B)(2)(b) and (c).

[FN36]. Id., Rule 116.6.

[FN37]. Report Of The Judicial Members Of The Committee Established To Review And Recommend Revisions Of The Local Rules Of The United States District Court For The District Of Massachusetts Concerning Criminal Cases, at 6.

END OF DOCUMENT

APPENDIX "D"

Summaries of Successful Cases Under *Brady v. Maryland*

Through July 2001

A PUBLICATION OF THE HABEAS ASSISTANCE AND TRAINING PROJECT

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INTRODUCTION

In the landmark case of Brady v Maryland, 373 U S 83 (1963), the Supreme Court declared that, regardless of the good faith or bad faith of the prosecution, the suppression of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment

In the more than thirty years since the Brady decision, the scope of its mandate has been found to include both direct evidence and impeachment evidence which is favorable to the defendant The duty of disclosure is not limited to evidence in the actual possession of the prosecutor Rather, it extends to evidence in the possession of the entire prosecution team, which includes investigative and other government agencies. Kyles v Whitley, 514 U S 419 (1995), see also Strickler v Greene, 119 S Ct 1936, at n.12 (1999)

A failure on the part of the government to disclose Brady material requires a new trial, or a new sentencing hearing, if disclosure of the evidence creates a reasonable probability of a different result As the Court explained in Kyles, "the adjective is important," and "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U S. at 434

The following summaries catalogue cases which have succeeded under Brady or its progeny This document is divided into the following categories (1) Successful Brady Cases; (2) Cases Remanded on Brady Claims; and (3) Unsuccessful But Instructive Brady Cases.[1]

[1]If you know of other successful Brady cases not included in this document please advise John Blume or Keir Weyble at (803) 765-1044, Mark Olive at (850) 224-0004, or Denise Young at (520) 322-5344

BRADY CASES

CONTENTS

SUCCESSFUL BRADY CASES

UNITED STATES SUPREME COURT

Napue v. Illinois, 360 U.S. 264 (1959). "When reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of immunity deal with witness violates Due Process

Brady v. Maryland, 373 U.S. 83 (1963) Suppression 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 of the prosecution.

Miller v. Pate, 386 U.S. 1 (1967). Habeas granted where prosecution knowingly misrepresented paint-stained shorts as blood-stained, and failed to disclose the true nature of the stains.

Giglio v. United States, 405 U.S. 150 (1972) Government failed to disclose impeachment evidence of a promise of immunity in exchange for testimony Prosecutor's knowing creation of a false impression requires new trial "if there is any reasonable likelihood that the false testimony could have affected the verdict."

Kyles v. Whitley, 514 U.S. 419 (1995). Conviction and death sentence reversed where state withheld eyewitness and informant statements, and a list of license numbers. Withheld evidence is to be evaluated collectively, not item-by-item, and the standard is a "reasonable probability" of a different result. The Court also made clear that "the individual 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." 514 U.S at 437

UNITED STATES COURTS OF APPEALS

Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) In A W I K and unauthorized use of automobile case, wherein defendant's gun was offered for ID purposes only and several witnesses made partial ID of gun as being used in shooting, reports of ballistics and fingerprint tests made by police, which tended to show that different gun was used and to exculpate defendant, were relevant and prosecution should have disclosed their existence

United States ex rel. Thompson v. Dye, 221 F.2d 763 (3rd Cir.), cert. denied, 350 U.S. 815 (1955) Conviction reversed where state failed to inform defense counsel that arresting officer smelled alcohol on defendant at the time of arrest Absent state's deceit, jury may have believed defendant's physical and mental state evidence

Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966) Claim for relief based on breach of prosecutor's duty to disclose is not dependent on whether a more able, diligent or fortunate counsel might possibly have discovered the evidence on his own

Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968) In racial misidentification case, failure of prosecutor to reveal misidentification requires reversal even though defense counsel had name and address of the witness

United States ex. rel. Raymond v. Illinois, 455 F.2d 62 (7th Cir. 1972), cert. denied, 409 U.S. 885 (1972). Defendant entitled to new trial even though exculpatory evidence had been revealed to defendant himself, but not to defense counsel

United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973), overruled on other grounds, United States v. Henry, 749 F.2d 203 (5th Cir. 1984) Prosecution found to be in possession of information which was in the files of the Postal Service. Availability of information is not measured by how difficult it is to get, but simply whether it is in possession of some arm of the state

United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974) Convictions reversed where defendants were deprived of all evidence of promise of leniency by prosecutor, and prosecutor failed to disclose that witness was in other trouble, thereby giving him even greater incentive to lie

Washington v. Vincent, 525 F.2d 262 (2nd Cir. 1975), cert. denied, 424 U.S. 934 (1976) Conviction reversed where key prosecution witness lied about his deal with the state, and prosecutor took no action to correct what he knew was false testimony This case was reversed despite the fact that there was evidence that the defendant and his counsel knew of the perjury as it happened but took no steps to object

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 testimony and compounded the violation by arguing to the jury that the witness had no reason to lie

Norris v. Slayton, 540 F.2d 1241 (4th Cir. 1976). Habeas granted where state failed to furnish to rape defendant's counsel copy of lab report showing no hair or fiber evidence in defendant's undershorts or in victim's bed.

Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976), cert. denied, 430 U.S. 959 (1977) Petitioner prejudiced where prosecutor failed to disclose deal with accomplice/witness for leniency. Prosecutor knew or should have known that false evidence was being presented where witness denied deal at trial.

United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976) Reversed where prosecutor concealed evidence that key prosecution witness was coerced into testifying against defendant, and then went on to falsely assure the jury that no one had threatened the witness.

Annunziato v. Manson, 566 F.2d 410 (2nd Cir. 1977) Habeas granted where one of two key prosecution witnesses testified falsely that he received no promise of leniency when in fact he had made a deal to avoid prison on pending charges, and prosecutor knew or should have known of this fact.

United States v. Butler, 567 F.2d 885 (9th Cir. 1978) New trial required where government failed to disclose whether the witness had been promised a dismissal of the charges against him, and the witness testified falsely in this regard The standard is whether the false testimony could in any reasonable likelihood have affected the judgment of the jury.

Jones v. Jago, 575 F.2d 1164 (6th Cir. 1978), cert. denied, 439 U.S. 883 (1978). Habeas granted under Brady and Agurs where state withheld, despite defense request, a statement from coindictee who, prior to trial, had been declared material witness for prosecution, and against whom all charges were then dropped. State's claim that witness' statement made no express reference to defendant and was therefore neutral was unsuccessful.

United States v. Beasley, 576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Conviction reversed due to failure of government to timely produce statement of key prosecution witness where not only was the witness critical to the conviction, but defense and prosecution argued his credibility at length, and the statement at issue differed from witness' trial testimony in many significant ways

United States v. Herberman, 583 F.2d 222 (5th Cir. 1978) Testimony presented to grand jury contradicting testimony of government witnesses was Brady material subject to disclosure to the defense.

Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979) Where co-defendant denied existence of agreement with prosecution during testimony, prosecution had a duty to correct. Jury was entitled to know about it and prosecution's deliberate deception was fundamentally unjust

United States v. Antone, 603 F.2d 566 (5th Cir. 1979), cert. denied, 446 U.S. 957 (1980) For Brady analysis, no distinction is drawn between different agencies under the same government --- all are part of the "prosecution team "

Monroe v. Blackburn, 607 F.2d 148 (5th Cir. 1979) Armed robbery conviction reversed where, despite specific request by defendant, prosecutor withheld a statement given by the victim to police which could have been useful in attacking victim's testimony at trial Because the request was specific, the standard of review was "no reasonable likelihood that evidence would have affected judgment of the jury."

United States v. Gaston, 608 F.2d 607 (5th Cir. 1979). Reversed where trial court failed to conduct an in camera review of Brady material despite defendant's request for specific documents relating to interviews of two named witnesses, no evidentiary hearing was conducted, nor were the documents produced. The reports were sought not only for impeachment, but for substantive exculpatory use.

DuBose v. Lefevre, 619 F.2d 973 (2nd Cir. 1980). Reversed where state encouraged witness to believe that favorable testimony would result in leniency toward the witness Failure to disclose was not justified by fact that promise of state had not taken a specific form. Questions about a deal arose during examination of the witness, but nothing about the deal was disclosed

Martinez v. Wainwright, 621 F.2d 184 (5th Cir. 1980). Brady violated where state prosecutor was unaware that FBI rap sheet was in possession of the medical examiner.

United States v. Auten, 632 F.2d 478 (5th Cir. 1980) Prosecutor's lack of knowledge of witness's criminal record was no excuse for Brady violation.

Chavis v. North Carolina, 637 F.2d 213 (4th Cir. 1980) Conviction reversed where prosecution suppressed an amended statement by a key witness, information concerning the witness's favorable treatment by authorities, and records of the witness's mental deficiencies

United States v. Muse, 708 F.2d 513 (10th Cir. 1983) Prosecutor must produce Brady material in personnel files of government agents even if they are in possession of another agency

Anderson v. State of South Carolina, 709 F.2d 887 (4th Cir. 1983). Conviction reversed where prosecution withheld police reports despite general and specific requests from defense counsel, and failed to furnish autopsy reports upon counsel's request There is no general "public records" exception to the Brady rule.

United States v. Holmes, 722 F.2d 37 (3rd Cir. 1983) District court abused its discretion by denying defendant's request for adjournment to permit counsel to complete examination of Jencks Act material, which was a stack of paper at least eight inches thick provided on the morning of the day before trial

Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984), cert. denied, 469 U.S. 1090 (1984) Conviction affirmed but death sentence reversed where evidence, admissible under Eddings, which contradicted prosecution's theory of the murder and placed defendant 110 miles from the scene, was withheld by prosecution

Carey v. Duckworth, 738 F.2d 875 (7th Cir. 1984) Prosecution cannot avoid Brady by keeping itself ignorant or compartmentalizing information about different aspects of the case

United States v. Alexander, 748 F.2d 185 (4th Cir. 1984), cert. denied, 472 U.S. 1027 (1985) Government's equivocation in making critical factual representations to defense counsel and to district court regarding its possession of Brady materials requested in connection with new trial motion fatally compromised integrity of proceedings on the motion so that district court's denial of the motion could not stand.

Walter v. Lockhart, 763 F.2d 942 (8th Cir. 1985), cert. denied, 478 U.S. 1020 (1986) State held, for over twenty years, a transcript of a conversation tending to exculpate the defendant insofar as it supported his claim that the cop shot at him first

United States v. Fairman, 769 F.2d 386 (7th Cir. 1985) Prosecutor's ignorance of existence of ballistic's worksheet indicating gun defendant was accused of firing was inoperable does not excuse failure to disclose

Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985). Brady violated where prosecution, after a specific request, suppressed initial statement of eyewitness to police in which he said he could not make an ID because he never saw the murderer's face His story changed after he found out there was a reward.

Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986) Habeas granted under Giglio where prosecution allowed its key witness to testify falsely, failed to correct the testimony, and exploited it in closing argument. Standard is whether false testimony could in any reasonable likelihood have affected the judgment of the jury

United States v. Severdija, 790 F.2d 1556 (11th Cir. 1986). Written statement defendant made to coast guard boarding party should have been disclosed under Brady, and failure to disclose warranted new trial. The statement tended to negate the defendant's intent, which was the critical issue before the jury.

Bowen v. Maynard, 799 F.2d 593 (10th Cir. 1986), cert. denied, 479 U.S. 962 (1986) Violation where prosecution failed to disclose that they considered Crowe a suspect when Crowe better fit the description of eyewitnesses, was suspected by law enforcement in another state of being a hit man, and carried the same weapon and unusual ammunition used in the murders This met even the strictest standard under Agurs

Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987), cert. denied, 481 U.S. 1054 (1987) Whether a key prosecution witness was incarcerated at the time of his testimony against a capital defendant, or had been promised immunity for his testimony, would be material if not disclosed

Carter v. Rafferty, 826 F.2d 1299 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988) Lie detector reports of test given to important prosecution witness were material where witness' testimony was the only direct evidence placing petitioner at scene of crime. Fact that other contradictory statements of the witness had been disclosed did not remove the "materiality" of the lie detector results

Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987) Court recognized defense counsel's error in failing to cite Giglio as authority to cross-examine witness about promise of immunity in context of IAC claim

Miller v. Angliker, 848 F.2d 1312 (2nd Cir. 1988), cert. denied, 488 U.S. 890 (1988) Habeas granted where state withheld evidence which indicated that another person had committed the crimes with which defendant was charged. Same standard for Brady claim evaluation applies for defendant who pled not guilty by reason of insanity as for defendant who pled guilty

United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989) Information in government witness' probation file was relevant to witness' credibility and should have been released as Brady material Criminal record of witness could not be made unavailable by being part of probation file District court's failure to release these materials required reversal

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) [*Civil case*] While Brady does not require police to keep written records of all their investigatory activities, attempts to circumvent the rule by keeping records in clandestine files deliberately concealed from prosecutors and defense, which contain exculpatory evidence, cannot be tolerated

McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988), cert. denied, 489 U.S. 1033 (1989). Black defendant's due process rights violated where state suppressed key witness's initial statement that attacker was white and prosecutor added to the deception at trial by allowing witness to testify that she "had always described her attacker as a black man."

United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989), cert. denied, 493 U.S. 858 (1989) Prosecutor is deemed to have knowledge of everything in the investigation of defendant.

United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989) Impeachment evidence which was withheld would have allowed defendant to challenge evidence presented as to amount of narcotics sold, was material to sentencing and required remand for new sentencing hearing

Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989) Prosecution's failure to inform defense that key witness had applied for commutation and been scheduled to appear before parole board a few days after

his testimony required reversal Violation was compounded by prosecution's statement to the jury that the witness had no possible reason to lie

United States v. Tincher, 907 F.2d 600 (6th Cir. 1989) "Deliberate misrepresentation" where prosecutor withheld grand jury testimony of cop, after defense requested any Jencks Act or Brady material and prosecutor responded that none existed. Convictions reversed.

United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990) Government's failure to disclose Brady material required new trial where drug transaction records would have aided cross-exam of key witness.

United States v. Tincher, 907 F.2d 600 (6th Cir. 1990) Prosecutor's response to Jencks Act and Brady request was deliberate misrepresentation in light of knowledge of testimony of government agent before grand jury. Reversal was required since misconduct precluded review of the agent's testimony by the district court.

Campbell v. Henman, 931 F.2d 1212 (7th Cir. 1991) Inmates do not forfeit right to exculpatory material before disciplinary proceeding simply because they forego option of assistance of staff representative who would have access to such material.

Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991) Due process violated by state's failure to disclose long criminal record of, and deals with, state's chief witness where evidence against defendant came almost entirely from this witness

Jean v. Rice, 945 F.2d 82 (4th Cir. 1991) Audio tapes and reports relating to hypnosis of rape victim and investigating officer were material under Brady, and should have been disclosed to defense where they had strong impeachment potential and could have altered case.

Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991) Brady violated where prosecutor knew her theory of the case was wrong but misled the jury to think the opposite was true through her presentation of testimony.

Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992). Brady violated where state failed to disclose statements of witness to polygraph examiner which contradicted her trial testimony

United States v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992). New trial ordered on basis of Brady violation where prosecution failed to disclose results of a pre-trial psychiatric evaluation of defendant which would have fundamentally altered strategy and raised serious competency issue.

United States v. Minsky, 963 F.2d 870 (6th Cir. 1992) Government improperly refused to disclose statements of witness that he did not make at trial Disclosure could have resulted in loss of credibility with jury based on false statements to FBI.

United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992) Prosecution's Brady obligation extends to search of files in possession of police department and internal affairs division

Walker v. City of New York, 974 F.2d 293 (2nd Cir. 1992), cert. denied, 113 S.Ct. 1387 (1993) In a §1983 action, plaintiff's complaint alleging failure of the municipality to train its assistant DA's on fulfilling Brady obligations, with result that the DA's suppressed impeachment evidence and failed to reveal lineup misidentification, was sufficient to state a claim against the municipality

Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) State obliged to turn over to petitioner any exculpatory semen evidence for use in federal habeas proceeding in which petitioner sought to overcome state procedural default through miscarriage of justice exception, for colorable showing of actual innocence, and duty was not extinguished by petitioner's failure to argue existence of such obligation in district court; due to obvious exculpatory nature of semen evidence in sexual assault case, neither specific request nor claim of right by petitioner was required to trigger duty of disclosure.

Hudson v. Whitley, 979 F.2d 1058 (5th Cir. 1992) Habeas petitioner, in fourth petition, claimed that state suppressed crucial evidence that its only eyewitness had originally identified a third party, and that third party had been arrested. Petitioner demonstrated "good cause" because state failed to disclose the info despite repeated requests

United States v. Gregory, 983 F.2d 1069 (6th Cir. 1992) (unpublished). Government suppressed audio from a videotape of marijuana plants being destroyed The information in the audio would have significantly reduced defendant's sentence. This was a Brady violation

United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1992) Where government failed to disclose agreement with potential witness and later request for missing witness instruction was denied because counsel was unaware of the agreement, Brady required disclosure

United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993). Brady violation where government failed to disclose memo indicating that informant lied to DEA, had undue influence over DEA agents, and thwarted investigation of evidence crucial to his credibility

Ballinger v. Kerby, 3 F.3d 1371 (10th Cir. 1993). Failure to produce exculpatory photograph, which would have undermined co-defendant's already flimsy credibility, violated Due Process.

United States v. Kalfayan, 8 F.3d 1315 (9th Cir. 1993) Where defense counsel had made Brady request about whether key witness had signed cooperation agreement, and later request for missing witness instruction foundered because defense counsel did not know of the deal, Brady required government to disclose its existence

United State v. Udechukwu, 11 F.3d 1101 (1st Cir. 1993) New trial granted to remedy prosecutorial

misconduct of failing to disclose salient information concerning defendant's theory that she had been coerced into being a drug courier Prosecutor argued during closing that there was no evidence to support defendant's claim when in fact he knew that source defendant named existed and was a prominent drug trafficker

Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1994), cert. denied, 115 S.Ct. 295 (1994) Prosecutorial misconduct where government attorneys failed to disclose to defendant and court exculpatory materials during denaturalization and extradition proceedings of alleged "Ivan the Terrible " They acted with "reckless disregard "

United States v. Young, 17 F.3d 1201 (9th Cir. 1994) New trial granted where detective's testimony regarding location of incriminating notebooks was false, regardless of whether government presented the evidence unwittingly Reasonable probability existed that result would have been different absent the false testimony, which was highly prejudicial in light of government's otherwise weak case.

United States v. Kelly, 35 F.3d 929 (4th Cir. 1994) Kidnapping conviction reversed where government failed to furnish an affidavit in support of an application for a warrant to search key witness's house just before trial, and failed to disclose a letter written by same witness which would have seriously undermined her credibility.

United States v. Robinson, 39 F.3d 1115 (10th Cir. 1994). District court did not abuse discretion in ordering new trial where, in violation of Brady, government failed to disclose evidence tending to identify former codefendant as drug courier; conviction was based largely on testimony of codefendants and defendant had strong alibi evidence.

United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995). Failure of prosecutor to correct representations he made to the jury which were damaging to defendant's duress defense, despite having learned of their falsehood during the course of the trial, was Brady violation and required granting of new trial motion.

Smith v. Secretary of New Mexico Dept. of Corrections, 50 F.3d 801 (10th Cir. 1995), cert. denied, 116 S.Ct. 272 (1995) Habeas granted where material evidence relating to a third person/suspect was not disclosed, prosecutor's lack of actual knowledge was irrelevant because police knew, and prosecution's "open file" was not sufficient to discharge its duty under Brady.

Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995) Habeas granted to capital murder petitioner where failure of prosecution to disclose to defendant that another individual had been arrested for the same crime violated defendant's right to a fair trial

United States v. Boyd, 55 F.3d 239 (7th Cir. 1995) Trial court did not abuse discretion by granting new trial based on government's failure to reveal to defense either drug use and dealing by prisoner

witnesses during trial or "continuous stream of unlawful" favors prosecution gave those witnesses.

United States v. O'Connor, 64 F.3d 355 (8th Cir. 1995), cert. denied, 116 S.Ct. 1581 (1996) Brady violation occurring when government failed to inform defendant of threats by one government witness against another and attempts to influence second government witness' testimony was reversible error with respect to convictions on those substantive drug counts and conspiracy counts where testimony of those government witnesses provided only evidence, evidence of threats, combined with undisclosed statements from interview reports, could have caused jury to disbelieve government witnesses.

United States v. David, 70 F.3d 1280 (9th Cir. 1995) (unpublished). New trial ordered where defendant had been convicted of operating a continuing criminal enterprise solely on the strength of testimony of two prisoners serving life sentences in the Philippines. Subsequent to the conviction, these two prisoners were released, and defendant discovered previously undisclosed evidence of a deal between the government and the two prisoners

Spencer v. Klauser, 70 F.3d 1280 (9th Cir. 1995) (unpublished). Habeas case attacking guilty plea to child molestation charges remanded for evidentiary hearing where substantial evidence tended to show that medical reports indicating no signs of sexual abuse existed at time of plea but were not disclosed by the state This nondisclosure, coupled with defendant's questionable mental competency created the danger of a guilty plea by an innocent man, and further inquiry was required.

United States v. Lloyd, 71 F.3d 408 (D.C.Cir. 1995) Defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to new trial where prosecution (1) withheld, without wrongdoing, tax return of defendant's client for year which defendant did not prepare returns; and (2) failed to disclose prior tax returns for four of defendant's clients The first item would probably have changed the result of the trial, and the second group of items were exculpatory material evidence

United States v. Smith, 77 F.3d 511 (D.C.Cir. 1996) Dismissal of state court charges against prosecution witness, as part of plea agreement in federal court, was material and should have been disclosed under due process clause, even though prosecutor disclosed other dismissed charges and other impeachment evidence was thus available, and whether or not witness was intentionally concealing agreement Armed with full disclosure, defense could have pursued devastating cross-exam, challenging witness' assertion that he was testifying only to "get a fresh start" and suggesting that witness might have concealed other favors from government.

United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996) Undisclosed evidence that prosecution witness, who testified that defendant paid him to keep drugs in his apartment, had previously lied under oath in proceeding involving same conspiracy was material where witness was impeached on basis that he was a cocaine addict and snitch, but not on basis of perjury, and where his testimony provided only connection between defendant and drugs found in witness' apartment

Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996). Grant of habeas relief affirmed where district court made detailed, legally relevant factual findings indicating that police had intimidated key witnesses to murder of police officer and failed to disclose material information regarding who was seen carrying the murder weapon moments after the shooting

United States v. Sebring, 44 M.J. 805 (N.M.Ct.Crim.App. 1996) [MILITARY] Under Kyles, prosecutor's obligation to search for favorable evidence known to others acting on the government's behalf extends to information concerning levels of quality control at government's controlled substances testing laboratory. Failure of prosecuting officer to discover and disclose report indicating that laboratory had experienced significant quality control problems required reversal of defendant's conviction.

United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996) New trial ordered where prosecution failed to disclose information indicating that its key witness, an informant, was involved in two different illegal transactions around the time he was working as a CI, and that the informant owed the defendant money, thus giving him incentive to send the defendant to prison Although the prosecutor did not know about the exculpatory information until months after the trial, nondisclosure to the defense of this material evidence required a new trial

United States v. Pelullo, 105 F.3d 117 (3rd Cir. 1997) Denial of '2255 motion reversed where government failed to disclose surveillance tapes and raw notes of FBI and IRS agents The notes contained information supporting defendant's version of events and impeaching the testimony of the government agents, who provided the key testimony at defendant's trial for wire fraud and other charges.

Duran v. Thurman, 106 F.3d 407 (9th Cir. 1997) (unpublished). Habeas corpus relief granted where state prosecutor told murder defendant's counsel that charges against state's key witness had been dismissed, when witness actually had a pending misdemeanor charge. The court rejected the state's contention that defense counsel should have known about the pending charge, stating counsel was entitled to believe the prosecution's representations to be truthful. The undisclosed charge was material because the witness provided the only testimony contradicting petitioner's theory of self-defense, and his credibility would have been lessened had the jury known that charges were pending against him

United States v. Fisher, 106 F.3d 622 (5th Cir. 1997) New trial ordered where government failed to disclose FBI report directly contradicting testimony of a key government witness on bank fraud charge Because the witness' credibility was crucial to the government's case, there was a reasonable probability that the result would have been different if the report had been disclosed

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997). Conviction and death sentence reversed where prosecution withheld from defense the Department of Correction file of the state's star witness Because the witness had a long criminal history, the prosecution had the duty to turn over all information bearing on his credibility The DOC file contained not only information that the witness had a long history of burglaries (the crime the witness was now blaming on the defendant), but also that he had a long history

of lying to the police and blaming others to cover up his own guilt

United States v. Frost, 125 F.3d 346 (6th Cir. 1997). Reversal required where government represented to defense that the substance of a witness' testimony would be adverse to the defendant, but in fact the testimony would have been exculpatory

United States v. Vozzella, 124 F.3d 389 (2nd Cir. 1997). Conviction for conspiring to extend extortionate loans reversed where prosecution presented false evidence and elicited misleading testimony concerning that evidence which was vital to prove a conspiracy

East v. Johnson, 123 F.3d 235 (5th Cir. 1997). Death sentence reversed where prosecution failed to disclose the criminal record of key witness used to establish future dangerousness with testimony that the defendant had raped and robbed her. If this witness' prior record had been disclosed, defense would have discovered a mental competency evaluation which reflected that the witness suffered from bizarre sexual hallucinations. District court erred in applying a sufficiency of the evidence test rather than considering whether impeachment of the witness would have undermined the jury's sentencing recommendation.

Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997). Defendant was convicted of murder and sentenced to death for the killing of a fellow prison inmate Conviction reversed when prosecution failed to disclose an internal prison memo generated the day of the incident which indicated that someone saw a second inmate commit the murder. While the defendant did present other inmates to testify at trial that this second inmate committed the murder, the prosecution argued that these witnesses were not believable because the person they were implicating was "conveniently dead," thus the outcome of the proceeding was sufficiently undermined

Singh v. Prunty, 142 F.3d 1157, 1161-1162 (9th Cir. 1998) The court granted habeas relief in this murder for hire case on the ground that the prosecution violated Brady by failing to disclose an agreement with its star witness, pursuant to which the witness avoided prosecution on several charges, and received significantly reduced sentences on other charges. The undisclosed information was material, in the court's view, because "[i]t is likely the jury had to believe [the witness'] testimony in order to believe the prosecution's theory For these reasons, [the witness] was the key witness who linked [petitioner] to the murder-for-hire scheme," and his "credibility was vital to the prosecution's case "

United States v. Service Deli, Inc., 151 F.3d 938, 943-944 (9th Cir. 1998) The court reversed the defendant government contractor's conviction for filing a false statement with the United States Defense Commissary Agency because the government failed to disclose notes taken by one of its attorneys during an interview with the state's most important witness The notes contained "three key pieces of information" useful in impeaching the witness· (1) the witness' story had changed; (2) the change may have been brought on by the threat of imprisonment, and (3) that the witness explained his inconsistent stories by claiming that he had suffered "a stroke which affected his memory " This information was material, the

court explained, because "the government's entire case rested on [the] testimony" of the witness who was the subject of the undisclosed notes, and that witness' credibility "essentially was the only issue that mattered " Finally, the court rejected the government's contention that the undisclosed impeachment evidence was merely cumulative because the defendant had gone into the same areas on cross examination of the witness The court explained "It makes little sense to argue that because [defendant] tried to impeach [the witness] and failed, any further impeachment evidence would be useless. It is more likely that [defendant] may have failed to impeach [the witness] because the most damning impeachment evidence in fact was withheld by the government "

Seiber v. Coyle, 1998 WL 465899 (6th Cir. July 27, 1998) (unpublished) The court granted relief on petitioner's claim that the state violated Brady in two instances. The first violation resulted from the state's failure to disclose that a member of the prosecution team had promised one of two key witnesses that his probation would be transferred to another jurisdiction after his testimony against petitioner. The second violation arose out of the state's nondisclosure of a preliminary crime scene report indicating that the perpetrator of the burglary for which petitioner was later convicted was approximately half petitioner's age, and that no other information identifying the perpetrator was known. The contents of this report sharply contradicted the testimony of the prosecution's only other key witness, a police officer who described the perpetrator in minute detail at trial, and identified petitioner as fitting the description.

United States v. Mejia-Mesa, 153 F.3d 925, 929 (9th Cir. 1998) The court reversed the district court's denial of §2255 relief and remanded for an evidentiary hearing to determine whether petitioner had procedurally defaulted his claim "that the government withheld, suppressed or destroyed a page or pages from the deck log of .. the vessel carrying the cocaine [which formed the basis of one of petitioner's convictions]," and if so, whether he could show cause and prejudice sufficient to overcome the default.

United States v. Scheer, 168 F.3d 445 (11th Cir. 1999). The court granted relief in this bank fraud case on the ground that the government violated Brady by failing to disclose that the lead prosecutor in the case had made a statement to a key prosecution witness, who was himself on probation as a result of a conviction arising out of the same set of facts, "that reasonably could be construed as an implicit -- if not explicit -- threat regarding the nature of [the witness'] upcoming testimony . ." 168 F 3d at 452 In granting relief, the court made clear that, to succeed, the appellant was not required to prove that the witness actually changed his testimony as a result of the prosecutor's threat, nor was he required to establish that, had evidence of the threat been disclosed, the remaining untainted evidence would have been insufficient to support his conviction.

Schledwitz v. United States, 169 F.3d 1003, 1014-1015 (6th Cir. 1999) The government violated Brady by failing to disclose that its key witness, who was portrayed as a neutral and disinterested expert during petitioner's fraud prosecution, had for years actually been actively involved in investigating petitioner and interviewing witnesses against him In granting relief, the court noted that, although "[t]aken individually, none of the [undisclosed evidence, which included items other than the nature of the expert's involvement] would appear to raise a 'reasonable probability' that [petitioner] was denied a fair trial," this

evidence, viewed collectively, entitled petitioner to relief

Crivens v. Roth, 172 F.3d 991, 996-999 (7th Cir. 1999). The Seventh Circuit granted relief in this non-capital murder case on the ground that the state violated Brady by failing to disclose the entire criminal record of its key witness In so holding, the court rejected the state's contention that no Brady violation occurred because the nondisclosure was not deliberate, but was instead a result of the witness having used aliases, thereby making parts of his criminal record more difficult to locate. The court reasoned: "Criminals often use aliases, but the police are able to link the various names to a single individual through a variety of means If the state indeed asked for the criminal history records . , we find it difficult to accept that the Chicago Police Department had not or could not have discovered [that the witness had been arrested under more than one name]." The court further concluded that, in light of the witness' demonstrated propensity to lie, the fact that petitioner had been afforded an opportunity to question him concerning his criminal record was not enough to render the state's nondisclosure immaterial. Finally, the court characterized the state's failure to disclose the witness' record in the face of a direct request and a court order "inexcusable," and concluded that "[t]he atmosphere created by such tactics is one in which we highly doubt a defendant whose life or liberty is at stake can receive a fair trial."

Love v. Freeman, 1999 WL 671939 (4th Cir. Aug. 30, 1999) (unpublished). The Fourth Circuit granted federal habeas corpus relief in this North Carolina child sexual assault case, finding that the state violated Brady by failing to disclose. evidence that the alleged victim twice denied she had been sexually abused, numerous inconsistencies in the alleged victim's account of the sexual assault, evidence of the alleged victim's "perhaps pathological lying history" and self-destrcutive and attention-seeking behavior; a tape recording and transcript of a social worker's interview of the alleged victim, during which the social worker utilized suggestive interviewing techniques and supplied the alleged victim with information that subsequently became part of her story; complete records of the alleged victim's hymenal examination, information suggesting the alleged victim's mother ceased supporting petitioner's claim of innocence as a result of coercion by the department of social services; and information indicating that the alleged victim had previously been raped by two boys

Spicer v. Roxbury, 194 F.3d 547, 558-560 (4th Cir. 1999) A majority of the Fourth Circuit panel affirmed the district court's grant of habeas relief in this post-Act, non-capital habeas case from Maryland. The majority agreed with the district court's conclusion that the prosecutor violated Brady v. Maryland by failing to appreciate and disclose to the defense a serious discrepancy between the descriptions of a key witness' knowledge as told to the prosecutor by the witness himself, and as told to the prosecutor by the witness' lawyer, who had contacted the prosecutor about the witness' knowledge in hopes of working out a plea deal While the witness told his lawyer several times that he had not seen petitioner on the day petitioner allegedly attacked a bar owner, and the lawyer communicated this information to the prosecutor, the witness himself subsequently told the prosecutor, and later petitioner's jury, that he had seen petitioner on the day of the attack, and that petitioner was running away from the crime scene while being chased by an employee of the victim's restaurant.

White v. Helling, 194 F.3d 937, 945-946 (8th Cir. 1999) The Eighth Circuit granted relief in this 27 year old robbery/murder case due to the state's nondisclosure of several documents strongly suggesting that a witness whose testimony severely undermined petitioner's defense of coercion had initially identified someone other than petitioner as the person who took his wallet during the crime, and that the witness had been coached to such an extent that, had the evidence been revealed earlier, the trial might have excluded the witness' testimony altogether.

Nuckols v. Gibson, 233 F.3d 1261 (10th Cir. 2000) The Tenth Circuit granted relief in this Oklahoma capital case, finding that the state failed to disclose material evidence impeaching a key prosecution witness The undisclosed evidence indicated that the witness – a deputy sheriff whose testimony provided the only support for the admissibility of petitioner's confession, which itself was the only piece of evidence linking petitioner to the crime – had been strongly suspected of stealing from the sheriff's office, and had been tangentially involved in a second murder, for which petitioner was also under arrest at the time of his confession. The evidence was impeaching and material because it would have allowed petitioner to raise questions about the witness' motivation for testifying that petitioner reinitiated questioning which led to his confession, thereby turning what had been a close credibility contest between petitioner and the witness in petitioner's favor, and securing the suppression of petitioner's confession.

Paradis v. Arave, 240 F.3d 1169 (9th Cir. 2001) The Ninth Circuit affirmed the district court's grant of relief in this former Idaho capital case (death sentence commuted to life) on petitioner's claim that the state violated Brady v Maryland by failing to disclose a prosecutor's notes taken at a meeting with law enforcement and the medical examiner. The notes contained, among other things, information regarding the condition of the victim, time of death, and the medical examiner's opinions based on that information, all of which would have been useful to petitioner in impeaching the medical examiner's testimony indicating that the victim died in Idaho, rather than in Washington. If successful, this would have negated Idaho's jurisdiction to prosecute petitioner for murder

United States v. Ruiz, 241 F.3d 1157, 1165 (9th Cir. 2001) In the course of remanding petitioner's case for an evidentiary hearing on a related sentencing issue, the Ninth Circuit held that "a defendant's right to receive undisclosed Brady material cannot be waived through a plea agreement and that any such waiver is invalid."

Finley v. Johnson, 243 F.3d 215 (5th Cir. 2001) In this Texas kidnapping case, petitioner made a sufficient showing of actual innocence to permit him to overcome procedural default of his Brady claim by showing that the Brady material in his case – evidence that a restraining order was issued against his kidnapping victim two days after the kidnapping – was highly probative of petitioner's defense of "necessity," because it supported his claim that his actions were immediately necessary to protect others from being harmed by the kidnapping victim, and if accepted by the jury, would have resulted in petitioner's acquittal

Boyette v. LeFevre, 246 F.3d 76, 93 (2nd Cir. 2001) The Second Circuit reversed the district court's

denial of relief in this New York robbery, arson and attempted murder case, finding that the prosecution violated Brady in failing to disclose several documents The prosecution's case rested solely on the victim's identification of petitioner, the credibility of which was bolstered at trial by the victim's claim that she recognized her attacker immediately. The undisclosed documents revealed that the victim had not, in fact, identified the perpetrator immediately, and tended to undermine the credibility of her memory by contradicting her claim that her attacker had smeared some type of fire accelerant on her face Petitioner's first trial ended when the jury hung 9-3 in favor of acquittal, and his defense at both trials centered on a relatively strong alibi supported by the testimony of multiple witnesses who placed petitioner out-of-state at the time of the crime The court summed up its conclusion that petitioner was entitled to relief as follows: "Because this very close case depended solely on [the victim's] credibility, the [state appellate court] applied Kyles in an objectively unreasonable way when it concluded – without any analysis – that [petitioner] was not prejudiced."

Leka v. Portuondo, ___F.3d___, 2001 WL 789080 (2nd Cir. July 12, 2001). In this non-capital New York murder case, the Second Circuit granted relief, finding that the prosecution's failure to disclose the name of a crucial eyewitness with information favorable to the defense "until three business days before trial," and failure to disclose the substance of the witness' knowledge at all, violated Brady Petitioner was convicted strictly on the questionable testimony of two eyewitnesses, each of whom gave post-trial statements recanting, to varying degrees, their identifications of petitioner. The suppressed evidence consisted of the eyewitness account of an off-duty police officer, who saw the shooting from above, and gave an account which differed in important respects from that of the witnesses who testified at trial. In finding the suppressed evidence "material," the Second Circuit observed that "[i]t is likely that [the witness'] testimony at trial would have had seismic impact " And in concluding that the prosecution suppressed the information notwithstanding the fact that it disclosed the witness' name three days before trial, the court explained that "the prosecution failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use "

UNITED STATES DISTRICT COURTS

Hernandez v. Nelson, 298 F.Supp. 682 (N.D.Cal. 1968), aff'd, 411 F.2d 619 (9th Cir. 1969) Habeas granted where defendant denied culpability in illegal sale of heroin, informer was material witness on issue of defendant's guilt, and prosecution knowingly engaged in conduct which permitted informer to be unavailable at time of trial.

Imbler v. Craven, 298 F.Supp. 795 (C.D.Cal. 1969), aff'd, 424 F.2d 631 (9th Cir. 1970), cert. denied, 400 U.S 865 (1970) Defendant was denied due process where prosecution permitted witness to give material testimony which prosecution knew or should have known was false, suppressed an exculpatory fingerprint, and failed to disclose negative evidence indicating that coat, which prosecution claimed was worn by defendant, was not defendant's.

Clements v. Coiner, 299 F.Supp. 752 (S.D.W.Va. 1969). Police polygraph report and psychiatrist's letter to prosecutor raising possibility of defendant's defective mental condition were material to issue of limitation of criminal responsibility and failure of prosecutor to produce documents, even though not requested, rendered conviction on guilty plea violative of constitutional due process

Bowen v. Eyman, 324 F.Supp. 339 (D.Ariz. 1970) Habeas granted where trial court's refusal to appoint expert to test seminal fluid removed from vaginal tract of rape victim and to test petitioner's blood type, which could have negated guilt, denied petitioner fundamental fairness and was tantamount to a suppression of evidence in violation of Brady

Simms v. Cupp, 354 F.Supp. 698 (D.Ore. 1972) Conviction vacated where state suppressed original description of witness' assailant, which differed substantially with her trial testimony, in order to corroborate inculpatory story of children who had been riding with defendant

Simos v. Gray, 356 F.Supp. 265 (E.D.Wisc. 1973). Where witnesses identified defendant from police photos six weeks after offense and never wavered from their identifications, the state had a duty to disclose police reports which indicated that, of the night of the offense, witnesses declined to view photos because they were sure they could not identify the couple they saw, that five days later a witness made a mistaken identification, and the witnesses gave inaccurate physical descriptions

Hawkins v. Robinson, 367 F.Supp. 1025 (D.Conn. 1973) Where government informant was the only witness who was not a law enforcement officer, and his testimony would have been highly relevant to identification and alibi defense, defendant was deprived of a fair trial when the trial court refused at his request to require the government to identify informant and furnish information as to his location

Ray v. Rose, 371 F.Supp. 277 (E.D.Tenn. 1974) Conviction set aside due to failure of prosecution to reveal that it had made a standing plea bargain with codefendant, who pleaded guilty only after he gave testimony during trial which implicated defendant, which resulted in defendant's being deprived of due

process of law

Emmett v. Ricketts, 397 F.Supp. 1025 (N.D.Ga. 1975) No privilege existed between chief prosecution witness and psychologist in connection with "age regression" sessions, and since psychologist was an investigative arm of the prosecution, both he and the DA were required to produce files for in camera inspection Habeas granted for failure to disclose

Moynahan v. Manson, 419 F.Supp. 1139 (D.Conn. 1976), aff'd, 559 F.2d 1204 (2nd Cir. 1977), cert. denied, 434 U.S. 939 (1977) Habeas granted where prosecution's failure to disclose that its key witness was a target of police investigation for the same criminal scheme for which defendant stood accused, was threatened with prosecution, but was never charged, deprived defendant of due process because it raised reasonable doubt as to guilt

Kircheis v. Williams, 425 F.Supp. 505 (S.D.Ala. 1976), aff'd, 564 F.2d 414 (5th Cir. 1977) Habeas granted where state, despite a court order, failed to produce motel records tending to exonerate defendant, and failed to inform the defense of an oral agreement with a key prosecution witness which could have affected the witness' credibility.

United States ex rel. Annunziato v. Manson, 425 F.Supp. 1272 (D.Conn. 1977). Habeas granted where trial court's refusal to permit cross-examination of key prosecution witness as to pending criminal charges to show bias and motive violated right of confrontation, particularly in light of prosecution's nondisclosure of impeachment information concerning extensive immunity and aid offers to the witness

Jones v. Jago, 428 F.Supp. 405 (N.D.Ohio 1977), aff'd, 575 F.2d 1164 (6th Cir. 1978), cert. denied, 493 U.S. 883 (1978) Habeas granted where state, despite a specific request from defense counsel, suppressed statement of coindictee which, though somewhat ambiguous, appeared on its face to be favorable to the defense and was sufficiently material to compel disclosure

United States v. Turner, 490 F.Supp. 583 (E.D.Mich. 1979), aff'd, 633 F.2d 219 (6th Cir. 1980), cert. denied, 450 U.S. 912 (1981). New trial granted where DEA agent, who had entered into a leniency agreement with the defense counsel for a prosecution witness, not only failed to correct the witness' testimony disclaiming any such arrangement but took the stand and buttressed the witness' false testimony through an affirmative material misrepresentation that no agreement existed, and such conduct was an affront to the court's dignity and honor and to the nation.

United States ex rel. Merritt v. Hicks, 492 F.Supp. 99 (D.N.J. 1980) Habeas granted where failure, despite specific request, to disclose police report which cast substantial doubt on credibility of witness whom New York state court twice characterized as being "in many respects unreliable," and upon whom the state's entire case rested, deprived defendant of due process and fair trial.

Cagle v. Davis, 520 F.Supp. 297 (E.D.Tenn. 1980), aff'd, 663 F.2d 1070 (6th Cir. 1981). Habeas

granted where, despite lack of request by petitioner for exculpatory material, fundamental fairness required prosecutor to disclose the availability of a witness, who was "planted" in petitioner's jail cell soon after his arrest to interview him in violation of his constitutional rights and who could have testified that, prior to petitioner's alleged confession to witness, petitioner had continually denied his involvement in victim's murder.

Blanton v. Blackburn, 494 F.Supp. 895 (M.D.La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981) New trial ordered where state failed to fully disclose all of agreements and understandings it had with key government witnesses and failed to correct testimony which it knew or should have known was false, even though witnesses' answers to questions concerning agreements were technically direct, and even though no formal plea agreements had been entered into.

United States v. Tariq, 521 F.Supp. 773 (D.Md. 1981). Government violates defendant's Fifth Amendment right to due process and Sixth Amendment right to compulsory process when it acts unilaterally in a manner which interferes with defendant's ability to discover, to prepare, or to offer exculpatory or relevant evidence, by deporting a witness who is an illegal alien, if the Government knows or has reason to know that the witness' testimony could conceivably benefit defendant and if deportation occurs before defense counsel has had notice and a reasonable opportunity to interview and/or depose the illegal alien

Anderson v. State of South Carolina, 542 F.Supp. 725 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) Habeas granted where right to fair trial was denied by prosecution's failure to make autopsy report and investigative notes available to trial counsel, because the withheld materials might well have created reasonable doubt in minds of jurors, who deliberated 32 hours before returning a guilty verdict.

Sims v. Wyrick, 552 F.Supp. 748 (W.D.Miss. 1982) Where promises were made to key prosecution witnesses in habeas petitioner's firebombing case, and those promises were unlawfully concealed from petitioner and his counsel, so that petitioner suffered obvious prejudice of being deprived of his right to cross-examine those witnesses, petitioner was deprived of due process and fair trial

Raines v. Smith, 1983 WL 3310 (N.D.Ala. 1983) Habeas granted where the police failed to tell prosecution that, while three witnesses identified one suspect, only one---an elderly man whose ability to accurately identify was highly suspect---identified defendant. There was no other evidence linking defendant to the crime

Jackson v. Calderon, 1994 WL 661061 (N.D.Cal. 1994) Habeas granted where defendant was denied the opportunity to elicit exculpatory testimony from an anonymous informant whose identity the government failed, in violation of Brady, to disclose Defendant demonstrated a "reasonable possibility that the anonymous informant . could give evidence on the issue of guilt which might result in [his] exoneration "

Kennedy v. Thigpen, NO CITE AVAILABLE (N.D.Ala. 1994). Conviction and death sentence reversed where prosecution withheld statement of a co-defendant which could have been useful to negate defendant's intent to kill and suggest that co-defendant was really the killer

United States v. Stifel, 594 F.Supp. 1525 (N.D.Ohio 1984) Conviction for willfully and knowingly mailing infernal machine with intent to kill another vacated where prosecution failed to disclose evidence implicating another suspect, statement by defendant's girlfriend attesting to his innocence in contradiction to her trial testimony, and results of investigation tending to show that defendant did not buy the switch used in the bomb

Scott v. Foltz, 612 F.Supp. 50 (E.D.Mich. 1985) Habeas granted where a witness testified falsely that she had not entered into a plea bargain with the prosecution before testifying, and that witness' credibility was a key issue in the case

Carter v. Rafferty, 621 F.Supp. 533 (D.C.N.J. 1985), aff'd, 826 F.2d 1299 (3rd Cir. 1987), cert. denied, 484 U.S. 1011 (1988). Convictions reversed where prosecution failed to comply with a specific request for a polygraph report which substantially undermined witness's testimony which was the "cracked and shaky pillar" supporting the state's case

Troedel v. Wainwright, 667 F.Supp. 1456 (S.D.Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987). Bagley and Napue violated when prosecution pushed expert to say that, in his expert opinion, Troedel fired the gun, despite the fact that his reports and his habeas testimony indicated that he could not tell who really fired it Prosecutor was found to have misled the jury in his questioning of the expert, and the evidence was material because it was the only thing linking Troedel to the crime.

Silk-Nauni v. Fields, 676 F.Supp. 1076 (W.D.Okla. 1987) Exculpatory evidence was unconstitutionally withheld when state failed to disclose a statement which would have revealed inconsistencies as to sequence of events leading up to shootings, and directly related to insanity defense by showing that defendant held and acted upon certain beliefs which lacked a foundation in reality.

Orndorff v. Lockhart, 707 F.Supp. 1062 (E.D.Ark. 1988), aff'd in part, vacated in part, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 499 U.S. 931 (1991)

Due process and right to confrontation violated where prosecution failed to disclose that witness's memory was hypnotically refreshed during pretrial investigation. Violation was compounded by prosecutor's statement during opening that the jury would be "amazed at the recollections" of the witness.

Hughes v. Bowers, 711 F.Supp. 1574 (N.D.Ga. 1989), aff'd, 896 F.2d 558 (11th Cir. 1990) Habeas granted where evidence was suppressed that the state's sole eyewitness to the murder stood to benefit from the life insurance policy of the victim if the defendant were shown to be the aggressor. Court evaluated this under the standard for knowing use of perjured testimony, i.e whether there is any

reasonable likelihood that the false testimony could have affected the jury's verdict

Ouimette v. Moran, 762 F.Supp. 468 (D.R.I. 1991), aff'd, 942 F.2d 1 (1st Cir. 1991) Habeas relief granted where failure of prosecutor to disclose to defendant that state's chief witness had 24 more criminal convictions than the four disclosed by the state, or to disclose the inducements, promises, and rewards offered to the witness for his testimony, violated defendant's due process rights

Bragan v. Morgan, 791 F.Supp. 704 (M.D.Tenn. 1992). Nondisclosure of plea agreement between prosecution and witness, whether or not it was quid pro quo, required new trial for defendant where witness's testimony that he faced life in prison, and prosecutor's claim in closing argument that witness faced habitual criminal count were false, regardless of a quid pro quo arrangement and the witness was the key prosecution witness

United States v. Burnside, 824 F.Supp. 1215 (N.D. Ill. 1993). Brady requires disclosure of impeachment information of which government personnel, but not prosecutors personally, are aware Knowledge of warden and others at facility housing witnesses could be imputed to prosecution

Xiao v. Reno, 837 F.Supp. 1506 (N.D.Cal. 1993). Due process was denied to alien when United States official had alien paroled into United States to be used as witness in heroin conspiracy trial, even though official was aware that prosecutors in Hong Kong declined to prosecute him because he may have been mistreated during interrogations, failure to produce memorandum concerning Hong Kong officials' concerns was flagrant Brady violation. District court permanently enjoined government from returning him to foreign country.

Rickman v. Dutton, 864 F.Supp. 686 (M.D.Tenn. 1994) Habeas granted where prosecution permitted witness to falsely testify that he had not been promised favorable treatment including immunity for incriminating statements and preferential treatment during his incarceration

United States v. Ramming, 915 F.Supp. 854 (S.D.Tex. 1996) Motion to Dismiss for, *inter alia*, prosecutorial misconduct granted where, in multi-count bank fraud indictment, government failed to disclose, despite court order to the contrary, numerous items of evidence tending to support defendants' claims of innocence and refute government's theory of the case

Banks v. United States, 920 F.Supp. 688 (E.D.Va. 1996). Guilty plea successfully challenged where government failed to disclose information regarding conjugal visits government allowed informant to receive, information was useful to attack credibility of informant and government agents and would probably have convinced defendant to proceed to trial since defendant's actions were only criminal when viewed in context supplied by the agents and the informant

United States v. French, 943 F.Supp. 480 (E.D.Pa. 1996) New trial ordered where government's undisclosed file on informant indicated that his motivation for cooperating was monetary, yet prosecution

elicited testimony from him at trial that he did not cooperate for the money, but rather because he felt that he was "doing something real good for the world "

United States v. Taylor, 956 F.Supp. 622 (D.S.C. 1997) Federal extortion and conspiracy indictments against state legislators dismissed due to government's repeated and flagrant misconduct including failure to disclose exculpatory and impeachment evidence bearing on credibility of government's cooperating witness, who was allowed to assume an unusual amount of control over the sting operation resulting in the defendants' indictments, and undermining reliability of government's case as a whole

Chamberlain v. Mantello, 954 F. Supp. 400 (N.D.N.Y. 1997). Relief granted where police officers gave perjured testimony, even though the prosecuter was unaware of the misconduct

Ely v. Matesanz, 983 F.Supp. 21 (1997). After an evidentiary hearing, the district court found that a plea agreement between the state and its witness had not been disclosed to the defense Additionally, the state failed to correct false testimony presented by the witness that no deal existed Writ of habeas corpus conditionally granted

United States v. Patrick, 985 F.Supp. 543 (E.D.Pa. 1997). Motion for a new trial granted when government failed to disclose evidence which would have impeached one of its main witnesses. This evidence could not have been obtained by the defendant through the exercise of due diligence as the government never idientified the information that was contained in the withheld documents. Thus, the defendant could not have known of the essential facts that would have permitted him to make use of the evidence

United States v. Colima-Monge, 978 F.Supp. 941 (1997). Defendant's due process rights would be violated if the INS withheld information concerning the co-defendant which may be relevant to defendant's motion to dismiss. Motion for protective order denied.

United States v. Dollar, 25 F.Supp.2d 1320, 1332 (N.D.Ala. 1998). The district court dismissed charges of conspiracy and concealing the identity of firearms purchasers as a result of the government's repeated, egregious violations of its disclosure obligations under Brady These violations centered on nondisclosure of materially inconsistent pre-trial statements of several of the government's key witnesses The court explained that, "[f]rom the outset of this case, defense counsel have been unrelenting in their effort to obtain Brady materials. The United States' general response has been to disclose as little as possible, and as late as possible--even to the point of a post-trial Brady disclosure. * * * [A]fter having assured the court that it had produced all Brady materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses "

Spicer v. Warden, Roxbury Correctional Institute, 31 F.Supp.2d 509, 522 (D.Md. 1998). The prosecution violated Brady by failing to reveal that counsel for one of three eyewitnesses upon whom its

case rested had told the prosecutor that the witness would say he had seen petitioner in the days before and after the crime, but not on the actual day of the crime. At trial, however, this witness testified that he had actually seen petitioner running from the scene of the crime The district court concluded that this development in the incriminating quality of the witness' testimony was sufficiently inconsistent with how his counsel had previously described what he knew as to render nondisclosure of counsel's description to the prosecutor a violation of Brady

Cheung v. Maddock, 32 F.Supp.2d 1150, 1159 (N.D.Cal. 1998). The state violated Brady in this attempted manslaughter case by failing to disclose medical records indicating that the victim of the shooting of which petitioner was convicted had a blood alcohol content substantially higher than the victim's testimony acknowledged This blood alcohol evidence was favorable to petitioner in several ways: it drew into question the victim's identification of petitioner, rather than one of petitioner's two companions, as the shooter; it undermined the victim's credibility, since his claim that he only consumed one drink on the night of the shooting could not possibly have been true in light of his blood alcohol content, and it undermined the credibility of the victim's companions, who testified in corroboration of his claim that he only consumed one drink on the night of the shooting

United States v. Locke, 1999 WL 558130 (N.D.Ill. July 27, 1999). The government violated Brady in connection with defendant's federal trial for conspiracy to import heroin by suppressing a statement made by a co-defendant at his change-of-plea hearing, in which the co-defendant indicated that neither he nor defendant had knowledge that their travel abroad with another co-defendant was for the purpose of importing heroin. Noting the weakness of the government's case against defendant at trial, the court found this statement material and granted defendant's motion for new trial In reaching this conclusion, the court rejected the government's contention that it did not "suppress" the statement since defendant's attorney was free to have attended the co-defendant's change-of-plea hearing, at which he would have heard the statement first hand. The court reasoned that a defendant's counsel had not failed to act with reasonable diligence in not attending the hearing, since such hearings do not ordinarily produce exculpatory evidence for co-defendants

Reasonover v. Washington, 60 F.Supp.2d 937 (E.D.Mo. 1999). After finding that petitioner had satisfied the "miscarriage of justice" standard and permitting her to pass through the Schlup actual-innocence gateway in order to obtain merits review of her procedurally defaulted claims, the court granted relief in this Missouri murder case in which the state sought, but did not obtain, the death penalty, on the ground that the prosecution committed numerous Brady violations, including failure to disclose two audiotapes, one containing petitioner's conversation with an ex-boyfriend in which she credibly asserted her innocence, and another containing petitioner's conversation with a snitch which is consistent with petitioner's claims of innocence and inconsistent with the snitch's subsequent trial testimony, failure to disclose the existence of an extremely favorable deal between the prosecution and its main snitch, whose testimony was the "linchpin" of the state's case, and failure to disclose a prior deal between the state and its secondary snitch, who testified falsely that she had never before made a deal with the state

United States v. McLaughlin, 89 F.Supp.2d 617 (E.D.Pa. 2000) The court granted defendant's motion for a new trial in this federal tax evasion case, finding that the government's nondisclosure of a witness' grand jury testimony contradicting the trial testimony of defendant's accountant on the critical point of whether the accountant had knowledge of defendant's bank account, and nondisclosure of documents supporting defendant's claim that certain income was legitimately entitled to tax deferred status, violated Brady

Watkins v. Miller, 92 F.Supp.2d 824 (S.D.Ind. 2000). After finding that petitioner's DNA evidence conclusively refuting the prosecution's theory that he alone raped and murdered the victim established a miscarriage of justice sufficient to entitle him to merits review of his procedurally barred Brady claims, the court granted relief on those claims. The court found that the state failed to disclose exculpatory evidence indicating that a witness saw the victim being abducted at a time for which petitioner had a firm alibi, and that another potential suspect had taken and failed a polygraph examination about the victim's murder.

Jamison v. Collins, 100 F.Supp.2d 647 (S.D.Ohio 2000) The court held that the cumulative effect of undisclosed exculpatory evidence in this Ohio capital case raised a reasonable probability that, had it been revealed, petitioner would not have been convicted of capital murder or sentenced to death The evidence included. statements by a cooperating codefendant that were significantly inconsistent with his testimony at petitioner's trial; statements of eyewitnesses suggesting the perpetrator did not match petitioner's description, and statements of eyewitnesses to robberies admitted as other acts evidence against petitioner. This evidence was material in that it could have been used to direct suspicion to others, including the codefendant, to impeach the codefendant's testimony, and to discredit eyewitness identifications of petitioner in connection with robberies admitted as other bad acts. Although petitioner's Brady claims were procedurally defaulted, the court found the fact that the state continued to withhold the evidence during petitioner's state court proceedings constituted "cause," and concluded further that the materiality of the undisclosed evidence under Brady and its progeny constituted "prejudice" sufficient to overcome the default

Mendez v. Artuz, 2000 WL 1154320 (S.D.N.Y. Aug. 14, 2000) The court granted habeas corpus relief in this New York murder and attempted murder case on the ground that the prosecution violated Brady by failing to disclose five documents containing significant evidence that a third party had ordered a hit on one of the victims in retaliation for a theft he believed the victim to have committed.

Zuern v. Tate, 101 F.Supp.2d 948 (S.D.Oh. 2000) The prosecution violated Brady in this Ohio capital case by failing to disclose a memorandum prepared by a deputy concerning a conversation the deputy had with a prison inmate Had it been disclosed, the memorandum would have led to the discovery of other admissible evidence, would have been useful for impeachment, and could have been used to negate the element of prior calculation by showing that petitioner had fashioned a weapon to harm another inmate, not to harm the guard he was convicted and sentenced to death for killing.

Benn v. Wood, 2000 WL 1031361 (W.D. Wash. June 30, 2000) The district court granted relief

from petitioner's conviction and death sentence, finding that although the state had been ordered to search for and disclose evidence of its confidential informant's prior dealings with law enforcement, it failed to conduct the search, and therefore failed to locate and disclose a wealth of impeaching material The undisclosed information included· evidence that the informant had been a police snitch for fifteen years, "significant evidence of unreliability and dishonesty in [the snitch's] dealings with police, perjury by the snitch in another case; protection by the prosecution from charges for other crimes, use and sale of drugs by the snitch while staying in a hotel at government expense during petitioner's trial. The undisclosed information was material because the snitch, who claimed petitioner had confided in him in jail, provided the only evidence to support the prosecution's theory that petitioner's killing of the victims was premeditated, and was the result of an insurance fraud scheme gone bad. With regard to the insurance fraud scheme, the prosecution also withheld evidence of an official determination that a fire in petitioner's trailer, which the prosecution alleged to be a component of the insurance scheme, had actually started accidently.

United States v. Peterson, 116 F.Supp.2d 366 (N.D.N.Y. 2000) The district court granted a new trial in this federal prosecution, finding that the prosecution violated the Jencks Act by inadvertently suppressing investigators' notes which, if disclosed, would have revealed discrepancies with the government's trial testimony relating to petitioner's statement. These discrepancies created a significant possibility that the jury would have had a reasonable doubt as to defendant's guilt

Bragg v. Norris, 128 F.3d 587 (E.D.Ark. 2000). The district court granted relief and ordered petitioner's immediate release in this "delivery of a controlled substance" case, in which petitioner established "actual innocence" to permit merits review of his Napue and Brady claims, and further established his entitlement to relief on the merits of those claims Both claims arose out of "highly reliable" evidence that a police drug agent falsified notes and back-dated reports in order to build an otherwise nonexistent case against petitioner for selling crack. The officer's identification of petitioner as the person who sold him crack was the only evidence supporting the conviction. Petitioner proved, however, that: the officer's claim that he identified petitioner by running his license plate through a state records check could not be true, because the plate number in question was not issued to petitioner by the state until several weeks after the officer claimed to have run his check, the officer's claim that he confirmed his identification by viewing a police photograph of petitioner could not have been true because the police had no photographs of him until months after the identification allegedly occurred; and, although the officer testified at petitioner's trial that he had excluded another suspect who shared a first name with petitioner by looking at photographs of that suspect, an undisclosed set of notes written by the officer indicate the officer's belief that the other suspect and petitioner were, in fact, the same person.

In granting relief on petitioner's Napue claim, the court acknowledged that the prosecuting attorneys may not have intentionally elicited false testimony from the officer, but found that knowledge of the contents of the officer's notes should be imputed to the prosecutor, thereby establishing a violation of Napue Additionally, citing the testimony of two other prosecutors that "the case would have been over" if the defense had been given access to the information about the officer's activities, the court concluded that this evidence was "material" for purposes of petitioner's Brady claim, such that relief was required

Finally, the court ordered petitioner's immediate release, and allowed petitioner to be accompanied back to the jail by his counsel "to ensure he is out-processed as rapidly as possible" in order to satisfy the court's desire that he "be released from custody this day "

Faulkner v. Cain, 133 F.Supp.2d 449 (E.D.La. 2001). The district court granted habeas corpus relief in this murder case on the ground that the prosecution violated Brady by suppressing the names of police officers who were first on the murder scene, and evidence that homosexual pornography and rubber gloves were found at the scene. This information was favorable and material because petitioner's defense was that his codefendant became belligerent and struck the victim in response to an unwanted homosexual sexual advance, not pursuant to a plan with which petitioner had been involved. The victim's sexual orientation and the codefendant's claim of self defense were key issues at trial with regard to, *inter alia*, petitioner's *mens rea* with respect to first degree murder as a principal.

United States v. Lin, 143 F.Supp.2d 783 (E.D.Ky. 2001). The district court dismissed the indictment in this federal prosecution for employing illegal aliens after finding that the government deported witnesses prior to disclosing statements taken from those witnesses indicating that the witnesses would have been favorable to the defense After acknowledging that "it is impossible for the defendants to make an avowal as to the deported aliens' testimony because they were denied any opportunity to interview them before the government rendered them unavailable," the court noted that the witnesses' statements indicate they would have testified favorably on the key question whether defendants knew they were employing illegal aliens, and recognized that the deported witnesses were "perhaps the only witnesses who may have information the defense could use to impeach the material witnesses' testimony " Based on its findings concerning the government's misconduct and the prejudice suffered by the defense, the court concluded that "the only appropriate remedy is the dismissal of the [71 count] indictment "

Beintema v. Everett, 2001 WL 630512 (D.Wyo. April 23, 2001). The district court granted habeas corpus relief in this "delivering marijuana" case on the ground that the prosecution's failure to disclose that a police officer had threatened the state's primary witness that his family would be prosecuted if he refused to cooperate violated Brady. Disagreeing with the Wyoming Supreme Court's conclusion that the evidence was not "material," the district court observed that petitioner's "trial was dependent almost entirely upon the testimony of a single witness, . and as such, impeachment evidence [petitioner]'s counsel could have used to attempt to discredit that witness or question the veracity of that witness would be material." In concluding that 28 U S C. §2254(d)(1) did not bar relief on petitioner's claim, the district court explained that "[t]he Wyoming Supreme Court's opinion includes repeated references stating that certain evidence was not material This suggests that 'cumulative materiality' was not the touchstone of the [state] court's opinion and that it was rather a series of independent materiality evaluations, contrary to the requirements of Bagley. This is . and unreasonable application of clearly established law "

STATE COURTS

Dozier v. Commonwealth, 253 S.E.2d 655 (Va. 1979). Conviction reversed where prosecutrix had made written statement which did not refer to alleged rape and did not refer to defendant by name Statement was constitutionally material to charges, in that it affected credibility of the witness, even though the written account of the abduction was substantially consistent with the prosecutrix's testimony at trial Failure of Commonwealth to disclose pursuant to defendant's request required new trial

Deatrick v. State, 392 N.E.2d 498 (Ind.Ct.App. 1979) New trial ordered where, in response to defendant's request, prosecutor and codefendant denied existence of a "deal" for codefendant's testimony, and on direct exam prosecutor elicited denial from codefendant that any promises for his testimony were made. Prior to trial prosecutor made promises and wrote a letter to parole board This could have affected verdict, especially considering eyewitnesses' were inability to identify faces of perpetrators and prosecutor's repeated emphasis of codefendant's sincerity

State v. Fullwood, 262 S.E.2d 10 (S.C. 1979) Where defendant pled self-defense when victim attacked him with a knife and cut him, where investigating officer, who was asked for disclosure, falsely told counsel that he had no information beneficial to defendant, and where prosecutor argued several times that victim had no knife although he had knife in his possession during the trial, concealment of the knife deprived defendant of fundamental fairness in his trial.

State v. Goodson, 277 S.E.2d 602 (S.C. 1981) In prosecution for housebreaking, grand larceny and safecracking, state's failure to disclose existence of roll of film showing a person other defendant on premises where crime occurred deprived defendant of a fair trial, in that film could possibly cast serious doubt on credibility of state's only witness implicating the defendant

People v. Angelini, 649 P.2d 341 (Colo.Ct.App.Div.III. 1982) Where defendant requested tapes of prosecution's interviews with key prosecution witness, prosecution's failure to disclose that witness had been hypnotized on morning witness testified required new trial

State v. Perkins, 423 So.2d 1103 (La. 1982) Reversed under Brady where State failed to disclose statement of eyewitness, which substantially corroborated defendant's version of shooting, despite defendant's request of a copy of any statements of any person interviewed by agent of State in connection with subject matter of case Statement might have affected outcome as to either guilt or punishment

Granger v. State, 653 S.W.2d 868 (Tex.App. 13 Dist. 1983), aff'd, 683 S.W.2d 387 (Tex. 1984), cert. denied, 472 U.S. 1012 (1985) Life sentence reversed where prosecutor, judge, and witness's counsel all failed to disclose existence of a deal that changed witness's sentence from death to life Also, because prosecution failed to correct the witness's testimony regarding the deal, her testimony from the first trial was not admissible at the second, after she refused to testify, because defendant's right to cross-examine her had been violated

Commonwealth v. Wallace, 455 A.2d 1187 (Pa. 1983) Prosecution failed to correct false statements by its key witness and suppressed parts of his criminal record Defense made numerous requests for full disclosure of the witness's criminal record and the prosecution repeatedly failed to deliver

Smith v. Zant, 301 S.E.2d 32 (Ga. 1983) Napue and Giglio violated where prosecution told jury that witness was not promised anything for his testimony when in fact he was threatened with death penalty if he failed to testify, and given life sentence in exchange for his testimony.

Binsz v. State, 675 P.2d 448 (Okl.Cr. 1984). Convictions and death sentence overturned where prosecution tried to avoid telling the jury of key witness's leniency deal by keeping the witness ignorant of the bargain struck with her counsel

Knight v. State, 478 So.2d 332 (Ala.Crim.App. 1985). Evidence that both defendant and rape victim were A and H secretors (substances in saliva), and that person who smoked cigarettes found ground out on victim's card table was an H secretor, was clearly favorable to defendant's claim of innocence, and State's failure to disclose such evidence was a due process violation.

People v. Buckley, 501 N.Y.S.2d 554 (N.Y.Sup.Ct. 1986). Updated rap sheet on prosecution witness, showing disposition of a charge not appearing on sheet given to defense was material which prosecution was obligated to disclose to defense

Cipollina v. State, 501 So.2d 2 (Fla.Dist.Ct.App. 1986), review denied, 509 So.2d 1119 (Fla. 1987) State committed Brady violation by failing to inform defense counsel of name and address of witness who obtained alibi information for defendant from codefendant in prison, even though State had informed defense that same witness had inculpated codefendant

Bloodworth v. State, 512 A.2d 1056 (Md. 1986) Under Bagley, exculpatory material does not have to be in the prosecutor's possession. Here, fact that prosecutors were not in physical possession of detective's report of another possible suspect with respect to three offenses was immaterial to whether failure to disclose report to defendant was Brady violation.

State v. Wyche, 518 A.2d 907 (R.I. 1986) Prosecutor's failure to disclose existence of blood test, which indicated that sexual assault victim's blood-alcohol concentration was 208, was deliberate, violated due process and Brady, and required new trial, where prosecutor knew of test results on evening before testimony of physician, who knew about test, and where prosecutor made no disclosure of test until guilty verdict.

State v. Osborne, 345 S.E.2d 256 (S.C.App. 1986), aff'd as modified, 353 S.E.2d 276 (S.C. 1987) Nondisclosure, despite timely Brady motions prior to trial, of two recorded statements by State's primary witness, who was a heavy alcohol and drug user, had long criminal record, and had changed his story to an eyewitness account in exchange for near immunity, denied defendants due process, where verdict was

questionable, and defense counsels' cross-exam might well have shifted weight of evidence to establish reasonable doubt had State complied with motion

State v. Smith, 504 So.2d 1070 (La.Ct.App. 1987). Defendant should have been permitted in camera inspection of alleged prior statement of victim for material inconsistencies or Brady information, in light of defendant's specific requests for such statements, which were based on differences between opening statement and victim's testimony

Ex parte Womack, 541 So.2d 47 (Ala. 1988) Conviction reversed where prosecution failed to disclose: (1) transcript of a meeting with a witness who recanted his grand jury testimony and attempted to implicate himself in the crime, only to be dissuaded by his counsel and the district attorney; (2) plea arrangements with two witnesses; (3) police reports and memos which included prior inconsistent statements and jailhouse confessions

State v. Johnston, 529 N.E.2d 898 (Ohio 1988) Conviction and death sentence reversed where prosecution failed to disclose evidence which undermined its theory of where the murder occurred and who did it

Ham v. State, 760 S.W.2d 55 (Tex. Ct. App. 1988) Conviction reversed where state failed to turn over evidence, following Brady request, of chief medical examiner's testimony which tended to confirm defense expert's position and draw into question the state's evidence of defendant's guilt

Ex parte Brown, 548 So.2d 993 (Ala. 1989). Conviction reversed where state failed to disclose, until introduction at trial, physical evidence which contradicted victim's statement despite the granting of defense's motion requiring disclosure of tangible evidence expected to be introduced at trial.

Ex parte Adams, 768 S.W.2d 281 (Tex.Cr.App. 1989) Conviction reversed where prosecution suppressed prior inconsistent statements of its key witnesses These statements seriously eroded the credibility of both witnesses

Bevill v. State, 556 So.2d 699 (Miss. 1990) Conviction and death sentence reversed where defense was not allowed to adduce at trial whether prosecution helped its key witness to have one of his prior convictions expunged in exchange for his testimony

People v. Ramos, 550 N.Y.S.2d 784 (N.Y.Sup.Ct. 1990) Failure of prosecutor to turn over criminal record of prosecution witness was an inexcusable Brady violation requiring reversal. Defense counsel was not required to make a specific request because prosecutor had made an affirmative specific representation as to the specific Brady material

Perdomo v. State, 565 So.2d 1375 (Fla.Dist.Ct.App. 1990) Trial court should have held Richardson hearing on potential Brady violation and its potential to prejudice defendant where potentially exculpatory

evidence might still be in state custody, even though state did not disclose evidence because it believed it had been stolen

State v. Davis, 823 S.W.2d 217 (Tenn.Cr.App. 1991) Drunk driving conviction reversed where state failed to disclose police department memoranda revealing knowledge of incorrect readings, malfunctions, and tampering with intoxilizer machine, although evidence also included police observations of defendant, the intoxilizer was central to the state's case

Commonwealth v. Santiago, 591 A.2d 1095 (Pa.Super. 1991), appeal denied, 600 A.2d 953 (Pa. 1991). Because the point of the disclosure requirement is to ensure a fair trial, the trial judge had an obligation to disclose to the defense prior inconsistent statements made *in camera* by prosecution witness

People v. Godina, 584 N.E.2d 523 (Ill.App. 1991), appeal denied, 591 N.E.2d 26 (Ill. 1992). Second-degree murder conviction reversed where pending burglary prosecution of state's witness was material and thus subject to disclosure under Brady where the witness' testimony assisted state in convicting defendant.

State v. Knapper, 579 So.2d 956 (La. 1991) Reversed where prosecution failed to disclose a police report in which eyewitness gave description of murderer's clothes which was opposite that of chief state witness. The report also mentioned another group of men who were committing crimes that night, one of whom was found in possession of the murder weapon

People v. Janota, 181 A.D.2d 932 (N.Y.App.Div. 1992). Rape conviction reversed due to prosecution's delay in turning over notes of complainant's initial version of the incident which would have brought her credibility into serious question Counsel found out about the notes after he had cross-examined her for a day and a half, and did not recall her for fear such a move would be seen as harassment

Commonwealth v. Moose, 602 A.2d 1265 (Pa. 1992) Murder conviction reversed where state failed to disclose deal with jailhouse snitch despite a general request by the defense Defendant's failure to seek criminal records of state witnesses was directly traceable to state's failure to identify the prisoner

Savage v. State, 600 So.2d 405 (Ala.Cr.App. 1992), cert. denied, 600 So.2d 409 (Ala. 1992) Manslaughter conviction reversed where prosecutor failed, in violation of Brady, to disclose statements of two witnesses who said defendant acted in self-defense; statements were arguably exculpatory and could have been used to impeach the testimony of the witnesses at trial

People v. Jackson, 154 Misc.2d 718 (N.Y.Sup.Ct. 1992), aff'd, 603 N.Y.S.2d 410 (N.Y.Sup. 1992), appeal denied, 633 N.E.2d 487 (N.Y. 1994). Convictions for second degree arson and six counts of

felony murder reversed where detective and fire department, despite their independent duty to disclose under Brady, failed to reveal that it was the expert opinion of the detective that the fire was an accidental electrical fire

People v. Clausell, 182 A.D.2d 132 (N.Y.App.Div. 1992) Due process violated where prosecution failed to disclose a buy report in a drug prosecution until after conviction since defense specifically requested the report twice, officer's testimony was essential, and report contained useful impeachment material

People v. Holmes, 606 N.E.2d 439 (Ill.App.1 Dist. 1992), appeal denied, 612 N.E.2d 518 (Ill. 1993) Conviction reversed where prosecution told jury that chief witness was just an innocent bystander when in fact he participated in the crime, and violated Napue by lying about the benefits witness was to receive for his testimony

Gorham v. State, 597 So.2d 782 (Fla. 1992) Conviction and death sentence vacated where state failed to disclose that key witness had been a paid CI in defendant's case and in others. The fact that the witness had received substantial payments in other cases made the evidence material for challenging his credibility

State v. Bryant, 415 S.E.2d 806 (S.C. 1992) Once defendant has established basis for his claim that undisclosed evidence contains exculpatory material or impeachment evidence, State must produce undisclosed evidence for trial judge's inspection, trial judge should then rule on materiality of evidence to determine whether State must produce it for defendant's use.

McMillian v. State, 616 So.2d 933 (Ala.Cr.App. 1993). Brady violated where prosecution failed to disclose: (1) earlier statements by its key witness claiming to know nothing about the crime and then argued to jury that witness had told same story from the beginning; (2) statement of fellow inmate who overheard key witness discussing plan to frame defendant

People v. Davis, 614 N.E.2d 719 (N.Y. 1993) Brady violated by failure to disclose, despite specific request, hospital records of third party whom complainant identified as one of his attackers, indicating that third party was admitted to hospital shortly before the attack

Funk v. Commonwealth, 842 S.W.2d 476 (Ky. 1993). Life sentence (state did seek death penalty) reversed where state failed to turn over various pieces of exculpatory hair and fiber evidence

Jones v. State of Texas, 850 S.W.2d 223 (Tex.App.-Fort Worth 1993) Conviction and sentence reversed where prosecution failed to timely disclose exculpatory, material information in a victim impact statement which tended to negate the only evidence of defendant's intent to shoot the victim

State v. Spurlock, 874 S.W.2d 602 (Tenn.Crim.App. 1993) Murder conviction reversed where

prosecution failed to disclose: (1) statements, which had been taken by the sheriff's department, which stated or implied that someone else did the murder, and (2) audio and video recordings of key prosecution witness giving statement incriminating defendant after being promised he would be released from jail

State v. Lindsey, 621 So.2d 618 (La.Ct.App. 1993) Conviction reversed where state failed to disclose a promise to give accomplice favorable consideration if she testified credibly, and exacerbated the Brady violation by failing to correct the witness' assertion at trial that she was not expecting consideration.

Garcia v. State, 622 So.2d 1325 (Fla. 1993). Conviction and death sentence reversed where prosecution failed to disclose statement to police given by a key prosecution witness which corroborated defendant's assertion that someone else committed the murder. Violation was compounded because prosecution denied the existence of the person defendant identified, despite the fact that police had arrested him and knew he was going by the name defendant gave them

Swartz v. State, 506 N.W.2d 792 (Iowa Ct. App. 1993) PCR granted where state failed, in violation of Brady, to disclose evidence of alleged coperpetrator's threatening and overbearing nature, and where rebuttal witness, who was the only witness available to directly contradict defendant's compulsion testimony, falsely denied existence of a deal for his testimony

People v. Garcia, 17 Cal.App.4th 1169 (Cal.Ct.App. 1993) Habeas granted where state failed to disclose evidence that tended to impeach reliability of state's accident reconstruction expert, by showing that expert had used faulty methodology and made errors in other cases

State v. Avelar, 859 P.2d 353 (Idaho Ct. App. 1993) Prosecution's failure to disclose that party to whom cocaine was delivered could not identify defendant as one who delivered cocaine violated due process and required that conviction be set aside, disclosure would likely have altered defendant's trial strategy significantly

People v. Steadman, 623 N.E.2d 509 (N.Y. 1993) Convictions reversed under Brady where trial assistants, as representatives of DA's office, were chargeable with knowledge of promises made by assistant DA to prosecution witness' attorney for purposes of duty to disclose Brady material, and assistants were obligated to clarify record after witness falsely testified that no promises were made.

People v. Gaines, 604 N.Y.S.2d 272 (N.Y.App.Div. 1993) Brady violation, which required reversal of convictions, occurred where prosecutor did not disclose cooperation agreement reached between trial assistant's superior and attorney for principal prosecution witness under which witness would not be required to go to prison on pending felony charges if he testified against defendant

Burrows v. State, 438 S.E.2d 300 (Va.App. 1993). Commonwealth's failure, in response to murder defendant's Brady request for exculpatory material, to provide defendant with information respecting

Commonwealth witness' criminal past and apparent long-standing relationship with Commonwealth's attorneys, warranted new trial

Ex parte Williams, 642 So.2d 391 (Ala. 1993) Brady violated where state failed to produce lineup photographs from which victim had identified a person other than defendant, hat which had led police to that person, and statement in which victim had failed to mention supposedly identifying raincoat found in defendant's home

Jefferson v. State, 645 So.2d 313 (Ala.Cr.App. 1994). Brady violated where undisclosed exculpatory evidence was material to murder prosecution because it would have tended to show that someone other than defendant committed crime and would have been relevant to impeach credibility of two witnesses who testified for prosecution.

West v. State, 444 S.E.2d 398 (Ga.App. 1994) Conviction reversed where State's failure to disclose tape recording of alleged drug deal involving defendant prior to trial violated due process, tape was exculpatory in that it might have shown that informant gave perjured testimony

People v. White, 606 N.Y.S.2d 172 (N.Y.App.Div. 1994). Convictions vacated under Brady and Rosario where undisclosed statement indicated that prosecution witness said he could not identify person who shot victim, while at trial he testified to knowing defendant vaguely and seeing him chase victim and fire weapon at him, and link of defendant to second murder was in significant part through ballistics evidence that same gun was used in both murders

State v. Florez, 636 A.2d 1040 (N.J. 1994) Conviction reversed where state failed to disclose fact that informant had been involved in reverse sting drug transaction, even though defendants knew he was involved in crime, but did not know he was an informer. This was material because the informer played a central role in setting up the drug deal.

State v. Landano, 637 A.2d 1270 (N.J. Super. Ct. App. Div. 1994) Brady violated where cop's handwritten notes indicating that witness rejected defendant's photo were suppressed, and only an official report saying witness failed to make an ID was disclosed.

Commonwealth v. Galloway, 640 A.2d 454 (Pa. Super. Ct. 1994) Commonwealth's Brady violation in failing to disclose that its key witness' recollection was hypnotically refreshed prior to trial entitled defendant to new trial on one murder where witness was only one to testify that she saw him possess and shoot a gun, and one of two witnesses to testify that she heard defendant confess

State v. White 640 A.2d 572 (Conn. 1994) State's failure to disclose exculpatory Brady material prior to probable cause hearing mandated reversal of convictions and new probable cause hearing even though material was disclosed to defense during jury selection; although defendants made use of evidence, witnesses whose statements were initially not revealed were unavailable at time of trial.

Commonwealth v. Green, 640 A.2d 1242 (Pa. 1994) Conviction and death sentence reversed where state failed to disclose two out of court statements by co-conspirator in which she claimed she shot and killed a cop

State v. Munson, 886 P.2d 999 (Okl.Cr. 1994) New trial granted where state failed to disclose hypnosis of key prosecution witness, withheld over 165 exculpatory photographs and wilfully suppressed hundreds of pages of exculpatory reports

State v. Perry, 879 S.W.2d 609 (Mo.Ct.App. 1994). State's failure to disclose defendant's girlfriend's pretrial statement violated Brady where statement was directly contrary to girlfriend's trial testimony, supported claim that he was "framed" and confessed solely in response to police beating, he specifically requested statement, and defense did not know statement existed until after trial

State v. Gilbert, 640 A.2d 61 (Conn. 1994) Capital murder conviction reversed where state failed to disclose, after specific defense request, reports from victims' family and friends in which they said that two other individuals had been in the store earlier the same day---carrying guns and threatening to kill someone.

Jefferson v. State, 645 So.2d 313 (Ala.Cr.App. 1994) Writ of error coram nobis granted where prosecution failed to disclose prior inconsistent statements of two witnesses who testified to seeing defendant fleeing the scene Earlier statements identified the fleeing suspect as someone else

Bowman v. Commonwealth, 445 S.E.2d 110 (Va. 1994) Prosecution's failure to earlier disclose police officer's report violated Brady; had defendant been aware of discrepancies in police officer's report and officer's failure to mention defendant's facial scars, he could have strengthened his defense of mistaken identity Trial court abused its discretion in refusing to review in camera police officer's report as requested by defendant.

People v. Rutter, 616 N.Y.S.2d 598 (N.Y.App.Div. 1994), opinion adhered to on reargument, 623 N.Y.S.2d 97 (N.Y.App.D. 1995) Appellate counsel held ineffective for failing to raise and argue. (1) People's disclosure, on morning after key witness was excused, of transcript of polygraph in which this witness denied knowledge of the homicide as Rosario and Brady violation; and (2) failure of trial court to allow the witness to be recalled and cross-examined with the transcript

State v. Gardner, 885 P.2d 1144 (Idaho Ct.App. 1994) Defendant entitled to withdraw guilty plea where prosecutor violated Brady by failing to disclose eyewitness statement tending to show that collision and resulting death were caused by tire blowout, not by defendant's fatigue or drug use

State v. Laurie, 653 A.2d 549 (N.H. 1995) New Hampshire constitutional right to present all favorable evidence affords greater protection to criminal defendant than federal Brady standard; it requires state to prove beyond a reasonable doubt that favorable evidence knowingly withheld would not have affected

verdict

People v. Curry, 627 N.Y.S.2d 214 (N.Y.App.Div. 1995) Motion to withdraw guilty plea granted where state failed to disclose information about investigation into police corruption in violation of due process. Case would hinge on credibility contest of defendant and cop, who allegedly stole defendant's money during arrest, and DA had serious information about the cop's criminal activities

People v. Wright, 635 N.Y.S.2d 136 (N.Y. 1995) Alleged assault victim's status as police informant was material and favorable to defendant, and prosecution's failure, despite Brady requests, to reveal that alleged victim was informant denied defendant due process. If information had been revealed, defendant, could have presented it as motive for police to corroborate alleged victim's testimony and to disbelieve defendant's claim that she stabbed alleged victim because she believed he was going to rape her Information also would have refuted state's explanation that victim did not want to go to hospital after stabbing because police would have thought he "did something" due to of his criminal record

Jackson v. Commonwealth, 1995 WL 710112 (Va.App. 1995). Conviction for abduction with intent to defile reversed where trial court erroneously failed to order state to disclose victim's statements to police. These statements contained information inconsistent with victim's testimony on several points Because victim's credibility was the crucial issue in the case, nondisclosure of the statements deprived defendant of the opportunity to explore and expose victim's inconsistencies.

People v. Jackson, 637 N.Y.S.2d 158 (N.Y.App.Div. 1995) State violated Brady in second-degree murder prosecution by failing for three years to disclose statements by learning-disabled witness who, by time of disclosure, had no substantive memory of many details of events at issue; statements' exculpatory value was evident on their face, as witness stated numerous times that defendant was outside apartment when shots were fired, and witness gave leads as to other possible perpetrators of crime

Hamilton v. State, 677 So.2d 1254 (Ala.Cr.App. 1995). Conviction and death sentence reversed where key witness perjured himself with regard to statements he claimed were made by defendant regarding lack of remorse and pride resulting from the murder, and falsely denied the existence of a deal for his testimony. Police had led witness to believe he would be freed from jail in exchange for his testimony, and their actions were taken as part of the prosecution team, despite fact that prosecutor had no knowledge of the deal

Brummett v. Commonwealth, 1996 WL 10209 (Va.App. Jan. 11, 1996) Convictions on five counts of sexual crimes reversed where trial court erroneously failed to order disclosure, after in camera review, of statements of victim and forensic evidence indicating semen found was not that of defendant

Cotton v. Commonwealth, 1996 WL 12683 (Va.App. Jan. 16, 1996) Statutory burglary and arson convictions reversed where state failed to timely disclose its relationship with a key witness who was

incarcerated with defendant prior to trial In exchange for testimony, prosecutor had agreed to make efforts on the witness' behalf with the parole board, and witness had been furnished with a copy of defendant's statement to police, which he was seen reading prior to defendant's trial

Shields v. State, 680 So.2d 969 (Ala.Cr.App. 1996) Murder conviction reversed where state withheld evidence of victim's prior conviction for assault and other information tending to show victim was aggressive and prone to violent acts. This information was material to defendant's claim of self-defense

Dinning v. State, 470 S.E.2d 431 (Ga. 1996). New trial ordered on Giglio violation where prosecution failed to disclose evidence of immunity agreements with material prosecution witnesses where evidence against murder defendant was circumstantial and witnesses' testimony was critical to state's case, withheld evidence included videotape of one witness' interview with police which contained protracted discussion of immunity in exchange for testimony

Smith v. State, 471 S.E.2d 227 (Ga. Ct. App. 1996). Conviction for selling crack cocaine reversed where special agent and probation officer had agreement that as part of informant's undercover work, officer would not serve outstanding warrant on informant and informant had crucial role in drug transaction, but state failed to fully disclose relationship with informant upon defendant's request and special agent testified that informant "didn't have any charges pending or anything."

Jiminez v. State, 918 P.2d 687 (Nev. 1996) Postconviction relief granted in capital case where prosecution failed to disclose evidence of other possible suspects which was relevant to informant's impeachment and to challenge methods and reliability of police investigation, and failed to disclose evidence that informant had assisted police in other cases in exchange for dismissal of charges while police witness and informant both testified informant had no relationship with police in other cases; information could have altered outcome where evidence against defendant was circumstantial, informants' testimony that he overheard defendant's telephone conversation with his father in which he admitted to killing was impeachable, and police did only slight investigation of other possible suspects.

People v. Lantigua, 643 N.Y.S.2d 963 (N.Y.App.Div. 1996) Sole eyewitness' recantation of identification testimony was not incredible or collateral to defendant's guilt or innocence in second-degree murder prosecution; credibility of eyewitness' testimony at trial, not of her recantation, was relevant issue, and there were questions as to conflicting testimony by eyewitness and her brother, and where eyewitness was at time of murder, and People's failure to disclose existence of another witness deprived defense of opportunity to investigate what that witness might have observed and of ability to conduct knowledgeable cross-examination of eyewitness as to her whereabouts, her view of events, distractions caused by presence of another person, and her general credibility

People v. May, 644 N.Y.S.2d 525 (N.Y.App.Div. 1996). Convictions for second degree murder, second degree attempted murder and first degree assualt reversed where prosecution failed to disclose arrangement with witness who was promised favorable sentence on unrelated charges in exchange for

testimony against defendant, and failed to correct witness' false statement to effect that he had not been promised any consideration in return for testimony, nondisclosure was not harmless in light of significance of witness' testimony that he witnessed actions alleged in indictment

Farmer v. State, 923 S.W.2d 876 (Ark. Ct. App. 1996) New trial ordered where prosecution failed to disclose impeachment evidence that officer upon whose testimony state's case was built was not a police officer at time of trial because he had resigned shortly before after wrecking his police car and filing a false police report to cover up his violation of police rules, prosecutor admitted that decision had been made not to ask witness at trial where he was employed

State v. Knight, 678 A.2d 642 (N.J. 1996) Murder conviction reversed on cumulative impact of suppressed exculpatory evidence which included: state's alleged eyewitness got no prison time on unrelated offense carrying potential 364-day confinement period, despite prosecution's claim that she had no incentive to lie, woman eyewitness who claimed to have spoken to witness just prior to crime had made statement that she was not near crime site at critical time, and FBI agent had testified that he lacked certain information regarding case at time he interrogated defendant when teletype records showed he had received information

Frierson v. State, 677 So.2d 381 (Fla. Dist. Ct. App. 1996) Prosecution's failure to disclose police report and deposition of officer regarding incident strikingly similar to shooting incident for which defendant was convicted and which indicated that date of event was day after that indicated by witnesses required new trial; fact that witnesses who testified were alcohol and substance affected and could have mistaken date of incident, along with officer's description and other undisclosed discrepancies in eyewitness testimony, undermined confidence in jury's verdict.

State v. Womack, 679 A.2d 606 (N.J. 1996), cert. denied, 117 S.Ct. 517 (1996). For purposes of defendant's prosecution for practicing medicine without a license, evidence that defendant told investigator his professional status as doctor of naturopathy and not medical doctor was not probative on state's theory regarding practice of medicine without a license, but was probative on state's alternative theory of holding oneself out as a medical doctor, failure to disclose such exculpatory evidence to grand jury required dismissal of portion of indictment asserting alternative theory.

Carroll v. State, 474 S.E.2d 737 (Ga. Ct. App. 1996) Defendant who pleaded guilty to homicide by vehicle and serious injury by vehicle allowed to withdraw plea due to state's failure to disclose that sole state expert had indicated, shortly before defendant entered plea, that calculation of speed at which defendant was driving when she lost control of vehicle was incorrect and that it was not possible to calculate her speed based on data provided by investigating officer, and opined that road conditions contributed to accident

Craig v. State, 685 So.2d 1224 (Fla. 1996) Death sentence reversed and new sentencing hearing ordered where prosecutor elicited false and misleading testimony from codefendant indicating that he was

serving two life sentences for his role in the crime and argued severity of codefendant's punishment to the jury when prosecutor knew that codefendant was already in a work release program and would soon be paroled, this information was material because it affected codefendant's credibility and prevented jury from considering actual disparity between sentences of each defendant

State v. Ponce, 1996 WL 589267 (Ohio Ct. App. Oct. 10, 1996). Rape conviction reversed where prosecution failed to turn over a police report and records from the county children's services authority. The police report contained a description of the alleged rape which was significantly inconsistent with the alleged victim's trial testimony, and the children's services records revealed information supportive of the defendant's theory at trial that the alleged victim's story had been fabricated. The court found that, "[c]ollectively, the prosecution's refusal to disclose the [materials] serve to undermine confidence in the outcome of defendant's trial " Id. at *6

State v. Oliver, 682 So.2d 301 (La. Ct. App. 1996). New trial ordered where conviction hinged on credibility of two alleged victims who were key prosecution witnesses and prosecution failed to disclose statements made by each near time of offense differed significantly from their trial testimony

State v. Cook, 940 S.W.2s 623 (Tex.Cr.App. 1996). Defendant's conviction and death sentence for a 1977 murder reversed where testimony of a key prosecution witness from defendant's first trial was introduced against defendant at his third trial after the witness had died The introduction of the testimony at the third trial undermined the reliability of defendant's conviction because the prosecution's earlier failure to disclose the witness' prior inconsistent statements to police and to the grand jury had precluded the defense from effectively investigating the witness' testimony and impeaching him with his prior statements.

Ex parte Mowbray, 943 S.W.2d 461 (Tex. Crim. App. 1996) Murder conviction reversed where prosecution waited until two weeks before trial to disclose blood spatter expert's report tending to support defendant's contention that victim shot himself in bed next to her despite having received the report seven months earlier, prosecution purposely delayed disclosure and caused defense counsel to erroneously believe that the expert who had written the exculpatory report would be a witness for the state and be available for cross-examination.

Flores v. State, 940 S.W.2d 189 (Tex. Ct. App. 1996). Murder conviction reversed where prosecution failed to disclose written and verbal statements made by disinterested witness corroborating defendant's contention that victim, who was defendant's roommate, shot herself during an argument with defendant Because there were no eyewitnesses to the shooting other than defendant her credibility was crucial, and undisclosed statements fully supported defendant's version of events such that, had they been disclosed, the result of the trial would likely have been different.

Ohio v. Aldridge, 1997 WL 111741 (Ohio App. 2 Dist. March 14, 1997) (unpublished). Order granting relief from multiple convictions for forcible rape of a child and gross sexual imposition of a child affirmed where prosecution failed to disclose full length report detailing numerous instances of highly

suggestive questioning techniques employed with child accusers; medical evidence indicating absence of sexual abuse, inability of alleged child victim to identify picture of defendant; and numerous threats made by police investigator against child witnesses in the face of their denials that sexual abuse occurred. Rather than full report, defense counsel were furnished with a redacted version which made no mention of the exculpatory and impeaching information contained in the full length version

People v. Ariosa, 660 N.Y.S.2d 255, 257 (N.Y.Co.Ct. 1997). Indictment for three counts of forcible rape dismissed where prosecution waited until jury deliberations had begun to turn over an envelope it had possessed for several months containing numerous items directly contradicting the victim's assertions at trial, some of which were written in the victim's own hand. While the court expressed its belief that the prosecution's nondisclosure was not motivated by malice, it nevertheless decided to send a message to the state that its review of discoverable materials must be "a pro-active, vigorous attempt to respond to the requests made by defense counsel or to seek protective orders in circumstances they feel are inappropriate for discovery "

State v. Phillips, 940 S.W.2d 512 (Mo. 1997) (*en banc*) New penalty phase ordered where state withheld audiotape containing hearsay statement indicating that defendant's son claimed sole responsibility for dismembering murder victim The statement was material because the prosecution specifically argued that defendant deserved the death penalty because she had cut up the victim's body herself, and the sole aggravating circumstance found by the jury was depravity of mind, which was based upon the dismemberment of the victim's body

State v. Kula, 562 N.W.2d 717 (Neb. 1997) Murder conviction reversed and new trial ordered where prosecution failed to disclose material evidence regarding investigation of other suspects before the first day of trial and trial court abused its discretion and committed plain error by refusing to grant a continuance following disclosure of the evidence to allow counsel to investigate other suspects and prepare a defense.

State v. Copeland, 949 P.2d 458 (1998). Conviction of second-degree rape reversed where prosecution failed to disclose that the victim/witness had a prior felony conviction. Such information could have been used by the defense to impeach this key witness, and there is a substantial liklihood that the failure to disclose the prior record affected the jury's verdict.

In re Brown, 952 P.2d 715 (Cal. 1998). Writ of habeas corpus granted in capital case where crime lab neglected to provide the defense a copy of the worksheet attached to defendant's toxicology report, even though the prosecution was unaware of the error. The prosecution was obligated to review the lab files for exculpatory evidence and provide any such evidence to the defense The worksheet reflected that PCP was present in the defendant's system at the time of the incident, which would have supported his claim of diminished capacity.

Ware v. State, 702 A.2d 699 (Md. 1997). Reversal required where prosecution failed to disclose that

its key witnesses had a motion to reconsider sentence pending which was being held in abeyance until the conclusion of defendant's trial The Maryland Court of Appeals held that this was an implied deal which should have been revealed

People v. LaSalle, 663 N.Y.S. 2d 79 (1997). First degree sodomy conviction reversed due to prosecution's failure to disclose that complaintant indicated at a prior hearing that she was unfamiliar with her attacker's full name

State v. Blanco, 953 S.W.2d 799 (Tex. Ct. App. 1997). Trial court did not abuse discretion in granting a motion for a new trial due to state's failure to disclose in the prosecution of an aggravated assault case that the defendant's brother had confessed to the crime

People v. Kasim, 66 Cal. Rptr.2d 494 (1997). Reversal required where prosecution withheld impeachment evidence that key witnesses had received deals for lenient treatment in their own criminal cases in exchange for their testimony against defendant Such evidence was material as the result of the trial depended in large part on the credibility of the witnesses.

State v. Missouri, 940 S.W.2d 512 (1997). Death sentence reversed as a result of the state's failure to discose a statement indicating that it was defendant's son rather than defendant who dismembered the victim's body. Such evidence, had it been known to the jury, reasonable could have affected the sentence that rested on the aggravating circumstance of depravity of mind

People v. Johnson, 666 N.Y.S.2d 160 (1997). In prosecution for sale of a controlled substance, prosecution erred in not disclosing lab analysis that contained alterations testified to by a police officer New trial ordered

State v. Harris, 713 N.E.2d 528 (Ohio Ct. App. 1998). The court of appeals affirmed the trial court's dismissal of felony possession of marijuana charges against defendants following disclosure by a prosecution investigator during trial that he had long possessed an airport log indicating that defendants had not been given baggage claim tickets when they boarded the flight on which the prosecution contended the defendants were smuggling marijuana. This evidence was consistent with defendants', which was that a third party who purchased defendants' tickets and encouraged them to fly to Ohio to look for work had actually placed the marijuana in their luggage without their knowledge. The court of appeals found that the trial court did not abuse its discretion in dismissing the charges rather than imposing a lesser sanction in light of the fact that the information had been purposely withheld, and continuing the case would result in undue prejudice to the defendants.

People v. Diaz, 696 N.E.2d 819, 826-828 (Ill. Ct. App. 1998) Defendant, a county jail correctional officer, was convicted of three charges arising out of his alleged involvement in drug dealing within the jail. The court reversed the convictions on the ground that the prosecution violated Brady and Napue by failing to disclose that an important inmate witness had been given a deal resulting in an illegal concurrent

sentence, and by failing to correct that witness' false testimony that he had not received favorable treatment in exchange for his testimony Rejecting the state's contention that the witness had not been given a deal, the court noted a clear indication in the State's Attorney's undisclosed file that the witness' "illegal sentence was 'OK'd' by a supervisor in the State's Attorney's office because [the witness] had worked as an informant for the State's Attorney's public integrity unit," and explained that "this court does not have to ignore common sense." "An agreement between the State and its witness," the court continued, "does not have to be so specific that it satisfies the traditional requirements for an enforceable contract " Here, the "circumstances, taken as a whole, indicate that a deal was made between [the witness] and the State " Turning to the prosecution's failure to correct the witness' false denial that a deal existed, the court stated. "We consider the State's conduct to have been outrageous and we will not tolerate it . That [conduct] raises questions about the State's integrity and goes to the heart of the judicial system--confidence in the factfinding process."

Little v. State, 971 S.W.2d 729, 731 (Tx. Ct. App. 1998). Defendant's DWI conviction was reversed due to the prosecution's failure to reveal to defense counsel that its expert on blood alcohol content had lost the graphical information necessary to assess the accuracy of the state's blood alcohol analysis Although this information was not directly exculpatory, it was impeaching in the sense that "the graphical results are necessary to analyze the reliability . . . of the results of the blood test " In concluding that relief was warranted under Brady, the court reasoned: "[H]ad the State disclosed the loss of the evidence as soon as it became aware of the fact, defense counsel would have had the option of employing a different trial strategy--one that may have resulted in exclusion of the testimony altogether * * * The testimony was the only quantitative evidence of appellant's intoxication * * * Thus, we conclude the State's failure to inform the defense of the lost evidence is a failure to disclose material information which undermines confidence in the outcome of the trial."

State v. Nelson, 715 A.2d 281, 285-288 (N.J. 1998). Defendant's death sentence was vacated on the ground that the prosecution violated Brady by failing to reveal that an officer wounded during defendant's shootout with police had served notice of, and later filed, a lawsuit against local authorities alleging that they had failed to provide training and instruction necessary to ensure the safety of police officers in situations such as the one that occurred in this case. The court reasoned as follows concerning the materiality of the officer's allegations to the sentencing phase of defendant's trial "Had the jury been aware that this crucial witness, the brother of one of the dead police officers, agreed with defendant that inadequate police training had sparked defendant's violent reaction, it is at least reasonably probable that an additional juror or jurors would have found the existence of one or more of defendant's mitigating factors "

State v. Calloway, 718 So.2d 559, 563 (La. Ct. App. 1998) Defendant's convictions for two counts of first-degree murder were reversed due to nondisclosure by the prosecution and the trial court (which reviewed the information *in camera*) of statements made by two of the prosecution's primary eyewitnesses These statements, which were taken shortly after the murders occurred, contradicted the eyewitnesses' trial testimony in several important respects, including the height, weight, age and attire of

the assailant. The court explained that the failure to make these statements available to the defense "not only deprived [defense counsel] of the opportunity to cross examine the witnesses about these inconsistencies, but also deprived [defendant] of the opportunity to show the weakness in the [witnesses'] identifications. Further, it might have bolstered the defense theory that the witnesses colluded to cover up what really happened on the night in question."

State v. Parker, 721 So.2d 1147 (Fla. 1998). The court granted sentencing phase relief in this Florida capital case as a result of the state's suppression of evidence from a jailhouse informant indicating that a co-defendant, not petitioner, actually shot and killed the victim. In concluding that this evidence was material, the court noted that petitioner had been sentenced to death by a vote of eight to four, and that the only evidence suggesting petitioner had been the shooter was the testimony of another co-defendant's girlfriend, who claimed petitioner admitted the shooting while the girlfriend was visiting his co-defendant in jail. That co-defendant received a life sentence.

State v. Allen, 1999 WL 5173 at *4-5. (Tenn. Crim. App. Jan 8, 1999). Defendants' attempted rape convictions were reversed on the ground that the state breached its Brady obligation by failing to comply with a court order to review the alleged rape victim's psychiatric treatment records for exculpatory information. Citing concerns for the alleged victim's privacy, the prosecutor never undertook the order examination, and therefore failed to uncover and disclose evidence indicating that the alleged victim had a documented history of, among other things, psychotic behavior. Because the outcome of defendants' trial "primarily turned on the credibility of the victim," the appellate court concluded that they were entitled to relief. Commenting on the prosecutorial inaction which led to the Brady violation in this case, the court stated that "[a] 'hear no evil, see no evil' attitude is inconsistent with prosecutorial responsibilities."

Rowe v. State, 704 N.E.2d 1104, 1109 (Ind. Ct. App. 1999) The court granted post-conviction relief from petitioner's convictions for murder and attempted murder. At trial, petitioner's "intoxication and insanity defenses were completely hamstrung by" the testimony of his roommate/lover that petitioner had not ingested any drugs prior to shooting several members of his own family. The state violated Brady, however, by failing to reveal that this witness had been convicted of burglary and theft and was on probation at the time of his testimony. This information would have been useful to petitioner in order to establish that the witness had strong motivation to deny taking part with petitioner in the consumption of illegal drugs -- namely, admitting taking drugs would have strengthened the state's case at the witness' probation revocation proceeding scheduled to take place a few months after petitioner's trial.

Gibson v. State, 514 S.E.2d 320, 325-326 (S.C. 1999) The court affirmed the grant of state post-conviction from petitioner's guilty plea to voluntary manslaughter on the ground that the prosecution violated Brady by failing to disclose that a state witness could not have seen the crime in the manner she claimed because the view from the position she described was obstructed. When confronted with this fact by state authorities with whom she visited the crime scene, the witness changed her story. If disclosed, this evidence would have been favorable to petitioner as additional proof of the witness' propensity to lie. The evidence was material because, had it been disclosed, there was a reasonable probability that petitioner

would have chosen to go to trial instead of pleading guilty

In re Pratt, 82 Cal.Rptr.2d 260, 270-271 (Cal. Ct. App. 1999) The court affirmed the trial court's grant of state habeas relief on the ground that the state violated Brady by failing to disclose a substantial amount of evidence indicating that the only prosecution witness to claim that petitioner had confessed to the murder for which he was convicted had been a long-time informant for state and federal law enforcement agents, and had received favorable treatment in return for his cooperation with authorities. In the course of its decision, the appellate court provided a useful discussion of how Brady claims should be analyzed on state habeas in California.

State v. DelReal, 593 N.W.2d 461 (Wis. Ct. App. 1999) Defendant's conviction for second degree recklessly endangering safety while armed was reversed due to the prosecution's failure to reveal that his hands had been swabbed for gunshot residue, but that the swabs were not analyzed prior to trial. This evidence was material both because the results of the post-trial tests requested by defendant were negative, and because the fact that the swabs had been taken directly contradicted the testimony of the self-proclaimed lead investigator, who testified unequivocally that no swabs had been taken In the context of this case, which involved questionable eyewitness identifications of defendant and inconsistent testimony as to the location of the perpetrator relative to others at the scene, there was a reasonable probability of a different result had the residue evidence been revealed

Little v. State, 1999 WL 185608 (Miss. Ct. App. April 6, 1999) (*en banc*) The court reversed defendant's embezzlement conviction on the ground that the prosecution violated Brady by failing to disclose the existence and contents of a "cash receipts journal" which documented that "the bulk" of the $96,000 he was accused of embezzling had in fact been deposited into the company account

People v. Torres, 1999 WL 323331 (Ill. Ct. App. May 21, 1999) The court reversed petitioner's convictions for murder and two counts of attempted murder where the prosecution failed to disclose that two of its witnesses were promised release from probation in exchange for their testimony, and failed to correct one witness' false testimony that he had not been promised leniency in exchange for his testimony. This evidence was material because, aside from these witnesses, only two others identified petitioner as a shooter, and all of the prosecution's witnesses were members of a gang that was at odds with petitioner's gang

Young v. State, 1999 WL 394889 (Fla. June 10, 1999). The Florida Supreme Court vacated petitioner's death sentence and remanded for resentencing due to the prosecution's failure to disclose attorney notes indicating that one of its key witnesses who testified to the sequence and type of gunshots he claimed to have heard during petitioner's altercation with the decedent had initially indicated that he was not even sure whether he had heard gunshots or firecrackers. In addition, the prosecution withheld statements from other people which, if disclosed, would have provided corroboration for petitioner's theory that the decedent had fired first and petitioner returned fire in self defense In the course of granting relief, the court rejected the state's contention that the exculpatory notes were attorney work product and

therefore exempt from disclosure The court explained that "the [disclosure] obligation exists even if such a document is work product or exempt from the public records law "

Young v. State, 739 So.2d 553 (Fla. 1999) The court granted sentencing phase relief in this capital case as a result of the state's failure to disclose prosecution notes of witness interviews, which showed witness' uncertainty whether they heard a shotgun or a pistol fire first These notes could have corroborated defense witnesses, and impeached the testimony of a state trooper who claimed that he heard a shotgun fire first This evidence was material because the avoiding or preventing arrest aggravator supporting petitioner's death sentence rested squarely on the testimony of the trooper

Johnson v. State, 1999 WL 608861 (Tenn.Crim.App. Aug. 12, 1999), aff'd, 38 S.W.3d 52 (Tenn. 2001) The state violated in connection with the sentencing phase of petitioner's capital trial by withholding a crime scene report indicating that a bullet which grazed a bystander could not have been fired from the location the state contended petitioner was in at the time of the offense. This evidence was material because the state argued to the jury that petitioner had fired that shot in support of the aggravating circumstance of creating a great risk of death to others, which the jury ultimately found

State v. Castor, 599 N.W.2d 201 (Neb. 1999). The state's failure, despite a Brady request by the defense, to disclose statements of two witnesses, one of which directly contradicted the state's theory that the victim was shot in his home, and one of which supported defendant's theory that the victim disappeared after getting into a brown pickup truck parked in front of the victim's house, violated Brady, and warranted grant of defendant's motion for new trial

Robles v. State, 1999 WL 812295 (Tex.App. Oct. 7, 1999). The court reversed defendant's convictions for sexual assault and indecency with a child on the ground that the prosecution acted in bad faith in misleading the trial court as to the existence of a tape recording of the alleged victim, who recanted at trial, being interviewed, and possibly coerced and threatened, by the prosecutor and a child protective services worker. Assuming that the tape no longer exists, the court remanded for a development of evidence of the tape's contents to be followed by a determination whether, in light of the tape's destruction, defendant can be afforded a fair trial.

State v. Sturgeon, 605 N.W.2d 589 (Wis.App. 1999). Defendant established his right to withdraw a guilty plea to burglary due to the state's failure to disclose an interview transcript and an officer's personal recollection indicating that he twice denied any knowing involvement in the crime; the evidence was within the exclusive control of the prosecution, and defendant established that the Brady violation caused him to plead guilty

Mazzan v. Warden, 993 P.2d 25 (Nev. 2000) The court granted relief in this 1979 capital murder case, finding the prosecution violated Brady by failing to disclose numerous documents indicating that an alternate suspect with a motive had been in the area with an associate on the night of the murder Had this information been disclosed, it would have supported petitioner's claim that he heard two people running

from the murder scene. The withheld information revealed suspicion among law enforcement that the decedent had been killed as a result of his involvement in a major drug dealing organization, and the alternate suspect was believed by law enforcement to have been a key figure in that organization.

Harridge v. State, 534 S.E.2d 113 (Ga.App. 2000) In this vehicular homicide case, the state violated Brady by failing to reveal the existence of lab results generated by the Georgia Bureau of Investigation indicating that cocaine and marijuana had been detected in the decedent's urine. In reaching this conclusion, the court noted that, "[f]or purposes of Brady, we decide whether someone is on the prosecution team on a case-by-case basis by reviewing the interaction, cooperation and dependence of the agents working on the case . Here, the GBI laboratory was fully involved in the investigation of this case in that it was responsible for testing not only [the decedent's] blood and urine, but also [defendant's] blood. Moreover, both the medical examiner and the prosecutor were completely dependent on the crime lab for determining the amount of drugs and alcohol present in [the decedent's and defendant's] bodies Because the GBI laboratory was part of the prosecution team and based on [the GBI doctor's] affidavit, we find that the state had possession of the test results showing drugs in Smith's urine "

State v. Nelson, 749 A.2d 380 (N.J.App.Div. 2000) The state's failure to reveal that one of its witnesses in this drug case had a prior sexual assault conviction violated Brady, the witness was important to the state's case, the trial involved a credibility contest, the defendant was impeached with his own prior conviction, and the jury deliberated for over two days, reaching a verdict only after hearing a read-back of witness' testimony.

State v. Larimore, 17 S.W.3d 87 (Ark. 2000) The state's suppression of evidence of a state medical examiner's change of opinion concerning time of death following his conversation with police about his initial time of death determination providing defendant with an "iron-clad alibi" violated Brady

State v. Henderson, 2000 WL 731472 (Ohio App. 1 Dist. June 9, 2000) The state violated Brady defendant's felonious assault prosecution arising out of a drive by shooting by failing to disclose the taped statement of another individual who claimed to have been driving the car in which defendant was riding This statement was significant because it contradicted the prosecution's two witnesses, both of whom testified that defendant was both the driver and the shooter.

Buck v. State, 2000 WL 754367 (Mo.App.E.D. June 13, 2000) The state's failure to inform defendant about five of a prosecution witness' six convictions prejudiced defendant at his trial for tampering with a witness; although the prosecutor told defendant about one of the convictions, the witness was central to the prosecution's case in that he provided the only evidence that defendant tampered with a witness, and the other convictions would have been useful for impeachment.

State v. Hunt, 615 N.W.2d 294 (Minn. 2000) The prosecution violated Brady by failing to disclose that a psychological examination of its key witness against defendant revealed that the witness was incompetent to stand trial

People v. Ellis, 735 N.E.2d 736 (Ill.App. 2000) The appellate court reversed the denial of post-conviction relief in this murder case, finding that the prosecutor violated Brady by failing to inform defense counsel and the jury about benefits, of which prosecutor knew or should have known, which were orally promised to prosecution witnesses in exchange for their testimony. In so holding, the court imputed a detective's knowledge of these promises to the prosecutor.

State v. Harris, 2000 WL 1376459 (Ohio App. Sept. 26, 2000). The Ohio court of appeals reversed defendant's attempted murder and felonious assault convictions due to the prosecution's suppression of the victim's grand jury testimony, in which the victim denied having a gun prior to the fight which led to his stabbing At trial, the victim acknowledged having had a gun prior to the fight Although the version provided by the victim at trial was more favorable to defendant than the version he gave to the grand jury, the court of appeals concluded that the suppression of the grand jury testimony prejudiced defendant by depriving him of information which would have been useful for impeaching the victim's trial testimony. In reaching this conclusion, the court noted that "the prosecution placed emphasis on the veracity of [victim]'s account of losing possession of the handgun [before being stabbed] . . [and] challenged the jurors to contrast [victim]'s testimony against the testimony of 'defendant and his friends who have already lied to both the police and on the stand.'"

Byrd v. Owen, 536 S.E.2d 736 (Ga. 2000) The Georgia Supreme Court affirmed the grant of habeas relief in this drug-related murder case on the ground that the state deprived petitioner of due process by withholding evidence that it had reached an immunity agreement with its key witness, and by failing to correct the witness' misleading testimony about the existence of such an agreement. The court further found that the state's nondisclosure deprived petitioner of his right to effective assistance of counsel at trial and on direct appeal. Counsel testified in habeas proceedings that he would not have advised petitioner to waive trial by jury if he had known of the state's deal with the witness; with regard to direct appeal, the state's suppression of evidence of its agreement with the witness deprived counsel of the ability to raise all meritorious issues. The state's misconduct in this case was made more egregious by the fact that petitioner's direct appeal focused on the suppression of information about deals with two other witnesses, which the appellate court held should have been turned over pursuant to Brady before concluding that petitioner had not demonstrated materiality.

Commonwealth v. Strong, 761 A.2d 1167 (Penn. 2000) The Pennsylvania Supreme Court reversed the denial of post-conviction relief in this capital case, finding that the state violated Brady by failing to reveal the existence of an understanding between the state and petitioner's co-perpetrator, pursuant to which the co-perpetrator was offered a sentence of two years on charges of murder and kidnapping in exchange for his testimony, and eventually received a sentence of 40 months after pleading guilty. The court found it irrelevant that the trial prosecutor had been unaware that his superior had been negotiating the co-perpetrator's deal with his counsel, and found the evidence of that deal "material" because there were obvious discrepancies between petitioner's and the co-perpetrator's testimony, and because the co-perpetrator was the key witness who put the gun in petitioner's hand at the time of the murder

Commonwealth v. Hill, 739 N.E.2d 670 (Mass. 2000) The court affirmed the grant of a new trial in this Massachusetts murder case, concluding that the state violated Brady by deliberately failing to disclose a leniency agreement with a key prosecution witness, despite requests for such information. The state's nondisclosure deprived defendant of his right to cross-examine the witness effectively, and the harm resulting from this nondisclosure was exacerbated by the conduct of the prosecutor, who allowed the witness to mislead the jury about his own sentencing expectations and his motive for testifying for the state, and suggested in closing argument that the jury should assess credibility by considering whether the witness had "something to lose," and that defendant was the only witness with anything to lose

Lay v. State, 14 P.3d 1256 (Nev. 2000) The court granted post-conviction relief from petitioner's murder conviction after concluding that the state violated Brady by withholding evidence that a paramedic, who testified that the victim identified petitioner as the shooter, had stated in several pretrial interviews that the victim did not tell her anything while she was treating him This information was favorable and material because, apart from evidence of petitioner's fingerprints on the stolen car from which shots were fired, the paramedic was the only neutral witness to provide evidence that petitioner either fired shots or drove the car.

State v. Hampton, 36 S.W.3d 921 (Tex.App.- El Paso 2001) Defendant's murder conviction was reversed as a result of the prosecution's mid-trial disclosure of a supplemental police report indicating that a witness had seen to people – one of whom was identified as the person who would become a key witness for the state – running from the murder scene Following disclosure of this report, the defense moved for a continuance, which the trial court denied In reversing defendant's conviction, the court of appeals rejected the state's contention that the prosecution's "open file" policy was sufficient to have satisfied its disclosure obligations, noting that the record contained no evidence to indicate that the report in question was actually in the prosecution's "open file " The court of appeals found the information contained in the report "material" because it "may well have . altered" the defendant's self-defense strategy, and because it had "strong impeachment potential" with regard to the state witness named in the report, who testified at trial that defendant had confessed to him

Johnson v. State, 38 S.W.3d 52 (Tenn. 2001) In this Tennessee capital case, the court granted sentencing phase post-conviction relief on the ground that the state violated Brady by withholding a police report containing favorable information material to the issue of the applicability of an aggravating sentencing factor The withheld police report showed that petitioner could not have fired the bullet that grazed a customer during a grocery store robbery. The state relied on the theory that petitioner fired that bullet to support the aggravating circumstance that he knowingly created great risk of death to two or more persons, other than the murder victim, during the act of murder The court found the information in the police report material because, had it been disclosed, there was a reasonable probability that the aggravating circumstance would not have been applied to petitioner; absent evidence that petitioner fired the bullet in question, the state failed to prove that he placed any other people at great risk of death.

State v. McKinnon, 2001 WL 69214 (Ohio.App. Jan. 29, 2001) Defendant's rape conviction was

reversed due to the prosecution's nondisclosure of an investigative report quoting a security guard from the apartment complex where the alleged victim claimed to have been raped as having been told by the alleged victim that her attacker made her take off all her clothes and do it on the floor. At trial, on the other hand, the alleged victim testified that her attacker "tore off" her clothes. The court found the undisclosed report favorable and material because it could have been used to undermine the alleged victim's credibility, and rebut the prosecution's argument that she had been consistent in her account of the attack every time she spoke about it – both crucial points given that the alleged victim's testimony was the only evidence tying defendant to the attack.

Rogers v. State, 782 So.2d 373 (Fla. 2001) (*per curiam*) The court granted post-conviction relief in this Florida capital case, finding that the state violated Brady by failing to disclose (1) a second confession by defendant's alleged co-perpetrator, who also testified for the prosecution, which could have been used to show that although defendant participated in other robberies with co-perpetrator, he had not participated in the one for which he was being tried; and (2) an audiotape of a witness preparation session on which the prosecution can be heard attempting to influence the testimony of its chief witness

Wilson v. State, 768 A.2d675 (Md.Ct.App. 2001). The court upheld the grant of post-conviction relief in this case involving robbery and related charges on the ground that the state violated Brady by failing to disclose written plea agreements between the state and two key codefendant witnesses Although defense counsel was able to elicit some information about the witnesses' deals during their testimony, that testimony was not completely accurate, and the inaccuracy was compounded by the state's characterization of those deals, and of the witnesses' lack of motivation to lie, during closing arguments

Garrett v. State, 2001 WL 280145 (Tenn.Crim.App. March 22, 2001) The prosecution violated Brady in this arson / felony murder case by failing to disclose an investigative report containing a statement by the first fireman to reach the victim, who was found in a utility room in a burning house. At trial, the state contended that the utility room door had been locked from the outside, raising the implication that the defendant locked the victim in the room prior to setting the house on fire. The report, however, indicated that the first person to reach the utility room found the door unlocked. The court found this information favorable and material even though the state presented additional evidence in post-conviction proceedings suggesting that the person who made the report had misquoted the fireman, who had actually stated that the door was locked at the time he arrived.

State v. Gonzalez, 624 N.W.2d 836 (S.D. 2001). The South Dakota Supreme Court reversed defendant's conviction of attempted statutory rape, finding that the state failed to disclose – in direct violation of the trial court's order – the alleged victim's counseling records. Those records were favorable and material because they contained a version of the alleged sexual encounters that differed from that offered by the complainant – who was the state's only witness on this issue – with respect to the number of encounters, and the events which took place during those encounters

Spray v. State, 2001 WL 522004 (Tex.App. May 17, 2001) The court reversed the defendant's

conviction for aggravated sexual assault of a child under fourteen, finding that the state violated Brady by failing to disclose a Child Protective Services report reflecting that the alleged victim's sister, who corroborated the abuse allegations at trial, had denied any sexual abuse when questioned by investigators On appeal, the court concluded that "[c]learly the CPS report was favorable and material in that [alleged victim's sister], the only other witness who can corroborate the sexual assault allegations, made statements contained therein that directly contradict her testimony at trial "

State v. Riggins, 2001 WL 618063 (Fla. June 7, 2001). The state violated Brady in this Florida capital case by failing to disclose the statement of a witness indicating that he saw the defendant's wife driving a vehicle similar to the victim's vehicle The substance of this statement contradicted the testimony of the defendant's wife, who was a key prosecution witness The court found that the state suppressed the information even though it had provided the defense with a "lead sheet" naming the witness, because that sheet inaccurately reflected that the witness had seen a male driving the victim's vehicle, thereby making the witness' account seem unfavorable to the defense

Hoffman v. State, ___So.2d___, 2001 WL 747399 (Fla. July 5, 2001) The court reversed the denial of post-conviction relief in this Florida capital case, and remanded for the grant of a new trial. The state violated Brady by failing to disclose the results of analysis performed on strands of hair found in one victim's hands; those results excluded defendant, his co-defendant, and both victims as possible sources of the hairs, prejudiced the defense and entitled defendant to new trial, where only other evidence linking defendant to murders was a single fingerprint found on pack of cigarettes in victims' motel room, and defendant's confessions, and where another suspect had also confessed; defendant challenged both of his confessions at trial, and saliva samples taken from cigarette butts found at murder scene did not match defendant's blood type.

Atkinson v. State, ___A.2d___, 2001 WL 823861 (Del. July 18, 2001). Defendant's conviction of attempted unlawful sexual intercourse second degree and related charges was reversed due to the state's failure to disclose notes of witness interviews done by an investigating prosecutor until that prosecutor testified as the state's final witness. The notes revealed that the complainant, who was the state's main witness, had not initially described the sexual component of the alleged assault to three of the state's witnesses; if the notes had been made available to defense counsel before trial, cross-examination of those witnesses may have changed outcome of defendant's trial

CASES REMANDED BASED ON BRADY CLAIMS

UNITED STATES SUPREME COURT

DeMarco v. United States, 415 U.S. 449 (1974) (*per curiam*). Remanded for evidentiary hearing to determine whether plea bargain was made with witness before or after his testimony If it was made prior to testimony, then reversal of conviction was required under Giglio and Napue

UNITED STATES COURTS OF APPEALS

United States v. Disston, 582 F.2d 1108 (7th Cir. 1978) Habeas petitioner entitled to evidentiary hearing where government never disclosed codefendant's informer status, and where government, despite pretrial request, failed to disclose eavesdropping tapes

United States v. Sternstein, 596 F.2d 528 (2nd Cir. 1979) Where government argued that defendant prepared fraudulent tax returns in order to satisfy customers, an IRS special agent's report indicating that a substantial number of defendant's returns showed no errors was relevant to defense's argument that innocent mistakes had been made and was subject to examination under Brady Remanded.

Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981), cert. denied, 455 U.S. 927 (1982). Remanded where defendant alleged that confession of a second person at the scene, who claimed to be the shooter, was withheld. If defendant was indeed denied such a report, then new trial is required.

Baumann v. United States, 692 F.2d 565 (9th Cir. 1982). Although defendant did not show that any exculpatory evidence was suppressed, his claim was not so frivolous or incredible as to justify summary dismissal of his PCR petition. Remanded for an evidentiary hearing on the issue.

United States v. Griggs, 713 F.2d 672 (11th Cir. 1983) Remanded for in camera review of files to detect suppression where there was some merit to defendant's contention that if arguably exculpatory statements were in prosecutor's file and not produced the failure to disclose would indicate the "tip of the iceberg" of evidence that should have been revealed

United States v. Torres, 719 F.2d 549 (2nd Cir. 1983). Remand for supplementation of the record to determine whether failure to introduce exculpatory FBI report was the result of IAC or Brady violation.

United States v. Peltier, 731 F.2d 550 (8th Cir. 1984) Remanded for hearing to consider any evidence relevant to the meaning of an FBI teletype stating that the recovered rifle contained a different firing pin than the murder weapon. Court must then rule on whether the evidence supports defendant's contention of a Brady violation

United States v. Lehman, 756 F.2d 725 (9th Cir. 1985), cert. denied, 474 U.S. 994 (1985) Remand required where defendant made specific discovery request, government neither produced the report nor denied that it had such report, and district court failed to order government to respond to request Defendant was thereby precluded from showing that the government had the report and that it contained exculpatory information

Haber v. Wainwright, 756 F.2d 1520 (11th Cir. 1985). Remand was appropriate for determination of whether there was understanding between government and key government witness as to his future prosecution, whether state failed to disclose any such understanding, and whether this failure violated petitioner's right to fair trial.

Government of Virgin Islands v. Martinez, 780 F.2d 302 (3rd Cir. 1985) Remand necessary to determine whether defendant's knowledge of his confession, which he claimed contained exculpatory evidence, and his failure to disclose confession to his attorney, barred his claim of Brady violation where it was possible that defendant might not have understood his English-speaking lawyer's role at trial and whether evidence was material

Anderson v. United States, 788 F.2d 517 (8th Cir. 1986) District court did not fully discharge its duty under Brady and the Jencks Act Remand was required to permit district court to review in camera tapes of conversations involving government witness and statements made by witness during polygraph examination.

United States v. Kelly, 790 F.2d 130 (D.C.Cir. 1986). District court's failure to develop any evidentiary record to make any findings in support of denial of motion for a new trial based on newly discovered evidence of Brady violations was an abuse of discretion and required reversal

Barkaukas v. Lane, 878 F.2d 1031 (7th Cir. 1989). Remanded where court found it unlikely that the prosecutor was unaware that an eyewitness had identified its key witness as the triggerman in a lineup shortly after the crime.

Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990). Habeas proceeding remanded under Brady for evidentiary hearing on suppression of evidence of collusion between police, defense attorney and defense psychologist concerning plans to later write a book about the case

United States v. Khoury, 901 F.2d 948 (11th Cir. 1990). Remand for hearing to determine whether investigatory report was Brady material where district court's implicit factual finding that investigatory report containing exculpatory material was fictitious was supported only by unsworn that were not reliable evidence

Cornell v. Nix, 921 F.2d 769 (8th Cir. 1990) Evidentiary hearing required on habeas claim that prosecution witness recanted testimony of defendant's confession but state did not disclose the recantation

to petitioner at time of state PCR.

United States v. Perdomo, 929 F.2d 967 (3rd Cir. 1991) Remanded where Brady required disclosure of criminal record of key prosecution witness, even though jury had opportunity to evaluate credibility through other impeaching evidence.

Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991) On second habeas petition, petitioner was entitled to evidentiary hearing on a police report indicating that the only eyewitness had been to a methadone clinic (on drugs) within two hours of the time of the crime Petitioner claimed nondisclosure of this fact was a violation of Brady.

United States v. Yizar, 956 F.2d 230 (11th Cir. 1992). Defendant entitled to evidentiary hearing on claim that Brady required prosecutor to volunteer statement of codefendant that defendant was innocent of arson charge.

United States v. Reid, 963 F.2d 383 (10th Cir. 1992) (unpublished). Remanded to determine whether nondisclosure of cooperation agreement with key prosecution witness was material---whether the suppression undermined the outcome of the case.

Tate v. Wood, 963 F.2d 20 (2nd Cir. 1992) Habeas petitioner entitled to evidentiary hearing because it was possible he had a valid Brady claim concerning failure to disclose evidence that victim was the initial aggressor.

Thomas v. Goldsmith, 979 F.2d 746 (9th Cir. 1992) Because of obvious exculpatory nature of semen evidence in sexual assault case, neither specific request nor claim of right by petitioner was required to trigger duty of disclosure in an actual innocence habeas petition Remanded to determine if evidence existed

United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993) Remand to determine if informant lied about homicide convictions because lies about this would be material exculpatory evidence discoverable under Brady.

United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994). Where most government witnesses against conspiracy defendant were defendant's coconspirators, district court's failure to review the witness' pre-sentence reports for material exculpatory or impeachment material required remand for these findings.

United States v. Thomas, 12 F.3d 1350 (5th Cir. 1994). Remand to determine if Brady violation existed where record of District Court's *in camera* findings was unclear concerning notes of federal agents discovered by defense during trial.

United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995). Remand for an evidentiary hearing warranted

on defendant's claim that government failed to disclose Brady materials, in light of inconsistencies between arresting officer's police report and officer's testimony at trial

Grisby v. Blodgett, 130 F.3d 365 (9th Cir. 1997). Case remanded for an evidentiary hearing where district court applied incorrect standard in determining whether the prosecution failed to disclose that a deal had been made with its key witness.

Paradis v. Arave, 130 F.3d 385 (9th Cir. 1997). In successive habeas petition, exhaustion requirement waived where subsequent state court proceedings would not serve interests of comity, federalism and justice Were relief not granted by state court, 28 U.S C. § 2244(d)(1)(D) (1996), as added by AEDPA, would bar habeas review of the claim. Case remanded for an evidentiary hearing to determine whether prosecution withheld the notes taken during a meeting with the pathologist which would have allowed the defense to impeach the doctor's testimony.

Walton v. Stewart, 1999 WL 57427 at *13 (9th Cir. Feb. 5, 1999) (unpublished) The court reversed the district court's denial of relief in this Arizona capital case and remanded for an evidentiary hearing to explore, among other issues, petitioner's contention that an informant who gave important testimony for the prosecution had been given incentives beyond the limited benefits he acknowledged at trial. The court reasoned· "Because [petitioner] could not fully confront [the informant] about the agreements [the informant] made in exchange for his testimony, and because [the informant]'s testimony was pivotal in [petitioner]'s guilt and penalty phases, [petitioner] is entitled to an evidentiary hearing on his Brady claim."

In Re Sealed Case No. 99-3096, 185 F.3d 887, 896 (D.C.Cir. 1999). The court remanded this case and instructed the district court to require the U.S Attorney's office to review the records in the possession of the prosecution team for evidence indicating that a government informant who provided information leading to the defendant's arrest had a deal with the prosecution. In the course of reaching this conclusion, the court observed that it is "irrelevant . . that the requested records may have been in the possession of the Metropolitan Police Department, of the FBI or DEA, rather than the U S Attorney's Office "

STATE COURTS

State v. Pollitt, 508 A.2d 1 (Conn. 1986) Fact that claimed Brady material was disclosed during, and not after, trial did not preclude the application of Brady obligation to disclose, which declared the right to material and favorable evidence was part of the fundamental right to a fair trial Remanded for hearing on Brady issue

Duncan v. State, 575 So.2d 1198 (Ala.Cr.App. 1990), cert. denied, 575 So.2d 1208 (Ala. 1991) State's failure to disclose, despite specific request, legal pad on which police department employees recorded information about the case violated due process to the extent that the pad contained exculpatory information Remanded for determination.

Roberts v. State, 881 P.2d 1 (Nev. 1994) Trial judge's failure to review confidential informant file before ruling on defendant's Brady claim, that the file contained material information relevant to entrapment defense and state should have disclosed file, required remand for in camera review of file

Dalbosco v. State, 960 S.W.2d 901 (Tex. Ct. App. 1997). Trial court erred in failing to include for appeal the personnel file of a police officer who testified against appellant Appellant alleges the file contains information indicating the officer was dissmissed for lying and thus may have been material impeachment evidence Case abated to trial court to include file

Gorman v. State, 619 N.W.2d 802 (Minn. 2000). Post-conviction relief petitioner was entitled to an evidentiary hearing on his claim that, he was prejudiced in his murder trial, at which he claimed self-defense, by the state's nondisclosure of evidence that the victim had another name and a prior criminal history under that name; the evidence that the victim was boasting that he had just been released from prison would have been admissible to bolster petitioner's credibility, and the evidence might have changed petitioner's decision to testify.

UNSUCCESSFUL BUT INSTRUCTIVE BRADY CASES

UNITED STATES SUPREME COURT

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) "False evidence" includes the introduction of specific misleading evidence important to the prosecution's case, or the nondisclosure of specific evidence valuable to the defense---but it does not include isolated passages of the prosecutor's closing argument, which is billed in advance to the jury as opinion, not evidence.

United States v. Agurs, 427 U.S. 97 (1976) Three situations where Brady applies

1. State's case included perjured testimony of which prosecutor knew or should have known;
2. Defense requested but was denied specific evidence material to guilt;
3. Defense made general request but prosecution suppressed evidence of sufficient probative value to create reasonable doubt as to guilt.

United States v. Bagley, 473 U.S. 667 (1985). Evidence is material when there is a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense. This includes impeachment evidence other than a "deal." A constitutional error occurs only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

Supreme Court found that the Strickland formulation of the Agurs materiality standard---a reasonable probability that the result of the proceeding would have been different---is sufficiently flexible to cover all three types of situations outlined in Agurs

United States v. Williams, 504 U.S. 36 (1992). District Court may not dismiss an otherwise valid indictment on the ground that the government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession

Strickler v. Greene, 119 S.Ct. 1936 (1999) The prosecution's suppression of favorable evidence constitutes "cause" under the "cause and prejudice" analysis undertaken to determine whether a federal habeas corpus petitioner can overcome a procedural default. Likewise, "prejudice" as used in that test equates with the reasonable-probability-of-a-different-result materiality standard of Brady As to whether criminal defendants must exercise some form of "due diligence" in order to avoid procedurally defaulting a Brady claim, the Court explained that, "[i]n the context of a Brady claim, a defendant cannot conduct the 'reasonable and diligent investigation' mandated by McCleskey to preclude a finding of procedural default when the evidence is in the hands of the State " Strickler, 119 S Ct 1951 With regard to materiality, the Court criticized the court of appeals for focusing solely on the sufficiency of the evidence without asking the more appropriate question "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict '" Strickler, 119 S Ct 1952 (quoting Kyles v. Whitley 514 U S. 419, 434-435 (1995))

UNITED STATES COURTS OF APPEALS

United States v. Truong Dinh Hung, 667 F.2d 1105 (4th Cir. 1981). Failure to disclose exculpatory evidence was harmless error because it was cumulative to what was in the record.

Pina v. Henderson, 752 F.2d 47 (2nd Cir. 1985) Parole officer's knowledge of exculpatory statement by witness not imputed to prosecution, therefore no Brady violation Exception is where the agency can be considered an "arm of the prosecution."

United States v. Schell, 775 F.2d 559 (4th Cir. 1985) No violation where prosecutor failed to disclose a promise of leniency because that witness's testimony was corroborated by three other witnesses. Non-disclosure was harmless error

Bond v. Procunier, 780 F.2d 461 (4th Cir. 1986). Denial of relief from murder conviction affirmed where District Court, without an evidentiary hearing, determined that Williams, who claimed to have had a conversation with a key prosecution witness during which the witness admitted to the murder, was not credible based on information outside the record.

United States v. Davis, 787 F.2d 1501 (11th Cir. 1986), cert. denied, 479 U.S. 852 (1986) Brady does not apply if the evidence in question is available to the defense from another source

United States v. Wilson, 901 F.2d 378 (4th Cir. 1990) Although prosecution concealed witness's prior statements concerning CIA agent's intent to set up the defendant, Brady was not implicated because the defense had the opportunity to interview the witness

United States v. Tillem, 906 F.2d 814 (2nd Cir. 1990) Government is not required to disclose evidence it does not possess or of which it is not aware

United States v. Stuart, 923 F.2d 607 (8th Cir. 1991) Remote possibility of the existence of Brady material in other files in other jurisdictions does not require wholesale disclosure to defense, nor does it require trial court to conduct *in camera* review of files for evidence favorable to the defense

United States v. Streit, 962 F.2d 894 (9th Cir. 1992) Appellate review of Brady claim was not precluded by defendant's inability to demonstrate that documents which he sought contained exculpatory material and his failure to allege error in in camera procedure

United States v. Joseph, 996 F.2d 36 (3rd Cir. 1993) Third circuit construed its decision in Perdomo to mean that, where prosecution has no knowledge or cause to know of Brady material in a file unrelated to present case, defense must make a specific request to trigger duty of disclosure

United States v. Kern, 12 F.3d 122 (8th Cir. 1993) State's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue of Brady violation

Hogan v. Hanks, 97 F.3d 189 (7th Cir. 1996) Defendant's "general request for 'all exculpatory evidence'" was "equivalent to no request at all" under Agurs, and prosecution's failure to turn over police reports from 1978 indicating officer's disbelief of allegations then made by victim against another person did not violate Due Process because the reports had a "tenuous" connection to defendant's case, and defense counsel knew about the victim's past allegations

Matthew v. Johnson, 201 F.3d 353, 364 (5th Cir. 2000), cert. denied, 531 U.S. 830 (2000) After raising Teague *sua sponte*, the court surveyed the legal landscape existing at the time petitioner's conviction became final, the court found itself unable to "conclude that a state court would have felt compelled to decide that a prosecutor's failure to disclose exculpatory information prior to entry of a guilty or *nolo contendere* plea was a Brady violation, or otherwise a violation of the Due Process Clause." The court likewise concluded that petitioner would also require the benefit of a new rule in order to prevail on his claim that the prosecution's nondisclosure of favorable evidence rendered his plea involuntary by depriving him of the ability to make a knowing and intelligent decision to forego his right to trial by jury Finally, the court determined that the new rules petitioner sought did not fall within either of Teague's exceptions

STATE COURTS

Owens v. State, 305 S.E.2d 102 (Ga. 1983). Brady and Giglio claims rejected, but Confrontation Clause claim accepted, where trial court had granted state's motion to prohibit defense from cross examining co-conspirator on a deal struck between his counsel and the prosecution

People v. House, 566 N.E.2d 259 (Ill. 1990). Court rejected Brady claim, but accepted IAC claim, where defense counsel failed to discover an exculpatory statement by the victim which was memorialized by a nurse. Prosecution had no duty to disclose this information.

Thornton v. Georgia, 449 S.E.2d 98 (Ga. 1994). Death sentence reversed on *state* rule requiring particularized notice of introduction of evidence of unproven criminal acts where state failed to provide notice and witness testified to the acts during penalty phase.

APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, No. 01-CR-80778

vs. Hon. Gerald E. Rosen

(D-1) KARIM KOUBRITI,
(D-2) AHMED HANNAN,
(D-4) ABDEL-ILAH ELMARDOUDI,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER REGARDING THE GOVERNMENT'S AND DEFENDANTS' POST-TRIAL MOTIONS

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on September 2, 2004

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This Nation's war on terrorism has as its natural and inevitable adjunct the prosecution in the courts of those charged with terrorist activities. It is also inevitable that such cases will bring with them challenges to those who work in the judicial system which at times will place us in uncharted legal and constitutional waters. It should, then, not be surprising that this case -- the first prosecuted and tried in the aftermath of September 11th -- has in its post-trial phase presented the Court and counsel with a confounding maze of complicated and interrelated issues arising out of the original prosecution team's conduct of the case.

Yet, this case, like all others, is governed by the same core constitutional

principles that have withstood countless tests throughout our Nation's history. One such principle, which has featured centrally in the post-trial phase of this case, is the due process mandate that the prosecutor must disclose to the defense all evidence which is "favorable to [the] accused" and "material either to guilt or to punishment." *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).[1] In their post-trial motions, as throughout the trial, the Defendants charged that the Government had not fully met their obligations under *Brady* and *Giglio*. They further, and more seriously, charged that the prosecution had engaged in a pattern of misconduct.

Such challenges are not altogether unusual, of course, particularly in the tense atmosphere of a high-profile case. The Defendants' allegations of prosecutorial misconduct, however, were given some credence by the discovery post-trial of at least one document that was intentionally not disclosed but unquestionably should have been – a point candidly acknowledged at a December 12, 2003 hearing by the head of the Criminal Division of the U.S. Attorney's Office in Detroit. In light of the testimony at this hearing, the Court ordered the Government to conduct a thorough review of the case, including all documents, both classified and non-classified, in the Government's possession having any connection whatsoever with the case. The primary purpose of this Order was to allow the Court to make a comprehensively supported determination as to whether, in fact, the Defendants' fair trial, confrontation and/or due process rights had been violated by either the intentional or inadvertent withholding of material

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[1]In *Giglio v. United States,* 405 U.S. 150, 92 S. Ct. 763 (1972), the Supreme Court extended the dictates of *Brady* to encompass evidence impeaching the credibility of witnesses.

exculpatory information.

The Court followed this Order with another directing those Government counsel responsible for conducting the investigation to periodically report upon their progress to the Court and to turn over to the Court all relevant documents. As this review developed, and its scope exceeded that which the Court and no doubt Government counsel anticipated, the United States Attorney General, to his credit, appointed a Special Attorney, Craig S. Morford, from outside the Detroit U. S. Attorney's office to lead the Government's review.

As matters progressed further, other developments arising out of the case intervened which made the review more complicated by presenting issues of overlapping concern and potentially conflicting objectives.[2] This had the unfortunate by-product of delaying the resolution of the principal issues raised in the Defendants' post-trial motions.

It is a fair statement that at the inception of this review no one, least of all the Court, could have anticipated the nature and scope of the issues -- not to mention the sheer number of documents -- that would ultimately be involved in this investigation. (Just one complicating factor, for example, was the necessity for the Court to review many classified documents and for the Court to seek security clearance for its staff and defense counsel, a time consuming process.) Certainly, no one could have imagined last winter that it would be almost autumn before the review was completed and a

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[2] These intervening events included internal Justice Department investigations by the Office of Professional Responsibility and the Office of Professional Integrity into the conduct of the original prosecution team.

resolution at hand.

The Government's filing this week -- confessing error, moving to dismiss the terrorism related charges in Count I, and acquiescing in a new trial as to the document fraud charges in Count II -- brings to the point of resolution the vast majority of the outstanding issues raised in the Defendants' motions. It remains now only for the Court to put its imprimatur upon this resolution, at least as to those issues that are no longer in contest, before moving on to the next phase of this case.

Before doing so, the Court offers several observations about the case and its post-trial proceedings. First, from the inception of its review, it has been the Court's intention to conduct as thorough and comprehensive a review as possible and to examine all evidence, documents and concomitant issues presented to it before making a determination of the Defendants' motions. The Court believed then, and believes now, that jury verdicts reached after painstaking consideration of the evidence at trial and thorough deliberation should not be precipitously disregarded and overturned. Rather, jury verdicts should be disturbed only upon a court's firmest conviction and belief -- formed after the most searching and comprehensive review of all of the evidence and issues -- that a miscarriage of justice has occurred and a defendant's fundamental constitutional rights violated.

The Court is satisfied that this searching and comprehensive review has now been completed. Beyond the material provided directly to the Court by Government counsel in response to the review Order, the Court itself has conducted a personal review of all classified information in the possession of the Central Intelligence Agency concerning this case. In addition, the Court has, of course, thoroughly reviewed and

considered the Government's filing.

This brings the Court to its second observation. The Court would be remiss if it did not commend both Government and defense counsel, and express its appreciation, for their work and conduct during the post-trial review process. Both the Government team pursuing the review, led by Mr. Morford, and all defense counsel have conducted themselves throughout this difficult process with the highest level of professionalism and commitment to the justice system, and all counsel have at all times thoroughly cooperated with the Court.

With respect to the Government team, in vigorously pursuing and producing to the Court all possible evidence, and helping to develop a complete record upon which a decision could be made, Government counsel has followed the evidence impartially and objectively and allowed the facts to lead where they may. The Court recognizes the initial impulse, under the circumstances presented here, to find fault with a system that allowed the mistakes now acknowledged by the Government -- and, to be sure, the Defendants' due process rights have been compromised as a result of these errors. Nonetheless, any such criticism must be considerably tempered by the Government team's post-trial commitment to uncover all of the evidence and carefully assess whether, in fact, the Defendants were denied their right to a fair trial.[3]

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[3]Indeed, it bears emphasis that the court-ordered review in this case was directly attributable to the efforts of Government lawyers at the U.S. Attorney's Office in Detroit, who brought evidence to the attention of defense counsel and the Court that resulted in the December 12, 2003 hearing. Further, it was the forthright statements of Government attorneys at this hearing which confirmed the Court's belief that a comprehensive review was necessary. Thus, it would be simply wrong to claim that the prosecution's transgressions came to light purely as a matter of "chance." This view would do a disservice to the system of checks and balances that safeguards the fair trial

In the Court's view, the position the Government has now taken -- confessing prosecutorial error and acquiescing in most of the relief sought by the Defendants -- is not only the legally and ethically correct decision, it is in the highest and best tradition of Department of Justice attorneys. Given the nature and background of this case, the Government's decision could not have been an easy one and, no doubt, is one that will come in for criticism and second-guessing from some quarters. However, it is the right decision.

With respect to defense counsel, they, too, have conducted themselves professionally. As matters became more complicated and protracted during the review, and it became clear it would not be possible for the Court to reach an early resolution, defense counsel exhibited admirable patience and restraint, thereby allowing the review to continue without undue distraction, while at the same time always keeping their clients' interests at the forefront of the Court's consideration and awareness. The Court understands that at times this took some faith on the part of defense counsel in the Court and the integrity of the review process, and for that the Court is appreciative. More generally, defense counsel's persistence, perseverance and tenacious commitment to their clients' cause has, to a great extent, brought matters to where they are today. Their work has been in the highest and best tradition of appointed counsel and the legal profession, and the American justice system.

Finally, this case -- and all of the issues that have been raised by it -- has always stood against the backdrop of the September 11 attacks upon our Nation and in the

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rights of defendants, and to the countless Government attorneys who are committed to the principles of justice.

continuing shadow of the threat of future terrorist attacks. It is no exaggeration to say that this monstrous apparition of fanatical terrorism presents to our Nation -- indeed, to the whole civilized world -- the gravest threat of the first decade of the new Millennium. In the first instance, of course, this threat to our security and way of life must be addressed by those in the policy branches of government. But, we are a nation that defines itself by laws, and as we are seeing in courts across the country, many of the actions taken by the Executive and Legislative branches to protect us will invariably end up before the courts for testing against the substantive and procedural protections of our Constitution.

For those of us who work in our Nation's courts and whose responsibility is the administration of justice -- including not only judges, but prosecutors and defense lawyers -- perhaps our greatest challenge will be to insure that this new threat is confronted in a way that preserves our most fundamental and cherished civil liberties. Certainly, the legal front of the war on terrorism is a battle that must be fought and won in the courts, but it must be won in accordance with the rule of law. Those of us in the justice system, including those prosecuting terror suspects, must be ever vigilant to insure that neither the heinousness of the terrorists' mission nor the intense public emotion, fear and revulsion that their grizzly work produces, diminishes in the least the core protections provided criminal defendants by our Constitution. To permit anything less -- to allow our constitutional standards to be tailored to the moment -- would be to give the terrorists an important victory in their campaign to bring us down because they will have caused us to become something less than what we are -- a nation of laws based upon constitutional foundations developed over more than two centuries of

jurisprudential evolution.

In the end, it is always at the most difficult and anxious moments in the life of our Nation -- and this is certainly one of those periods -- that our commitment to our constitutional values and traditions is most strenuously tested. Although prosecutors and others entrusted with safeguarding us through the legal system clearly must be innovative and think outside the conventional envelope in enforcing the law and prosecuting terrorists, they must not act outside the Constitution.

Unfortunately, that is precisely what has occurred in the course of this case. As thoroughly detailed in the Government's filing, at critical junctures and on critical issues essential to a fair determination by the jury of the issues tried in this case, the prosecution failed in its obligation to turn over to the defense, or to the Court, many documents and other information, both classified and non-classified, which were clearly and materially exculpatory of the Defendants as to the charges against them. Further, as the Government's filing also makes abundantly clear, the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case.

As the Government's filing also makes clear, these failures by the prosecution were not sporadic or isolated. Rather, they were of such a magnitude, and were so prevalent and pervasive as to constitute a pattern of conduct, that when all of the withheld evidence is viewed collectively, it is an inescapable conclusion that the Defendants' due process, confrontation and fair trial rights were violated and that the jury's verdict was infected to the point that the Court believes there is at least a reasonable probability that the jury's verdict would have been different had

constitutional standards been met.

Given the investment of the Government's time and resources -- not to mention the Court's -- and the significance of this case, one might well ask why and how this happened. This Court probably does not have sufficient training in the field of psychology and motivation to render an educated judgment, and it makes no final assessment here as to the legal or ethical culpability of the prosecution in this case.[4] However, it is sufficient to say here that two things are obvious to the Court from both its review of the Government's filing, as well as its own independent review of all the documents and evidence presented to it. First, the prosecution early on in the case developed and became invested in a view of the case and the Defendants' culpability and role as to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view. In doing so, the prosecution abandoned any objectivity or impartiality that any professional prosecutor must bring to his work. It is an axiom that a prosecutor must maintain sufficient distance from his case such that he may pursue and weigh all of the evidence, no matter where it may lead, and then let the facts guide him. That simply did not happen here.

More broadly, when viewed against the backdrop of the September 11 attacks upon our Nation and the public emotion and anxiety that has ensued, the prosecution's understandable sense of mission and its zeal to obtain a conviction overcame not only its professional judgment, but its broader obligations to the justice system and the rule

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[4] As noted above, there are ongoing investigations being conducted as to such matters, and the Court has no desire or intent to interfere with or influence the course or outcome of those investigations.

of law.

Normally, in a matter as consequential as this, the Court would write a detailed opinion and lengthy analysis of the law and how it lays out against the evidence, followed by its legal conclusions directed by this analysis. However, that is not necessary here. The Government's comprehensive and thorough filing amply provides the evidentiary and legal analysis necessary to support the Court's ruling. Suffice it to say that the Court's own involvement in the review, which has been ongoing, intensive and exhaustive and has included a thorough review of all documents and information not provided to the defense, both classified and non-classified, fully supports the Government's conclusions and position.[5] In short, the Court finds it unnecessary to provide further explication for its decision -- at this point, it is enough that the Government has confessed error, agrees to dismiss Count I, and concurs with the Defendants' motion for a new trial as to the charges in Count II.

This brings to a conclusion this very troubled and troubling phase of this case. The Court will leave to another day for resolution any residual issues upon which the parties may not be in agreement.

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[5] Indeed, the Government has acknowledged that its submission does not address the full extent to which the prosecution failed to meet its obligations to the Defendants and the Court. This public filing, in particular, does not address any classified materials that might have been subject to disclosure under *Brady* and *Giglio*. Having itself reviewed these classified materials, the Court observes that they provide additional and substantial support for the conclusions reached in the Government's filing.

ORDER

For the reasons set forth here and for the reasons set forth in the Government's filing,

IT IS HEREBY ORDERED that the Government's Motion to Dismiss, without prejudice, Count I of the Third Superseding Indictment is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion for New Trial is GRANTED, in part.

Count I of the Third Superseding Indictment, accordingly, is DISMISSED, without prejudice, and a NEW TRIAL is hereby ordered as to the charges in Count II.

/s/
Gerald E. Rosen
United States District Judge

Treatment of *Brady v. Maryland* Material in United States District and State Courts' Rules, Orders, and Policies

Report to the Advisory Committee on
Criminal Rules of the Judicial Conference
of the United States

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Federal Judicial Center
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Contents

I. Introduction

In July 2004, the Judicial Conference Advisory Committee on Criminal Rules asked the Federal Judicial Center to study the local rules of the U.S. district courts, state laws, and state court rules that address the disclosure principles contained in *Brady v. Maryland*.[1] *Brady* requires that prosecutors fully disclose to the accused all exculpatory evidence in their possession. Subsequent Supreme Court decisions have elaborated the *Brady* obligations to include the duty to disclose (1) impeachment evidence,[2] (2) favorable evidence in the absence of a request by the accused,[3] and (3) evidence in the possession of persons or organizations (e.g., the police).[4] This report presents the findings of that research.

The committee's interest is in learning whether federal district courts and state courts have adopted any formal rules or standards that provide prosecutors with specific guidance on discharging their *Brady* obligations. Specifically, the committee wanted to know whether the U.S. district and state courts' relevant authorities (1) codify the *Brady* rule; (2) set any specific time when *Brady* material must be disclosed; or (3) require *Brady* material to be disclosed automatically or only on request. In addition, the Center sought information regarding policies in two areas: (1) due diligence obligations of the government to locate and disclose *Brady* material favorable to the defendant, and (2) sanctions for the government's failure to comply specifically with *Brady* disclosure obligations.

This report has three sections. Section I presents a general introduction to the report, along with a summary of our findings. Section II describes the federal district court local rules, orders, and policies that address *Brady* material, and Section III discusses the treatment of *Brady* material in the state courts' statutes, rules, and policies.

A. Background: *Brady*, Rule 16, and Rule 11

1. Brady v. Maryland

In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[5] Subsequent Supreme Court decisions have held that the government has a constitutionally mandated, affirmative duty to disclose exculpatory evidence to the defendant to help ensure the defendant's right to a fair trial under the Fifth and Fourteenth Amendments' Due Process

1. 373 U.S. 83 (1963).
2. Giglio v. United States, 405 U.S. 150, 153–54 (1972).
3. United States v. Agurs, 427 U.S. 97, 107 (1976).
4. Kyles v. Whitley, 514 U.S. 419, 437 (1995).
5. 373 U.S. at 87

Clauses.[6] The Court cited as justification for the disclosure obligation of prosecutors "the special role played by the American prosecutor in the search for truth in criminal trials."[7] The prosecutor serves as "'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[8]

The *Brady* decision did not define what types of evidence are considered "material" to guilt or punishment, but other decisions have attempted to do so. For example, the standard of "materiality" for undisclosed evidence that would constitute a *Brady* violation has evolved over time from "if the omitted evidence creates a reasonable doubt that did not otherwise exist,"[9] to "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,"[10] to "whether in [the undisclosed evidence's] absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence,"[11] to the current standard, "when prejudice to the accused ensues . . . [and where] the nondisclosure [is] so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[12]

2. Federal Rule of Criminal Procedure 16

Federal Rule of Criminal Procedure 16 governs discovery and inspection of evidence in federal criminal cases. The Notes of the Advisory Committee to the 1974 Amendments expressly said that in revising Rule 16 "to give greater discovery to both the prosecution and the defense," the committee had "decided not to codify the *Brady* Rule."[13] However, the committee explained, "the requirement that the government disclose documents and tangible objects 'material to the preparation of his defense' underscores the importance of disclosure of evidence favorable to the defendant."[14]

Rule 16 entitles the defendant to receive, upon request, the following information:

- statements made by the defendant;
- the defendant's prior criminal record;

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6 *See* United States v. Bagley, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

7. Strickler v. Greene, 527 U.S. 263, 281 (1999).

8. Kyles v. Whitley, 514 U.S. 419, 439 (1995) (*quoting* Berger v. United States, 295 U.S. 78, 88 (1935)).

9. United States v. Agurs, 427 U.S. 97, 112 (1976).

10. *Bagley*, 473 U.S. at 682.

11. *Kyles*, 514 U.S. at 434.

12. *Strickler*, 527 U S. at 281–82.

13. Fed. R. Crim. P. 16 advisory committee's note (italics added).

14. *Id*

- documents and tangible objects within the government's possession that "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";
- reports of examinations and tests that are material to the preparation of the defense; and
- written summaries of expert testimony that the government intends to use during its case in chief at trial.[15]

Rule 16 also imposes on the government a continuing duty to disclose additional evidence or material subject to discovery under the rule, if the government discovers such information prior to or during the trial.[16] Finally, Rule 16 grants the court discretion to issue sanctions or other orders "as are just" in the event the government fails to comply with a discovery request made under the rule.[17]

3. Federal Rule of Criminal Procedure 11

Federal Rule of Criminal Procedure 11 governs prosecutor and defendant practices during plea negotiations. The Supreme Court has not said whether disclosure of exculpatory evidence is required in the context of plea negotiations; however, in *United States v. Ruiz*, the Court held that the government is not constitutionally required to disclose *impeachment* evidence to a defendant prior to entering a plea agreement.[18] The Court noted that "impeachment information is special in relation to the *fairness of a trial,* not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficiently aware')."[19] The Court stated that "[t]he degree of help that impeachment information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case—a matter that the Constitution does not require prosecutors to disclose."[20] Finally, the Court stated that "a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice."[21]

4. American College of Trial Lawyers' proposal

In October 2003, the American College of Trial Lawyers (ACTL) proposed amending Federal Rules of Criminal Procedure 11 and 16 in order to "codify the rule of law first propounded in *Brady v. Maryland*, clarify both the nature and

15. Fed. R. Crim. P. 16(a)(1)(A)–(E).
16. Fed. R. Crim. P. 16(c).
17. Fed. R. Crim. P. 16(d)(2).
18. 536 U.S. 622, 633 (2002).
19. *Id.* at 629 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).
20. *Id.* at 630.
21. *Id.* at 631.

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."[22]

5. Department of Justice's response to the ACTL's proposal

The Department of Justice (DOJ) opposes the ACTL's proposal to amend Federal Rules of Criminal Procedure 11 and 16. DOJ contends that the government's *Brady* obligations are "clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule," and therefore no codification of the *Brady* rule is warranted.[23]

B. Summary of Findings

1. Relevant authorities identified in the U.S. district courts

- Thirty of the ninety-four districts reported having a relevant local rule, order, or procedure governing disclosure of *Brady* material. References to *Brady* material are usually in the courts' local rules but are sometimes in standard or standing orders and joint discovery statements.
- Eighteen of the thirty districts that explicitly reference *Brady* material use the term "favorable to the defendant" in describing evidence subject to the disclosure obligation. Nine other districts refer to *Brady* material as evidence that is exculpatory in nature. One additional district uses neither term, and two other additional districts use both terms in defining *Brady* material.
- Twenty-one of the thirty districts mandate automatic disclosure; five dictate that the government provide such material only upon request of the defendant. One district requires parties to address *Brady* material in a pretrial conference statement, and three are silent on disclosure.
- The thirty districts that reference *Brady* material vary significantly in their timetables for disclosure of the material. The most common time frame is "within 14 days of the arraignment," followed by "within five days of the arraignment." Some districts have no specified time requirements for disclosure, using terms such as "as soon as reasonably possible" or "before the trial."
- In twenty-two of the thirty districts with *Brady*-related provisions, the disclosure obligation is a continuing one, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be notified and provided with the new evidence.

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22. Memorandum from American College of Trial Lawyers to the Judicial Conference Advisory Committee on Federal Rules of Criminal Procedure (October 2003), at 2

23. Memorandum from U.S. Department of Justice (Criminal Division) to Hon. Susan C. Bucklew, Chair, Judicial Conference Subcommittee on Rules 11 and 16 (April 26, 2004), at 2

- Of the thirty districts with policies governing *Brady* material, five have specific due diligence requirements for prosecutors. One district has a certificate of compliance requirement only. The remaining twenty-four districts do not appear to have due diligence requirements.
- None of the districts specify sanctions for nondisclosure by prosecutors, leaving any sanction determination to the discretion of the court.
- Three of the thirty districts that reference *Brady* have declination procedures for disclosure of specific types of information.

2. *Relevant authorities identified in the state courts*

- All fifty states and the District of Columbia have a rule or other type of authority, including statutes, concerning the prosecutor's obligation to disclose information favorable to the defendant.
- Many of the states have enacted rules similar to Federal Rule of Criminal Procedure 16; however, some of these rules and statutes vary in their details. Some states go beyond the scope of Rule 16 and the *Brady* constitutional obligations by explicitly setting time limits on disclosure; other states have adopted Rule 16 almost verbatim, using language like "evidence material to the preparation of the defense" and "evidence favorable to the defendant."
- Most states' rules impose a continuing disclosure obligation, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be promptly notified and shown such new evidence.
- A few states have a specific due diligence obligation that requires prosecutors to submit a "certificate of compliance" indicating that they have exercised due diligence in locating favorable evidence and that, to the best of their knowledge and belief, all such information has been disclosed to the defense.
- All of the states authorize sanctions for prosecutors' failure to comply with discovery obligations and other state-court-mandated disclosure requirements. A few states permit a trial court to dismiss charges entirely as a sanction for prosecutorial misconduct, while other states have held dismissal to be too severe a sanction.

II. U.S. District Court Policies for the Treatment of *Brady* Material

In this section, we describe federal local court rules, orders, and procedures in the thirty responding districts that codify the *Brady* rule, define *Brady* material and/or set the timing and conditions for disclosure of *Brady* material. In addition, we discuss due diligence obligations of the government and specific sanctions for the government's failure to comply with disclosure procedures.

A. Research Methods

Because of the short time we had to complete our research, we were unable to survey each district court about compliance with its *Brady* practices, that is, the degree to which the court's rules and other policies describe what actually occurs in the district. To obtain a comprehensive picture of such practices, we would need to survey U.S. attorneys, federal public defenders, and selected retained or appointed defense counsel in each of the ninety-four districts. Such a survey would be considerably more time-consuming than the research conducted for this report.

We searched the Westlaw RULES-ALL and ORDERS-ALL databases using the following search terms:

- "Brady v. Maryland" & ci(usdct!);
- "exculpatory" & ci(usdct!);
- "exculpatory evidence" & ci(usdct!); and
- "evidence favorable to the defendant" & ci(usdct!).

In addition, we reviewed paper copies of each district court's local rules. For twenty-two districts, these database and paper-copy searches yielded specific local rules and orders that relate to the *Brady* decision or that set forth guidance to the government regarding disclosure of *Brady* material. For the seventy-two (94 minus 22) districts for which our searches did not yield a relevant local rule or order, we contacted the clerks of court to request their assistance in locating any local rules, orders, or procedures relating to the application of the *Brady* decision. Through this effort, we identified eight additional districts (for a total of thirty) that clearly refer to *Brady* material in their local rules, orders, or procedures.

We also received responses from another eight districts that do not clearly refer to *Brady* material, but that provided summary information about their disclosure policies.[24] Some districts responded with statements such as "We have not promulgated any local rule and/or general order referencing *Brady* material." Others stated, "We have not adopted any formal standards or rules that provide guidance to prosecutors on discharging *Brady* obligations." And a few districts

24. These districts were M.D. La., N.D. Miss., E.D. Mo., W.D.N.Y., N.D. Ohio, M.D. Pa., D S.C., and D.V.I

reported, "We follow Federal Rule of Criminal Procedure 16." In most instances, these districts did not provide any other information regarding how *Brady* material disclosures operated in their districts.

The thirty districts that have local rules, orders, and procedures specifically addressing *Brady* material served as the basis for the federal courts section of our analysis. We reviewed and analyzed each of the thirty districts' rules, orders, and published procedures to determine

- the types of information defined as *Brady* material;
- whether the material is disclosed automatically or only upon request;
- the timing of disclosure;
- whether the parties had a continuing duty to disclose;
- whether the parties had a due diligence requirement; and
- whether there are specific provisions authorizing sanctions for failure to disclose *Brady* material.

We also noted whether the districts had declination procedures.

B. Governing Rules, Orders, and Procedures

We found references to *Brady* material in various documents, including local rules, orders (including standing orders and standard discovery, arraignment, scheduling, and pretrial orders), and supplementary materials such as joint statements of discovery and checklists (including disclosure agreement checklists).

Provisions for obligations to disclose *Brady* material are contained in the documents listed in Table 1.[25] We were unable to find information on each of the variables discussed here for all districts. Consequently, this is not a comprehensive description of each of the thirty districts' procedures.

C. Definition of *Brady* Material

Most disclosure rules, orders, and procedures in the thirty districts that address the *Brady* decision define *Brady* material in one of two ways: as evidence favorable to the defendant (18 districts),[26] or as exculpatory evidence (9 districts).[27] One

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25. Two of the thirty districts (W.D. Okla., D. Vt.) address *Brady*-material disclosure in more than one document.

26. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16.13(b)(1)); N.D. Cal. Crim. L.R. 17.1-1(b)(3); D. Conn. L. Crim. R App. Standing Order on Discovery § (A)(11); N.D. Fla. L.R. 26 3(D)(1); S.D. Fla. L.R. Gen. Rule 88.10; M.D. Ga. Standard Pretrial Order; S.D. Ga. L. Crim. R. 16 1(f), D. Idaho Crim. Proc. Order §§ I(5) & (I)5(a); W.D. Mo. Scheduling and Trial Order § VI A., D Nev Joint Discovery Statement § II; W.D. Okla. App. 5, § 5; W.D. Pa. L. Crim. R. 16.1(F); E.D. Tenn. Discovery and Scheduling Order (sample); M.D. Tenn. L.R. 10(a)(2)(d); D. Vt. L. Crim. R. 16.1(a)(2); W.D. Wash. Crim. R. 16(a)(1)(K); and S.D. W. Va. Arraignment Order and Standard Discovery Requests § (3)(1)(H)).

27 S D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order, and Other Matters § VII(a)(1)(h); D. Mass. Crim. R. 116.02(A); D.N.H. L Crim. R.

district (Western District of Kentucky) refers to the material by case name ("*Brady* material") but does not define it further—for example, the terms "evidence favorable to the defendant" or "exculpatory evidence" do not appear in the order.[28] Finally, two districts (Northern District of Georgia[29] and Northern District of New York[30]) use both terms, "evidence favorable to the defendant" and "exculpatory evidence," to define *Brady* material.

Table 1. District Court Documents That Reference *Brady* Material

Documents	Number of Districts	Districts
Local rules	16	S.D. Ala., N.D. Cal., N.D. Fla., S.D. Fla., S.D. Ga., D. Mass., D.N.H., D.N.M., N.D.N.Y., E.D.N.C., W.D. Okla., W.D. Pa., D.R.I., M.D. Tenn , W.D. Wash., E.D. Wis.
Standard orders	3	M.D. Ga., S.D. Ind., D. Vt.
Standing orders	2	M.D. Ala., D. Conn.
Procedural orders	1	D. Idaho
Arraignment orders & standard discovery requests	1	S.D. W.Va.
Arraignment orders & reciprocal orders of discovery	1	W.D. Ky.
Joint discovery statements	2	D. Nev., W.D. Okla.
Discovery & scheduling orders	1	E.D. Tenn.
Scheduling orders	1	W.D. Mo.
Magistrate judges' pretrial orders	1	N.D. Ga.
Criminal pretrial orders	1	D. Vt.
Criminal progression orders	1	D. Neb.
Model checklists	1	W.D. Tex.

16 1(c); D.N.M. L.R.-Crim. R. 16.1; E.D.N.C. L. Crim. R. 16.1(b)(6), D.R.I. R. 12(e); W.D. Tex. Crim. R. 16 (Model Checklist); N.D. W Va. L.R. Crim. P 16.05; and E.D. Wis. Crim. L.R. 16.1(b) & (c).

28. W.D Ky. Arraignment Order & Reciprocal Order of Discovery § (4)(V).

29. N.D. Ga. Magistrate Judge's Pretrial Order § IV(B).

30. N.D.N Y. L.R. Crim. P. 14.1(b)(2) ("favorable to the defendant"), and N.D.N.Y. L.R. Crim. P. 17.1.1(c) ("exculpatory and other evidence").

1. Evidence favorable to the defendant

The most common definition of "evidence favorable to the defendant," found in ten of the eighteen districts that use the term, defines *Brady* material as any material or information that may be favorable to the defendant on the issues of guilt or punishment and that is within the scope (or meaning) of *Brady*.[31] Three of the ten districts add the qualifier "without regard to materiality."[32]

2. Exculpatory evidence or material

Nine districts refer to *Brady* material as exculpatory in nature.[33] Seven of these use the terms "exculpatory evidence" or "exculpatory material."[34] An eighth district, Rhode Island, refers to "material or information, which tends to negate the guilt of the accused or to reduce his punishment for the offense charged."[35] Finally, the ninth district, New Mexico, specifically provides for an assessment of the material where there is disagreement among the parties: "if a question exists of the exculpatory nature of material sought under *Brady*, it will be made available for in camera inspection at the earliest possible time."[36]

Of these nine districts, Massachusetts has the most detailed and expansive rule dealing with *Brady* material and exculpatory evidence. It defines exculpatory evidence as follows:

- Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.
- 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. § 3731.

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31. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16.13(b)(1)); D. Conn. L. Crim. R. App. Standing Order on Discovery § (A)(11); N.D. Fla. L.R. 26.3(D)(1); S.D. Fla. L.R. Gen. Rule 88.10; W.D. Mo. Scheduling and Trial Order § VI.A.; E.D. Tenn. Discovery and Scheduling Order (sample); M.D. Tenn. Rule 10(a)(2)(d); D. Vt. L. Crim. R. 16.1(a)(2); and W.D. Wash. Crim. R. 16(a)(1)(K).

32. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16.13(b)(1)); and N.D. Fla. L.R. 26.3(D)(1).

33. S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order, and Other Matters § VII(a)(1)(h); D. Mass. Crim. R. 116.02(A); D.N.H. L. Crim. R. 16.1(c); D N.M. L.R.-Crim. R. 16.1; E.D.N.C. L. Crim. R. 16.1(b)(6); D.R.I. R. 12(e); W.D. Tex. Crim. R. 16 (Model Checklist); N.D. W. Va. L.R. Crim. P. 16.05; and E.D. Wis. Crim. L.R 16.1(b) & (c).

34. S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order, and Other Matters § VII(a)(1)(h); D. Mass. Crim. R. 116 02(A); D.N.H. L. Crim. R. 16.1(c); E.D.N.C. L. Crim. R. 16.1(b)(6); W.D. Tex. Crim. R. 16 (Model Checklist); N.D. W. Va. L.R. Crim. P. 16.05; and E.D. Wis Crim. L.R. 16.1(b) & (c)

35. D.R.I. R. 12(e).

36. D.N.M. Crim. R. 16 1.

- 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.
- A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.
- A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.
- 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
- 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.
- 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.
- 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.
- Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.
- 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 case-in-chief
- 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.
- 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.
- Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.
- 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.[37]

37. D. Mass. L.R. 116.2(B)

D. Disclosure Requirements

Twenty-one districts mandate automatic disclosure of *Brady* material.[38] One, the Middle District of Georgia, has a caveat—the government need not furnish the defendant with *Brady* information that the defendant has obtained, or with reasonable diligence, could obtain himself or herself.[39] New Mexico mandates "discussion" of disclosure, and says that in camera inspection may be needed.[40]

Five districts dictate that the government provide *Brady* material only upon request of the defendant.[41] The Northern District of California adds qualifying language that requires that the parties address the issue "if pertinent to the case," and in their pretrial conference statement "if a conference is held."[42] Three districts[43] do not mention this issue in their local rules or orders.

Only one district specifically addresses the disposition of the information or evidence once the case has been resolved. The Middle District of Tennessee requires that the information or evidence be returned to the "government or destroyed following the completion of the trial, sentencing of the defendant, or completion of the direct appellate process, whichever occurs last."[44] A party who destroys materials must certify the destruction by letter to the government.

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38. M.D. Ala. Standing Order on Criminal Discovery § (1)(B); S.D. Ala. L.R. 16 13(b)(1); D. Conn. L. Crim. R. App. Standing Order on Discovery § (A)(11); N.D. Fla. L.R. 26.3(D)(1); S.D. Fla. L.R. Gen. Rule 88.10; M.D. Ga. Standard Pretrial Order; S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Pleas, Trial Date, Discovery Order and Other Matters § VII(a)(1)(H); D. Mass. Crim. R. 116.2(B); W D. Mo. Scheduling and Trial Order § VI(A); D. Nev. Joint Discovery Statement § II; D.N.M. L.R.-Crim. R. 16.1; D.N.H. L. Crim. R. 16.1(c); N.D.N.Y. L.R. Crim. P. 14.1(b); W.D. Okla. L. Crim. R. 16 1(b) & App. V. Joint Statement of Discovery Conference § 5; W.D. Pa. L. Crim. R. 16.1(F); D.R.I. Rule 12(e)(A)(5); E.D. Tenn. Discovery & Scheduling Order; M.D. Tenn. L.R. 10(a)(2)(d); D. Vt. L. Crim. R. 16.1(a)(2); N.D. W. Va. L.R. Crim. P. 16.05; and E.D. Wis. Crim. L.R. 16.1(b).

39. M.D. Ga. Standard Pretrial Order, citing United States v. Slocum, 708 F.2d 587, 599 (11th Cir. 1983).

40. D.N.M. L.R.-Crim. R. 16.1.

41. N.D. Ga. Standard Magistrate Judge's Pretrial Order; S.D. Ga. L. Crim. R. 16.1(f); E.D.N.C. L. Crim. R. 16.1(b)(6), W.D. Wash. Crim. R. 16(a)(1)(K); and S.D. W. Va. Arraignment Order and Standard Discovery Request § III(1)(H).

42. N.D. Cal. Crim. L.R. 17.1-1(b).

43. D. Idaho, W.D. Ky., and W.D. Tex.

44. M.D. Tenn. R. 12(k).

1. *Time requirements for disclosure*[45]

The thirty districts vary significantly in their disclosure timetables. Some districts specify a time by which the prosecution must disclose *Brady* material, while other districts rely upon nonspecific terms such as "timely disclosure" or "as soon as practicable."

a. *Specific time requirement*

Twenty-five districts have mandated time limits (or specific events, such as hearings or pretrial conferences) for prosecutorial disclosure of *Brady* material (see Table 2).

Table 2. Districts with Time Requirements for Prosecutorial Disclosure of *Brady* Material

Time Requirement	Districts
At arraignment	M.D. Ala.,[46] S.D. Ala.
Within 5 days of arraignment	N.D. Fla., S.D. Ga., W.D. Pa., E.D. Wis.
Within 7 days of arraignment	D. Idaho, N.D. W. Va.
Within 10 days of arraignment	D. Conn., D.R.I., S.D. W. Va.
Within 14 days of arraignment	S.D. Fla., N.D.N.Y., M.D. Tenn., W.D. Tenn., W.D. Tex., D. Vt., W.D. Wash.
Within 28 days of arraignment	D. Mass.
At the discovery conference	W.D. Okla.
Within 10 days of the scheduling order	W.D. Mo.
Prior to the pretrial conference	N.D. Ga.
At the pretrial conference (PTC) (or address in the PTC statement or order)	N.D. Cal., E.D.N.C.
At least 20 days before trial	D.N.H.

45. It is well settled that the district court may order when *Brady* material is to be disclosed, United States v. Starusko, 729 F.2d 256 (3d Cir. 1984). Some decisions have held that the Jencks Act controls and that *Brady* material relating to a certain witness need not be disclosed until that witness has testified on direct examination at trial, United States v. Bencs, 28 F.3d 555 (6th Cir. 1994); United States v Jones, 612 F.2d 453 (9th Cir. 1979); United States v. Scott, 524 F.2d 465 (5th Cir 1975). Others have held that *Brady* material might be disclosed prior to trial, in order to afford the defendant the opportunity to make effective use of it during trial, United States v. Perez, 870 F.2d 1222 (7th Cir. 1989); United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979); United States v. Pollack, 534 F.2d 964 (D.C. Cir. 1976).

46. "or on a date otherwise set by the Court for good cause shown." M.D. Ala Standing Order on Criminal Discovery § 1.

b. No specific time requirement

Four districts have nonspecific time requirements for disclosure, set out in local rules or in various court orders, or determined by case law.[47] The terms used for these time requirements include the following descriptions:

- "as soon as reasonably possible";[48]
- "before the trial";[49]
- "after defense counsel has entered an appearance";[50] and
- "[t]iming of disclosure should be *described* in the District's standard Arraignment Order/Reciprocal Order of Discovery."[51]

Time requirements for disclosure for one district were not given.[52]

2. *Duration of disclosure requirements*

Twenty-two of the thirty districts make the prosecutor's disclosure obligation a continuing one, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be notified and shown the new evidence.[53] A few districts use adjectives or modifiers to more clearly define how soon after discovery of new material the government must disclose it.[54] One dis-

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47. In the Eastern District of Tennessee, timing of disclosure is governed by *U.S. v. Presser*, 844 F.2d 1275 (6th Cir. 1988), which addressed material that was arguably exempt from pretrial disclosure by the Jencks Act, yet also arguably exculpatory under the *Brady* rule. There, the material needed only to be disclosed to defendants "in time for use at trial."

48. M.D. Ga. Standard Pretrial Order.

49. D. Nev. Joint Discovery Statement § II.

50. S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters § VII(a)(1)(H).

51. W.D. Ky. Arraignment Order and Reciprocal Order of Discovery § V (emphasis added).

52. D.N.M.

53. M.D. Ala. Standing Order on Criminal Discovery; S.D. Ala. L.R. 16.13(c); D. Conn. L. Crim. R. App. Standing Order on Discovery § D; N.D. Fla. Crim. L.R. 26.3(G); S.D. Fla. L.R. Gen. R. 88.10; S.D. Ga. L. Crim. R. 16.1; D. Idaho Procedural Order § I(5); S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters § VII(c); W.D. Mo. Scheduling and Trial Order § II; D.N.H. L. Crim. R. 16.2; D.N.M. L.R.-Crim. R. 16.1; N.D.N.Y L.R. Crim. P. 14.1(f); E.D.N.C. L. Crim. R. 16.1(e); W.D. Okla. App. 5; E.D. Tenn. Discovery and Scheduling Order; M.D. Tenn. R. 10(a)(2); W.D. Tex. C.R. 16(b)(4); D. Vt. L. Crim. R. 16.1(e); W.D. Wash. Crim. R. 16(d); N.D. W. Va. L.R. Crim. P. 16.05; S.D. W. Va. Arraignment Order and Standard Discovery Request § III(4); and E.D. Wis. Crim. L.R. 16(b)

54. *E.g.*, "immediately" (D. Conn. L. Crim. R. App. Standing Order on Discovery § D; S.D. Fla. L.R. Gen. R. 88.10; N.D.N.Y. L.R. Crim. P. 14.1(f); M.D. Tenn. R. 10(a)(2); and N.D. W. Va. L.R. Crim. P. 16.05); "as soon as it is received" (S.D. W. Va. Arraignment Order and Standard Discovery Request § III(4)); "promptly" (S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters § VII(c); W.D. Tex. C.R. 16(b)(4)), "expeditiously" (M.D. Ala. Standing Order on Criminal Discovery; S.D. Ala. L.R. 16.13(c); N.D.N.Y. L.R. Crim. P. 14.1(f)); and "by the speediest means available" (N.D. Fla. Crim. L.R. 26.3(G)).

trict's local rule explicitly states that motions to enforce the continuing duty "should not be necessary."[55]

E. Due Diligence Requirements

Five districts have specific "due diligence" requirements for prosecutors.[56] Two of these five districts[57] plus one additional district[58] require the government to sign and file a "certificate of compliance" (with *Brady* obligations) with discovery. In one of the five districts, failure to file the certificate of compliance along with a discovery or inspection motion "may result in summary denial of the motion or other sanctions within the discretion of the court."[59]

While other districts do not use the term "due diligence" in their local rules, orders, or procedures, some make it clear that the government has the responsibility to identify and produce discoverable evidence and information. For example, the Western District of Missouri's rule regarding the government's responsibility for reviewing the case file for *Brady* (and *Giglio*) material says:

> The government is advised that if any portion of the government's investigative file or that of any investigating agency is not made available to the defense for inspection, the Court will expect that trial counsel for the government or an attorney under trial counsel's immediate supervision who is familiar with the *Brady/Giglio* doctrine will have reviewed the applicable files for the purpose of ascertaining whether evidence favorable to the defense is contained in the file.[60]

In addition, the Middle and Southern Districts of Alabama include a restriction on the delegation of the responsibility:

> The identification and production of all discoverable information and evidence is the personal responsibility of the Assistant U.S. Attorney assigned to the action and may not be delegated without the express permission of the Court.[61]

F. Sanctions for Noncompliance with *Brady* Obligations

None of the thirty districts specify remedies for prosecutorial nondisclosure. All leave the determination of any sanctions to the discretion of the court.

One district, however, provides some guidance for judges dealing with the failure of the government to comply with *Brady/Giglio* obligations. The Uniform Procedural Order in the District of Idaho says:

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55. D.N.M. Crim. R 16.1

56. D. Conn. L. Crim R. App. Standing Order on Discovery § A; W.D. Mo. Scheduling and Trial Order § II; D. Nev Joint Discovery Statement § II; D.N.H. L. Crim. R 16 2; and W D. Wash. Crim. R. 16(a).

57. W.D. Mo. and W D. Wash.

58. D.N.M. *See* D.N.M. L.R.-Crim. R. 16.1. This rule does not use the term "due diligence."

59 W.D. Wash. Crim. R. 16(1).

60. W.D Mo. Scheduling and Trial Order Note following §§ VI(A) & (B).

61. M.D. Ala. Standing Order on Criminal Discovery; S.D. Ala. L.R. 16.13(b)(2)(C).

> If the government has information in its possession at the time of the arraignment, but elects not to disclose this information until a later time in the proceedings, the court can consider this as one factor in determining whether the defendant can make effective use of the information at trial.[62]

Most courts allow sanctions (generally based on Rule 16's authority) for both parties for general discovery abuses. These sanctions include exclusion of evidence at trial, a finding of contempt, granting of a continuance, and even dismissal of the indictment with prejudice. For example, the Northern District of Georgia's standard Magistrate Judge's Pretrial Order says:

> Where reciprocal discovery is requested by the government, the attorney for the defendant shall personally advise the defendant of the request, the defendant's obligations thereto, and the possibility of sanctions, including exclusion of any such evidence from trial, for failure to comply with the Rule. *See* Fed. R. Crim. P. 16(b) and (d) (as amended December 1, 2002); L.Cr R. 16.1 (N.D. Ga.).[63]

The Southern District of Florida's Discovery Practices Handbook states that "[i]f a Court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the Court with the gravity it deserves; willful violation of a Court order is always serious and is treated as contempt."[64] The Northern District of West Virginia's local rule is even more sweeping:

> 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 L.R. Crim. P. 16 [the general discovery 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 the Court may enter such order as it deems just under the circumstances up to and including the dismissal of the indictment with prejudice.[65]

G. Declination Procedures

Three of the thirty districts specifically refer to declination procedures in their local rules or orders.[66] For example, the Southern District of Georgia's local rule says:

> In the event the U.S. Attorney declines to furnish any such information described in this rule, he shall file such declination in writing specifying the types of disclosure

62. D. Idaho Uniform Procedural Order § I(5).

63. N.D. Ga. standard Magistrate Judge's Pretrial Order.

64. S.D. Fla. L.R. App. A. Discovery Practices Handbook § I.D(4) Sanctions. Note that the practices set forth in the handbook do not have the force of law, but are for the guidance of practitioners. The *Discovery Practices Handbook* was prepared by the Federal Courts Committee of the Dade County Bar Association and adopted as a published appendix to the Local General Rules.

65. N.D. W. Va. L.R. Crim. P. 16.11.

66. S.D. Ga. L. Crim. R. 16.1(g); D. Mass L.R. 116.6(A); and W.D. Wash. Crim. R. 16(e).

that are declined and the ground therefor. If defendant's attorney objects to such refusal, he shall move the Court for a hearing therein.[67]

The District of Massachusetts has an even more detailed rule governing the declination of disclosure and protective orders, providing for challenges, sealed filings, and ex parte motions:

> (A) Declination. If in the judgment of a party it would be detrimental to the interests of justice to make any of the disclosures required by these Local Rules, such disclosures may be declined, before or at the time that disclosure is due, and the opposing party advised in writing, with a copy filed in the Clerk's Office, of the specific matters on which disclosure is declined and the reasons for declining. If the opposing party seeks to challenge the declination, that party shall file a motion to compel that states the reasons why disclosure is sought. Upon the filing of such motion, except to the extent otherwise provided by law, the burden shall be on the party declining disclosure to demonstrate, by affidavit and supporting memorandum citing legal authority, why such disclosure should not be made. The declining party may file its submissions in support of declination under seal pursuant to L.R. 7.2 for the Court's in camera consideration. Unless otherwise ordered by the Court, a redacted version of each such submission shall be served on the moving party, which may reply.
>
> (B) Ex Parte Motions for Protective Orders. This Local Rule does not preclude any party from moving under L.R. 7.2 and ex parte (i.e., without serving the opposing party) for leave to file an ex parte motion for a protective order with respect to any discovery matter. Nor does this Local Rule limit the Court's power to accept or reject an ex parte motion or to decide such a motion in any manner it deems appropriate.[68]

Other districts have procedures for motions to deny, modify, restrict, or defer discovery or inspection.[69] The moving party has the burden to show cause why discovery should be limited.

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67. S.D. Ga. L. Crim. R. 16.1(g). *See also* S.D. Ind. Notification of Assigned Judge, Automatic Not Guilty Plea, Trial Date, Discovery Order and Other Matters (standard order in criminal cases) § VII(d).

68. D. Mass. Crim. R. 116.6. The Western District of Washington has a similar but less detailed and expansive rule. W.D. Wash. Crim. R. 16(e).

69. *See, e.g.,* D. Conn. Standing Order on Discovery § F. The Middle District of Tennessee's standing order language is similar to Connecticut's; however, the Middle District of Tennessee's includes the following cautionary message: "It is expected by the Court, however, that counsel for both sides shall make every good faith effort to comply with the letter and spirit of this Rule." M.D. Tenn. R. 10(a)(2)(n).

III. State Court Policies for the Treatment of *Brady* Material

This section describes state court statutes, rules, orders, and procedures that codify the *Brady* rule or incorporate specific aspects of it, define *Brady* material and/or set the timing and conditions for its disclosure, impose any due diligence obligations on the government, and specify sanctions for the government's failure to comply with such disclosure procedures.

A. Research Methods

We identified within all fifty states and the District of Columbia the relevant statewide legal authority governing prosecutorial disclosure of information favorable to the defendant. We searched relevant databases in Westlaw and LEXIS, including state statutes, criminal procedure rules, state court rules governing criminal discovery, state constitutions, state court opinions, and state rules on professional conduct. For most states, we were able to locate a relevant state rule, order, or other legal authority when we used the following search terms in various combinations:

- "exculpatory evidence";
- "favorable evidence";
- "*Brady* material";
- "prosecution disclosure"; and
- "suppression of evidence."

If we were unable to locate a rule for a state, we reviewed state court opinions to determine if case law addressed or clarified the legal obligation regarding prosecutorial disclosure of information favorable to the defendant.

Our analyses and conclusions are based on our interpretation of the relevant authorities that we identified. We looked for relevant legal authority that contained clear and unequivocal language regarding the duty of the prosecutor to disclose information to the defense. Where we could not identify authority with clear language regarding the prosecution's disclosure obligation, we erred on the side of caution and noted the absence of a clear authority regarding the duty to disclose.

B. Governing Rules, Orders, and Procedures

All fifty states and the District of Columbia address the prosecutor's obligation to disclose information favorable to the defendant. Table 3 shows the sources of the relevant authority.

Table 3. Sources of Authority for Prosecutor's Obligation to Disclose Evidence Favorable to the Defendant

Authorities[70]	Number of States	States
Rules of Criminal Procedure or general court rules	35	Ala., Alaska, Ariz., Ark., Colo., Del., D.C., Fla., Idaho, Ill., Ind., Iowa, Ky., Me., Md., Mass., Mich., Minn., Miss., Mo., N.H., N.J., N.M., N.D., Ohio, Pa., R.I., S.C., Tenn., Utah, Vt., Va., Wash., W. Va., Wyo.
General statutes	14	Conn., Ga., Kan., La., Mont., Neb., Nev., N.Y., N.C., Okla., Or., S.D., Tex., Wis.
Penal code	2	Cal., Haw.

Some state supreme courts have found prosecutors' suppression of exculpatory evidence to violate the due process clauses of their constitutions. For example, in *State v. Hatfield,* the West Virginia Supreme Court held that "[a] prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia Constitution."[71] Another state, Nevada, explicitly notes in its criminal discovery procedure statute that "[t]he provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the constitution of this state . . . to disclose exculpatory evidence to the defendant."[72]

C. Definition of *Brady* Material

In thirty-three of the fifty-one jurisdictions, we found rules or procedures that codify the *Brady* rule. There are differences in the *Brady*-related definitions of materials covered.

1. Evidence favorable to the defendant

Although there is some variation in the specific language used to define *Brady* material,[73] twenty-three states[74] have adopted language generally resembling the

70. We identified several states that address the favorable evidence disclosure obligation in more than one source, e.g., in a statute as well as in a rule. We charted only the highest authority

71. 286 S.E 2d 402, 411 (W. Va. 1982).

72. Nev. Rev. Stat. § 174.235(3) (2004).

73. *See, e g ,* Me. R. Crim. P. 16(a)(1)(C) ("any matter or information known to the attorney for the state which may not be known to the defendant and which tends to create a reasonable doubt of the defendant's guilt as to the offense charged.").

following: "any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce the accused's punishment therefor."[75]

2. *Exculpatory evidence or material*

Ten other states[76] expressly list exculpatory material as items of information that prosecutors are required to disclose. These states describe exculpatory material in two ways: as "exculpatory evidence"[77] or as "exculpatory material."[78]

The remaining states do not appear to have any express language regarding *Brady* material, but case law in several of those states discusses the *Brady* obligation. For example, in *Potts v. State*, the Georgia Supreme Court held that the "[d]efendant . . . has the burden of showing that the evidence withheld from him so impaired his defense that he was denied a fair trial within the meaning of the *Brady* Rule."[79] The Supreme Court of Wyoming noted that although "[t]here is no general constitutional right to discovery in a criminal case. . . . [s]uppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt."[80] Other state courts have similarly invoked the *Brady* rule in their decisions.[81]

No state procedure expressly refers to impeaching evidence as material subject to disclosure requirements, but three states specify that prosecutors must turn over any information required to be produced under the Due Process Clause of the U.S. Constitution.[82] Two states require disclosure pursuant to the *Brady* decision.[83] Despite this lack of express language, however, it appears that any state court

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74. Ala., Ariz., Ark., Colo., Fla., Haw., Idaho, Ill., Ky., La., Me., Md., Minn., Mo., Mont., N.J., N.M., Ohio, Okla., Pa., Tex., Utah, and Wash.

75. Idaho Crim. R. 16(a).

76. Cal., Conn., Mass., Mich., Miss., Nev., N.H., Tenn., Vt., Wis.

77. *See, e.g*, Nev. Rev. Stat. § 174.235(3).

78. *See, e.g.*, Cal. Penal Code § 1054.1(e).

79. 243 S.E.2d 510, 517 (Ga. 1978) (citation omitted).

80. Dodge v. State, 562 P.2d 303, 307 (Wyo. 1977) (citations omitted).

81. Bui v. State, 717 So. 2d 6, 27 (Ala. Crim. App. 1997) ("In order to prove a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence, (2) that the evidence was of a character favorable to his defense, and (3) that the evidence was material." (citation omitted)); O'Neil v. State, 691 A.2d 50, 54 (Del. 1997) ("[T]he [prosecution's] obligation to disclose exculpatory information is triggered by the defendant's request pursuant to Super. Ct. Crim. Rule 16 and is not limited to trial proceedings."); Lomax v. Commonwealth, 319 S.E.2d 763, 766 (Va. 1984) ("[T]he Commonwealth has a duty to disclose the [*Brady*] materials in sufficient time to afford an accused an opportunity to assess and develop the evidence for trial.").

82. *See, e.g*, Nev. Rev. Stat. § 174.235(3); N.M. Dist. Ct. R. Cr. P. 5-501(A)(6); N.Y. Consol. Law Serv. Crim. P. Law § 240.20(1)(h).

83. *See, e g.*, N.H. Super. Ct. R. 98(A)(2)(iv); Tenn Crim. P. R. 16 (Advisory Commission Comments).

opinion that cites the *Brady* rule would include impeachment evidence as material that state prosecutors are constitutionally obliged to produce for defendants.[84]

D. Disclosure Requirements

Five states[85] use the term "favorable" in describing evidence subject to the state disclosure obligation. However, these states limit the clause "evidence favorable to the accused" with a condition that such evidence be "material and relevant to the issue of guilt or punishment."[86]

Although *Brady* used "favorable" in describing the evidence required for prosecutorial disclosure,[87] Rule 16 does not expressly refer to "favorable evidence." The rule permits a defendant in federal criminal cases to receive, upon request, documents and tangible objects within the possession of the government that "*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."[88] In describing some of the items of evidence subject to the criminal discovery right, twenty-six states use language identical or substantially similar to the italicized language above.[89]

1. Types of information required to be disclosed

All of the states,[90] require, at a minimum, disclosure of the types of evidence that Rule 16 permits to be disclosed before trial:

- written or recorded statements, admissions, or confessions made by the defendant;
- books, papers, documents, or tangible objects obtained from the defendant;

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84. *See* United States v. Bagley, 473 U.S. 667, 676 ("Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule.").

85. La., N.M., Ohio, Okla., Pa.

86. *See, e.g.,* Pa. R. Crim P. 573 (B)(1)(a) ("The Commonwealth shall . . . permit the defendant's attorney to inspect and copy or photograph . . . any evidence favorable to the accused that is material either to guilt or to punishment."); La. Code Crim. P. Ann. art. 718 ("[O]n motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine . . . [evidence] favorable to the defendant and which [is] material and relevant to the issue of guilt or punishment.").

87. 373 U.S. at 87 ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.").

88. Fed. R. Crim. P. 16(a)(1)(C) (emphasis added).

89. Ala., Conn., Del., D.C., Haw., Idaho, Ind., Iowa, Kan., Ky., Miss., Mo., Neb., N.D., Ohio, Pa., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va., Wyo.

90. Indiana is unique in that it does not contain a separate rule for criminal discovery and relies on civil trial procedural rules to govern criminal trials. *See* Ind. Crim. R. 21 ("The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings.") Therefore, Indiana does not provide a specific list of evidence subject to criminal discovery. Presumably, however, a criminal defendant in Indiana state court would be entitled to the basic items of evidence listed here.

- reports of experts in connection with results of any physical or mental examinations made of the defendant, and scientific tests or experiments made;
- records of the defendant's prior criminal convictions; and
- written lists of the names and addresses of persons having knowledge of relevant facts who may be called by the state as witnesses at trial.[91]

Some states, however, go beyond this basic list of information and specify other material for disclosure:

- any electronic surveillance of any conversations to which the defendant was a party;[92]
- whether an investigative subpoena has been executed in the case;[93]
- whether the case has involved an informant;[94]
- whether a search warrant has been executed in connection with the case;[95]
- transcripts of grand jury testimony relating to the case given by the defendant, or by a codefendant to be tried jointly;[96]
- police, arrest, and crime or offense reports;[97]
- felony convictions of any material witness whose credibility is likely to be critical to the outcome of the trial;[98]
- all promises, rewards, or inducements made to witnesses the state intends to present at trial;[99]
- DNA laboratory reports revealing a match to the defendant's DNA;[100]
- expert witnesses whom the prosecution will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecution;[101]
- any information that indicates entrapment of the defendant;[102] and
- "any other evidence specifically identified by the defendant, provided the defendant can additionally establish that its disclosure would be in the interests of justice."[103]

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91. *See, e g*, Conn. Gen. Stat. § 54-86(a) (2003); Idaho Crim. Rule 16(a).
92. Mont. Code Ann. § 415-15-322 (2)(a).
93. Mont. Code Ann. § 415-15-322 (2)(b).
94. Mont. Code Ann. § 415-15-322 (2)(c).
95. Ariz. St. RCRP R. 15.1(b)(10).
96. N.Y. Consol. Law Serv. Crim. P. Law § 240.20(1)(b).
97. Colo Crim. P. Rule 16 (a)(I).
98. Cal. Penal Code § 1054.1(d).
99. Mass. Crim. P. R 14(1)(A)(ix) (as amended, effective Sept. 7, 2004).
100. N.C. Gen Stat. § 15A-903(g).
101. Wash. Super. Ct. Crim. R. 4.7(a)(2)(ii).
102. Wash. Super. Ct. Crim. R. 4 7(a)(2)(iii).
103. Pa. R. Crim. P. 573(B)(2)(a)(iv).

Most states provide that this "favorable" evidence *may* be disclosed to the defendant upon request or at the discretion of the court. Other states require that evidence beyond the scope of *Brady* material *must* be disclosed even without a request or court order.

2. *Mandatory disclosure without request*

Thirteen states[104] require mandatory disclosure of information "favorable" to the defense, regardless of whether the defendant made a specific discovery request for the material. We determined that this disclosure is mandatory because of the use of the phrase "prosecutor *shall* disclose," and the lack of any conditional clause such as "upon defendant's request," or "at the court's discretion." For example, Massachusetts describes as being "mandatory discovery for the defendant" the following items of evidence:

> (i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
>
> (ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
>
> (iii) Any facts of an exculpatory nature.
>
> (iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses . . . .
>
> (v) The names and business addresses of prospective law enforcement witnesses.
>
> (vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility . . .
>
> (vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.
>
> (viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.
>
> (ix) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.[105]

In contrast, Hawaii requires disclosure of evidence favorable to the defendant only if the defendant is charged with a felony.[106] In cases other than felonies, Hawaii permits a state court, at its discretion, to require disclosure of favorable evidence "[u]pon a showing of materiality and if the request is reasonable."[107]

Of the thirteen states that require disclosure of favorable evidence, three distinguish between information that is subject to mandatory disclosure and other

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104. Alaska, Ariz., Cal , Colo., Fla., Haw., Me., Md., Mass., N.H., N.M., Or., Wash.

105. Mass. Crim. P. Rule 14 (as amended, effective Sept. 7, 2004).

106. Haw. R. Penal P 16(a) ("[D]iscovery under this rule may be obtained in and is limited to cases in which the defendant is charged with a felony.")

107. Haw. R. Penal P 16(d).

evidence that must be specifically requested by the defendant or ordered by the court. Maine requires prosecutors to disclose the following items:

1. Statements obtained as a result of a search and seizure, statements resulting from any confession or admission made by the defendant, statements relating to a lineup or voice identification of the defendant.
2. Any written or recorded statements made by the defendant.
3. Any statement that tends to create a reasonable doubt of the defendant's guilt as to the offense charged.[108]

Maine requires the defendant to make a written request to compel the disclosure of books, papers, documents, tangible objects, reports of experts made in connection with the case, and names and addresses of the witnesses whom the state intends to call in any proceeding.[109]

The other two states that distinguish between items of evidence that are subject to mandatory disclosure are Maryland[110] and Washington.[111]

3. Disclosure upon request of defendant

Thirty-eight states[112] require a defendant to request favorable information, sometimes in writing, before the prosecution's obligation to disclose is triggered.

Ten states[113] place an additional condition on the defense:

- the defendant must make "a showing [to the court] that the items sought may be material to the preparation of his defense and that the request is reasonable,"[114] or
- the defendant must show "good cause" for discovery of such information.[115]

It appears that these ten states permit disclosure of certain favorable evidence only at the discretion of the trial court, and only if the court finds that the defendant has met the burden of proof in making the discovery request.

4. Time requirements for disclosure

States vary considerably in their time requirements for disclosure of *Brady* material. Some specify a time by which the prosecution must disclose favorable information, while others rely upon undefined terms such as "timely disclosure" or "as

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108. Me. R. Crim. P. 16(a)(1)(A)–(C).

109. Me. R. Crim. P. 16(b).

110. Md. Rule 4-263.

111. Wash. Super. Ct. Crim. R. 4 7.

112. Ala., Ark., Conn., Del., D.C , Ga., Idaho, Ill., Ind., Iowa, Kan., Ky., La , Mich., Minn., Miss., Mo., Mont., Neb., Nev., N.J., N.Y., N.C , N.D , Ohio, Okla., Pa., R.I., S.C., S.D., Tenn., Tex., Utah, Vt , Va., W. Va., Wis., Wyo.

113. Conn., Idaho, Ind., Minn., Mo., Neb , Pa., Tex., Va., Wash.

114. Conn. Gen. Stat. § 54-86(a).

115. Tex. Code Crim. Proc. art. 39.14 (2004).

soon as practicable." Ten states[116] have established two separate time limits—one for the period within which the defendant must file a discovery request for favorable information and another for the period within which the prosecution must disclose the information.[117]

For a small number of states,[118] we were unable to determine a specific timetable for disclosure of *Brady* material. Nonetheless, it is probable that these states impose a "timely" disclosure requirement that would not prejudice the defendant's right to a fair trial.

a. Specific time requirement

Twenty-eight states[119] have mandated specific time limits for prosecutorial disclosure of evidence favorable to the defendant. Table 4 summarizes these time requirements.

Table 4. States with Specific Time Limits for Prosecutorial Disclosure of Evidence Favorable to the Defendant

State	Authority	Time Requirement
Alabama	Ala. R. Cr. P. 16.1	Within 14 days after the request has been filed in court
Arizona	Ariz. St. R. Cr. P. 15.6(c)	Not later than 7 days prior to trial
California	Cal. Penal Code § 1054.7	Not later than 30 days prior to trial
Colorado	Colo. Cr. P. R. 16(b)	Not later than 20 days after filing of charges
Connecticut	Conn. Gen. Stat. § 54-86(c)	Not later than 30 days after defendant pleads not guilty
Delaware	Del. Super. Ct. Crim. R. 16(d)(3)(B)	Within 20 days after service of discovery request
Florida	Fla. R. Cr. P. 3.220(b)(1)	Within 15 days after service of discovery request
Georgia	Ga. Code Ann. § 17-16-4(a)(1)	Not later than 10 days prior to trial
Hawaii	Haw. R. Penal P. 16(e)(1)	Within 10 calendar days after arraignment and plea of the defendant

116. D.C., Idaho, Mo., Nev., N.Y., Ohio, Okla., R.I , Va., W. Va.

117. *See, e.g*, Nev. Rev Stat. § 174.285 (2004) ("A request . . may be made only within 30 days after arraignment or at such reasonable later time as the court may permit. . . . A party shall comply with a request made . . . not less than 30 days before trial or at such reasonable later time as the court may permit.").

118. D.C., Iowa, Pa., S.D., Tenn., Tex., and Wyo.

119. Ala., Ariz., Cal., Colo , Conn , Del., Fla., Ga., Haw., Idaho, Ind., Kan., Me , Md., Mass., Mich , Minn., Mo , Nev., N H., N.J., N.M., N.Y , Ohio, Okla., R I , S C., Wash.

State	Authority	Time Requirement
Idaho	Idaho Cr. R. 16 (e)(1)	Within 14 days after service of discovery request
Indiana	Ind. R. Trial P. 34(B)	Within 30 days after service of discovery request
Kansas	Kan. Stat. Ann. § 22-3212(f)	Within 20 days after arraignment
Maine	Me. R. Crim. P. 16(a)(3)	Within 10 days after arraignment
Maryland	Md. R. 4-263(e)	Within 25 days after appearance of counsel or first appearance of defendant before the court, whichever is earlier
Massachusetts	Mass. Crim. P. Rule 14(1)(A)	At or prior to the pretrial conference
Michigan	Mich. Ct. R. 6.201(F)	Within 7 days after service of discovery request
Minnesota	Minn. R. Crim. P. 9.03; Minn. Bd. of Judicial Stand. R. 9(e)	Within 60 days after service of discovery request; by the time of the omnibus hearing
Missouri	Mo. Sup. Ct. R. 25.02	Within 10 days after service of discovery request
Nevada	Nev. Rev. Stat. § 174.285	Not later than 30 days prior to trial
New Hampshire	N.H. Sup. Ct. R. 98(A)(2)	Within 30 days after defendant pleads not guilty
New Jersey	N.J. Ct. R. 3:13-3(b)	Not later than 28 days after the indictment
New Mexico	N.M. R. Crim. P. 5-501(A)	Within 10 days after arraignment
New York	N.Y. Consol. Law Serv. Crim. P. Law § 240.80(3)	Within 15 days after service of discovery request
Ohio	Ohio R. Crim. P. 16(F)	Within 21 days after arraignment or 7 days prior to trial, whichever is earlier
Oklahoma	Okla. Stat. § 2002(D)	Not later than 10 days prior to trial
Rhode Island	R.I. Super. R. Crim. P. 16(g)(1)	Within 15 days after service of discovery request
South Carolina	S.C. R. Crim. P. 5(a)(3)	Not later than 30 days after service of discovery request
Washington	Wash. Super. Ct. Crim. R. 4.7(a)(1)	No later than the omnibus hearing

b. Nonspecific, descriptive time frame

Eighteen states[120] provide nonspecific, descriptive time requirements for disclosure of *Brady* material. The terms used for these general time frames include the following:

- "timely disclosure";[121]
- "as soon as practicable";[122]
- "a reasonable time in advance of trial date";[123]
- "within a reasonable time";[124]
- "in time for the defendants to make effective use of the evidence";[125]
- "as soon as possible";[126]
- "as soon as reasonably possible";[127] and
- "within a reasonable time before trial."[128]

State case law may provide guidance on whether a particular disclosure has satisfied the "timely" disclosure requirement. In general, however, the state courts have interpreted "timely" or "as soon as possible" to mean that the prosecution must disclose information favorable to the defendant "within a sufficient time for its effective use" by the defendant in preparation for his or her defense.[129] State courts that have ruled on the issue of timing of disclosures have emphasized that any disclosure must not constitute "unfair surprise" to the defendant and must not prejudice the defendant's right to a fair trial.[130]

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120. Alaska, Ark., Ill., Ky., La., Me., Miss., Mont., Neb., N.C., N.D., Ohio, Or., Utah, Vt., Va., W. Va., Wis.

121. *See, e.g.,* Alaska R. Prof. Conduct 3.8(d); La. R. Prof. Conduct 3.8(d).

122. *See, e.g.,* Ark. R. Crim. P. 17.2(a); Ill. Sup. Ct. R. 412(d).

123. *See, e.g.,* Ky. R. Crim. P. 7.24(4).

124. *See, e.g.,* Me. R. Crim. P. 16(a).

125. *See, e.g.,* State v. Taylor, 472 S.E.2d 596, 607 (N.C. 1996) ("[D]ue process and *Brady* are satisfied by the disclosure of the evidence at trial, so long as disclosure is made in time for the defendants to make effective use of the evidence." (citations omitted))

126. *See, e.g.,* Vt. R. Crim. P. 16(b).

127. *See, e.g.,* State v. Hager, 342 S.E.2d 281, 284 (W. Va. 1986) ("[W. Va. R. Crim. P.] 16 impliedly sanctions the use of newly discovered evidence at trial, so long as the evidence is disclosed to the defense as soon as reasonably possible.")

128. *See, e.g.,* Wis. Stat. § 971.23(1).

129. State v. Harris, 680 N.W.2d 737, 754–55 (Wis. 2004) ("We hold that in order for evidence to be disclosed 'within a reasonable time before trial' . . . it must be disclosed within a sufficient time for its effective use. Were it otherwise, the State could withhold all *Brady* evidence until the day of trial in the hope that the defendant would plead guilty under the false assumption that no such evidence existed.").

130. State v. Golder, 9 P.3d 635 (Mont. 2000) (defendant argued that the timing of the state's formal disclosure of the two witnesses and the nature of their testimony constituted unfair surprise and jeopardized his right to a fair trial as assured under the Montana Constitution).

E. Due Diligence Obligations

By various means each state imposes a continuing duty on the prosecutor to locate and disclose additional favorable information discovered throughout the course of a trial. Delaware's Superior Court Rule 16(c) is typical of the rules in most states with a due diligence obligation:

> 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 the additional evidence or material.[131]

Beyond this basic duty to supplement discovery of information, five states[132] require prosecutors to certify, in writing, that they have exercised diligent, good faith efforts in locating all favorable information, and that what has been disclosed is accurate and complete to the best of their knowledge or belief. For example, Florida requires the following:

> Every request for discovery or response . . . shall be signed by at least 1 attorney of record . . . [certifying] that . . . to the best of the signer's knowledge, information, or belief formed after a reasonable inquiry it is consistent with these rules and warranted by existing law . . . .[133]

Similarly, Massachusetts provides:

> When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided.[134]

F. Sanctions for Noncompliance with *Brady* Obligations

All states provide remedies for prosecutorial nondisclosure that follow closely, if not explicitly mirror, Federal Rule of Criminal Procedure 16(d)(2), which states that a "court may order [the prosecution] to permit the discovery or inspection, grant a continuance, or prohibit [the prosecution] from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances."[135]

In addition, eleven states[136] indicate that willful violations of a criminal discovery rule or court order requiring disclosure may subject the prosecution to other sanctions as the court deems appropriate. These sanctions "may include, but

131 Del. Super. Ct. R. 16(c).

132. Colo., Fla., Idaho, Mass., N.M.

133. Fla. R. Crim. P. 3.220(n)(3). *See also* Idaho Crim. R. 16(e) (Certificate of Service).

134. Mass. Crim. P. R. 14(a)(1)(E)(3) (as amended, effective Sept. 7, 2004).

135. Fed. R. Crim. P. 16(d)(2).

136. Ala., Ark., Fla., Haw., Ill., La., Minn., Mo., N.M., Vt., Wash.

are not limited to, contempt proceedings against the attorney . . . as well as the assessment of costs incurred by the opposing party, when appropriate."[137]

At least one state, Idaho, expressly states that failure to comply with the time prescribed for disclosure "shall be grounds for the imposition of sanctions by the court."[138] Other states probably also permit their courts to impose sanctions for failure to meet time requirements, as their rules provide remedies for failure to comply with *any* discovery rules, which can and often do include a time-limits provision.

At least three states[139] allow the court to order a dismissal as a possible sanction for particularly egregious violations of disclosure obligations. For example, Maine's rules state the following:

> If the attorney for the state fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the state to comply, granting the defendant additional time or a continuance . . . prohibiting the attorney for the state from introducing specified evidence and *dismissing charges with prejudice.*[140]

However, three states[141] regard dismissal to be too severe a sanction for nondisclosure. Louisiana's Code of Criminal Procedure notes that for disclosure violations, their state courts may "enter such other order, *other than dismissal*, as may be appropriate."[142] Similarly, the Supreme Court of Pennsylvania found dismissal to be "too severe" a sanction for failure to disclose *Brady* material, and explained that the discretion of Pennsylvania trial courts "is not unfettered."[143]

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137. Fla. R. Crim. P. 3.220(n)(2).

138 Idaho Crim. Rule 16(e)(2).

139. Conn., Me., N.C.

140. Me. R Crim. P. 16(d) (emphasis added).

141 La., Tex., Pa.

142. La. Code Crim. P. Ann. art. 729.5(A) (emphasis added).

143. Commonwealth v. Burke, 781 A.2d 1136, 1143 (Pa. 2001) ("[O]ur research has revealed [no judicial precedents] that approve or require a discharge as a remedy for a discovery violation. In fact, the precedents cited by the trial court and appellant support the view that the discharge ordered here was too severe . . . . [W]hile it is undoubtedly true that the trial court possesses some discretion in fashioning an appropriate remedy for a *Brady* violation, that discretion is not unfettered ").

To John Rabiej
James Ishida
From Jim Oleson
Date Oct 7, 2004
Re *Brady* Codification Attempts

During the *Brady* Study Subcommittee Conference Call on Wednesday, September 15th, it was suggested that the American College of Trial Lawyers' recent proposal for rule codification of *Brady v Maryland* is not the first time the issue has been suggested In particular, it was suggested that such proposals might have been made in 1974 and 1993

At your request, I oriented myself with the microfiche records, and began a search for previous *Brady*-related discussion *Brady* is not an index term, so within the Index by Rule Topics, I examined promising documents related to "Discovery and Inspection, Rule 16 " I am attaching the listing (labeled A) I reviewed all items marked with a check-mark, and printed all items highlighted as potentially useful I also put the microfiche location on each printed document, so that we can locate these documents again, if needed

As you will see, Rule 16 has undergone almost continuous review and discussion since 1941 Issues that may be relevant to the current *Brady* inquiry (e.g. potential conflicts with the Jencks Act, scope and timing issues, or public policy considerations) are recurrent

Explicit discussion of the codification of *Brady*, however, appears to have been quite limited

- In 1978, District Court Judge Curtis Meanor (D N J) suggested radically liberalizing criminal discovery He noted that while serving as a judge of the New Jersey Superior Court, he had no *Brady* problems, but that since assuming the federal bench, several *Brady* problems had arisen He suggested liberalizing federal criminal discovery (using New Jersey practice as a model), writing, "No Brady issue can arise if the defendant knows all that the prosecutor knows " Wayne LaFave, writing to the Advisory Committee on Criminal Rules, noted Meanor's suggestion, and noted that substantial discovery amendments had been recently made (effective December 1975). This document is labeled B

- In 1988, the Advisory Committee on Criminal Rules considered changes to Rule 16 (deciding to consider discovery changes individually rather than reviewing the ABA's 1978 open-file draft rule), but no particular language had been presented In 1989, Federal Public Defender Edward Marek suggested specific changes to Rule 16, on a number of topics, including *Brady* material Marek noted that the proposed rule would change the timing of the prosecutor's *Brady* obligations, and compel disclosure of information that could reduce the applicable sentencing guideline range (or sentence within a range) His draft language, and discussion of the issue, can be found on pages 17-18 of the document labeled C

- Marek's proposal was discussed by members of the Advisory Committee in 1989. Members struggled with the practical problems of moving back the period of disclosing the exculpatory material See document D, at pp. 5-6.

- In 1990, the organization California Attorneys for Criminal Justice (CACJ) sent a comment, supporting the proposed amendment to Rule 16(a)(1)(A) Statement of Defendant, but suggesting that far more comprehensive change was needed to federal criminal discovery rules. "CACJ urges a complete revamping of Rule 16 to provide for open pre-trial discovery including advance production of witness statements, agents reports and notes, *Roviaro*, *Giglio* and *Brady* material and guideline sentencing information " See document E

- In 1991, David Schlueter distributed to the Advisory Committee materials related to the ABA's proposed amendment to Rule 16(a)(1), regarding *Brady* materials. In his cover letter, Schlueter notes that the Advisory Committee visited the issue in May 1989 and November 1989, before it was tabled by a vote of 7 to 3 in light of the difficulty in codifying *Brady* The attached ABA materials describe the timing of the *Brady* obligation (to occur simultaneously with other Rule 16 discovery), the scope of *Brady* obligations (primarily "classic" *Brady* material, and not impeachment material or Giglio information relating to government promises made to witnesses in exchange for testimony) The ABA proposal also describes the impact on plea bargaining (because guilty pleas are valid only if voluntary and intelligent, the suppression of exculpating material undermines the legitimacy of the plea) As noted, however, the ABA ultimately chose to promulgate general *Brady* principles instead of being bound by specific language Schlueter's memorandum of Nov 6, 1989 identifies the problems that the Committee faced (principally timing of the obligation) and notes that Rule 16 could be amended to reflect current caselaw It could (1) require a defense request as a trigger, (2) limit discoverable exculpatory material to that mandated by *Brady*, and (3) could resolve the timing issue by defering to caselaw or stating that "the disclosure should be made in time for effective use by the defense " Schlueter also provides a draft proposal that does not address matters of timing See document F

- In 1991, the Advisory Committee was informed by the Reporter that the Committee had considered and rejected the ABA codification a year earlier Some U S Attorneys have taken the position that Brady does not apply to sentencing, though the DOJ Representative (Mr. Pauley) said that he assumed it did No motion was taken on the proposal to codify *Brady* See document G

This is all that I was able to find that directly invoked *Brady* Other Rule 16 materials may be relevant to the current review of *Brady*, however During the telephone conference, mention was made of Jencks Act conflicts This topic received a great deal of attention during the discussion of amendments to Rule 16(a)(1)(F) Disclosure of Witness' Names and Statements See, e g., document H (outlining the debate over timing issues and Jencks Act conflict) and document I (noting that the Judicial Conference rejected this proposed amendment) Although it is not clear why the Judicial Conference rejected the amendment, it is worth noting that a similar proposed rule change had been approved by the Supreme Court in 1974, but was rejected by Congress as a result of vigorous DOJ opposition. See document J

My search for *Brady*-related documents also generated materials related to policy considerations and previous DOJ positions on the liberalization of discovery that could, depending on the direction the subcommittee takes, prove relevant I will set these other documents aside for the time being, and present them if they appear to be useful to the group

APPENDIX "B"

(B)

CM-470: 86 87

M E M O R A N D U M

August 30, 1979

SUBJECT: Possible Amendment of Rule 16

TO: Advisory Committee on Criminal Rules

FROM: Wayne LaFave

Attached for your consideration is a letter from Judge Meanor suggesting liberalization of discovery. We have fairly recently dealt with the subject; substantial amendments were made effective December 1975. Very strongly held and contrary positions were then put before this Committee and before the Congress, which weakened what we proposed. The question for the Committee at this point is simply whether you wish the reporter to try his hand at a revision of Rule 16 along the lines suggested by Judge Meanor.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOSEPH H. RODRIGUEZ
JUDGE

311 UNITED STATES COURT HOUSE
NEWARK, N. J. 07101

October 25, 1978

Mr. Joseph F. Spaniol, Jr.
Deputy Director of the Administrative
Office of the United States Court
Supreme Court Building
Washington, D.C. 20544

Dear Mr. Spaniol:

I am writing to urge as strongly as I can the expansion of discovery rights afforded criminal defendants in federal court.

I have been on the federal bench for over four years. Prior to that I was a judge in the New Jersey court system for five years--four as a judge of a trial court of general jurisdiction and one year as judge of an intermediate appellate court. New Jersey has, perhaps, the broadest available discovery in criminal cases and has had for years. It works well and there is no reason why such discovery should not be had in federal cases. The principal I espouse is that extensive discovery in criminal cases should be the rule and not the exception. Discovery should be limited and protective orders issued only for cause shown. I attach a copy of N.J.Court Rule 3:13-3 and the comments appended thereto. In my opinion, this rule should receive serious consideration as a model to follow.

If surprise works injustice in civil litigation, why is that not equally true in criminal cases? I see no need to perpetuate grand jury secrecy after the indictment has been returned, and advocate turnover of the entire grand jury transcript. The spectre of the criminal defendant pressuring the government's witnesses if their statements are revealed is just that--a ghost, not reality.

Today we put defendants to trial within 60 days of arraignment. This is hardly time enough to prepare a complicated fraud or other type of documents case with discovery and is much too little time without it. The fact is that the government is ready when the indictment is returned. Its investigation is almost always complete before the grand

jury is asked to act, and the government can nail down its witnesses under oath by requiring their appearance before that body. The government can take months--even years--to prepare its case through the investigative agency and the grand jury. The defendant is then given 60 days to do what the government has had much more time to accomplish.

From the point of view of administration of the criminal justice system in the courts, wide discovery would be a blessing not a detriment. To keep the system afloat, we need to encourage pleas of guilty at as early a time as possible. We have all had the experience of a plea coming after the testimony of the government's key witness has been given. Most of us have secured the cooperation of government attorneys in the matter of turning over Jencks Act material the night before it is expected a witness will conclude direct examination. We have had the experience of a plea of guilty being offered when it is known what that witness is going to say, without the witness having taken the stand. When a plea comes during trial that could have been obtained earlier, we have wasted time and expense. One difficulty with the offer of a plea during trial is that the government often will not adhere to the plea offer it made before trial, thus preventing the plea and causing trial of a case that need not be tried. In my judgment, broad discovery will encourage more guilty pleas and will enable us to obtain them at an earlier stage.

When a judge of the New Jersey Superior Court, Appellate Division, I participated in 435 appeals, at least half of them criminal. We did not have one single Brady problem in all those cases. As a judge of this court for over four years, I must have had at least 100 habeas corpus matters filed by state prisoners. Not in one has a Brady problem arisen. By contrast, I have had several significant Brady issues arising post-trial out of federal criminal cases. There can be no question that wide discovery would eliminate virtually all, if not all, Brady issues. No Brady issue can arise if the defendant knows all that the prosecutor knows.

I recognize that expanded discovery would be limited by the Jencks Act, 18 U.S.C. § 3500. In my opinion, an effort should be made to have Congress repeal this statute so that criminal discovery can be governed exclusively by court rule. I have grave doubt that the lack of discovery presently prevalent in federal criminal cases can justly coexist with the demands of the Speedy Trial Act.

Very truly yours,

H. Curtis Meanor
U.S.D.J

HCM.el

APPENDIX "C"

CM 5401 65

MEMORANDUM

TO: Criminal Rules Committee

FROM: Dave Schlueter

RE: Proposed Changes in Discovery; Rule 16.

DATE: April 20, 1989

At the November 1988 meeting the Committee discussed possible amendments to Rule 16 and after extended debate, voted to discuss each proposed change to Rule 16 separately at the May 1989 meeting and possible amendments to Fed. R. Evid. 404(b).

Mr. Marek has circulated to the Committee an extensive memo offering suggested changes to Rule 16. Specifically, the amendments to Rule 16 would provide for (1) notice to the defense of "other offense" evidence, (2) production witness lists from both the prosecution and the defense, (3) disclosure of any statement made by the defendant and statements by co-conspirators, (4) disclosure of prosecution witness statements, and (5) Brady evidence.

In the discussion at the November meeting there was some indication from some members of the Committee that it would be appropriate to consider amending Rule of Evidence 404(b) to provide for disclosure of evidence of "other offense." To that end I have prepared a draft amendment to Rule 404(b) and a draft Committee Note. Those items are covered in a separate memo on Rule of Evidence 404(b).

OFFICE OF THE
FEDERAL PUBLIC DEFENDER
FOR THE
NORTHERN DISTRICT OF OHIO

February 15, 1989

EDWARD F. MAREK
FEDERAL PUBLIC DEFENDER

Honorable Leland C. Nielsen
United States Senior District Judge
United States Courthouse
940 Front Street
San Diego, California 92189

Re: Rule 16 Discovery

Dear Judge Nielsen:

I am in receipt of the minutes of the Advisory Committee's November, 1988 meeting in New Orleans which reflect a vote of the Committee to consider separately at our May, 1989 meeting possible changes to Rule 16 regarding pretrial discovery. As I recall, the Committee decided to consider proposed discovery changes individually rather than as part of the omnibus, open-file discovery approach represented by the American Bar Association's 1978 draft rule on discovery and procedure before trial, which contained provisions that would have, among other things, changed current law regarding disclosure of the identity of informants and grand jury material and which lacked any reciprocal discovery rights.

One of the problems which prevented individual consideration of possible discovery changes at our November, 1988 meeting was the fact that the Committee did not have before it specific amending language to address all of the proposed changes. Accordingly, in order to facilitate consideration of the issues at our next meeting, I have undertaken to draft amending language to address each issue. As I recall, the following specific subjects were before the Committee at the November, 1988 meeting as part of our overall discovery discussion: other offense evidence, witness lists, co-conspirator statements, witness statements and Brady material.* In addition to drafting amending language to

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* Although the minutes of our last meeting do not reflect it, my recollection is that the Committee decided to delay consideration of any discovery changes to accommodate guideline sentencing until after the Supreme Court decided the constitutionality of the sentencing guidelines and we have some input from the Federal Judicial Center regarding its study of local rules adopted to accommodate guideline sentencing. The Supreme Court has now upheld

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address these areas, I have included a brief discussion of some of the more important considerations regarding each issue. I paid particular attention to questions raised about the appropriateness and wisdom of the rules process addressing such issues as discovery of witness lists and co-conspirator statements.

Each discovery issue addressed here was the subject of memoranda submitted to the Committee in connection with the November, 1988 New Orleans meeting. Of course, these memoranda remain available to members to provide additional information.

It is my hope that having specific language before the Committee which addresses each issue will facilitate consideration of the various proposals for change in the discovery rules.

Very truly yours,

Edward F. Marek

EFM:pd
Enc.

cc: James E. Macklin, Jr.
Dean David A. Schlueter

Continued . . .

the constitutionality of the sentencing guidelines. However, we may not have access to the study being conducted by the FJC in time for our May meeting.

V. EXCULPATORY EVIDENCE

Rule 16 would be amended to add subsection (a)(1)(H) as follows:

> (H) **Material Favorable to the Defense.** The attorney for the government shall disclose to the defendant any material or information within the possession or control of the government which tends to negate the guilt of the defendant as to offense charged or which would tend to reduce the punishment of the defendant.

Discussion

Brady v. Maryland, 373 U.S. 83 (1963), did not create a constitutional right of pretrial discovery in criminal proceedings. Rather, courts have construed Brady only to require disclosure of exculpatory information in time for its effective use at trial by the defendant*. See United States v. Presser, 844 F.2d 1275 (6th Cir. 1988).

The amendment to Rule 16 proposed here would change the timing of disclosure of exculpatory information, but would leave

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* Please refer to a memorandum submitted to the Advisory Committee in connection with the November, 1988 New Orleans meeting for additional arguments in favor of a rule change to provide for pretrial discovery of Brady material. In the event the Committee accepts such a rule change, subsection (a)(2) of Rule 16 would also require amendment to reflect the addition of a new subsection (a)(1)(H).

to case law the development of a standard for determining which information is exculpatory. The Supreme Court has construed Brady to require disclosure of evidence that is both (1) favorable to the accused, and (2) material to either guilt or to punishment. See United States v. Bagley, 473 U.S. 667, 674 (1984).

Prior to the advent of the sentencing guidelines, the second component of the Supreme Court's holding in Brady was often overlooked. It will be recalled that Brady also requires disclosure of information which tends to reduce a defendant's punishment. Accordingly, a rule change to require pretrial discovery of "Brady material" would also include, by definition, disclosure of information which would tend to reduce the applicable sentencing guideline range or a sentence within the guideline range. Thus, this proposed rule change will facilitate the new sentencing guideline process and contribute to more informed guilty pleas as now required by Rule 11(c)(1).

APPENDIX "D"

(D)

CM-505-21-26

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE

May 18-19, 1989
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on November 18 and 19. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, May 18, 1989. The following members were present for all or part of the meeting:

Hon. Leland C. Nielsen, Chairman
Hon. Robinson O. Everett
Hon. James G. Exum, Jr.
Hon. William T. Hodges
Hon. Daniel H. Huyett, III
Hon. John F. Keenan
Mr. John Doar, Esq.
Mr. Tom Karas, Esq.
Mr. Edward F. Marek, Esq.
Mr. Roger Pauley, Esq., designee of Mr. Edward Dennis, Assistant Attorney General

David A. Schlueter, Reporter

Also present were Judge Joseph Weis, Chairman of the Standing Committee on Practice and Procedure, Judge Charles Wiggins, and Professor Wayne LaFave, members of the Standing Committee; Mr. James Macklin and Mr. David Adair from the Administrative Office; and Mr. William Eldridge from the Federal Judicial Center.

INTRODUCTIONS AND PRESENTATIONS

Judge Nielsen introduced and welcomed Judge Wiggins as the liason from the Standing Committee and noted that Mr. Roger Pauley had been designated by the Department of Justice as its official representative. He also recognized Mr. James Macklin who awarded Mrs. Ann Gardner a certificate and pin for 25 years of federal service.

CRIMINAL RULE AMENDMENTS UNDER CONSIDERATION

Rules Approved by the Judicial Conference and Submitted to the Supreme Court

The Reporter noted that amendments in three rules had been approved by the Standing Committee at its January 1989 meeting

not really changed since the earlier discussion. Mr. Doar noted that any changes in Rule 6(e) would be dangerous and Mr. Pauley responded that under the amendments disclosure would not be made without the approval of the federal prosecutor and reiterated the extensive background and need for the changes. Judge Keenan expressed concern that prosecutors might use the grand jury process to work toward only a civil case. Judge Everett moved that the Committee express to Congress that confidence in the secrecy of the grand jury is so important that there are serious problems with amending Rule 6(e). The motion failed for want of a second. There was additional discussion about related problems with the proposed changes with the consensus of the Committee being that Rule 6(e) should not be amended.

2. Proposed amendments to Rule 12(b)(pretrial motions). At the suggestion of Judge Manuel Real, the Committee considered whether to amend Rule 12(b) to require litigation of entrapment defenses through a motion to suppress evidence illegally obtained. After brief discussion Judge Huyett moved to table the proposal and Mr. Karas seconded the motion. It carried unanimously.

3. Proposed Amendments to Rule 16 (Discovery). The Committee considered a number of proposed changes to Rule 16 which had been deferred from the November 1988 meeting in New Orleans.

a. Notice of "Other Offense Evidence:" Mr. Marek offered a proposed amendment to Rule 16(a)(1)(E) which would require the government to furnish the defense with particularized information about its intent to use evidence under Federal Rule of Evidence 404(b). The Committee believed that the issue would appropriately fit within that evidence rule and as noted, infra, adopted amendments to Rule of Evidence 404(b).

b. Witness Lists The Committee considered an amendments to Rule 16 which would first, require the prosecution to furnish to the defense a written list of names and addresses of all government witnesses; second, provide for reciprocal discovery of names and addresses of defense witnesses; third, prohibit comment upon the failure to call a witness on either list, and fourth, impose a continuing duty to disclose the names and addresses of witnesses. Mr. Marek noted that the proposed changes followed proposals approved by the Supreme Court in 1974. Mr. Pauley indicated that the Department

of Justice would strongly oppose any efforts to require the prosecution to disclose the names and addresses of its witnesses. He reiterated the dangers posed, i.e. intimidation and possible loss of life, by disclosing the names of government witnesses before trial. He noted that the Department was not questioning the ability of trial judges to decide when a witness' name should be disclosed but he observed that trial judges will inevitably err and in those cases, the life of a witness could be endangered. Mr. Karas responded that trials without adequate defense preparation cannot be fair trials. Mr. Marek moved that the proposed language be adopted and Mr. Karas seconded the motion. It failed by a 2 to 6 vote. Judge Everett subsequently moved that the Department of Justice provide the Committee with its views on a certification process which would require the prosecution to disclose a witness' name and address unless it certified to the court that doing so would pose a risk of injury or loss of life to the witness. Judge Hodges seconded the motion which carried unanimously with one absention noted.

c. Co-conspirators' Statements. Mr. Marek moved that Rule 16(a)(1) be amended to require the prosecution to disclose to the defense "any statement of a co-conspirator which the government intends to use in evidence against the defendant pursuant to Rule 801(d)(2)(E), Federal Rules of Evidence." The motion was seconded by Mr. Karas. Mr. Pauley indicated that the Department of Justice was strongly opposed to such a requirement noting the possibility of danger to the witness. Judge Hodges noted that there are tremendous pragmatic problems with this sort of requirement because of the complicated and interwoven conspiracy statements, many of which have not been recorded. The motion failed by a vote of 2 to 6.

d. Defendant's Statements. Following some discussion on the requirement in Rule 16(a)(1) that the prosecution disclose any relevant written or recorded statement made by the defendant, Judge Hodges moved that the Rule be amended to require disclosure of any oral statements made by the defendant which the prosecution intends to offer at trial or of which a written record has been made. The motion was seconded by Mr. Karas and passed by a unanimous vote. A copy of Rule 16, as amended, and the proposed Advisory Committee Note are attached to these minutes

e. Exculpatory Evidence. Mr. Marek urged the Committee to consider amending Rule 16(a)(1) by adding a new subsection (H) which would require the prosecution to disclose all exculpatory ("Brady") material to the defense. The Committee discussed the proposal with several members noting the

practical problem of moving back the period of disclosing the exculpatory material. The Committee decided to defer this proposal until its next meeting.

f. Witness Statements. Mr. Marek offered a proposed change to Rule 16(a)(1) by adding a new subsection (G) to require the prosecution to produce, before trial, any prior Jencks Act statements made by any prosecution witness. He moved that the Committee communicate to Congress that it would be appropriate to initate some action on amending the Jencks Act. Judges Weis and Hodges expressed the view that the Rules Enabling Act permits the Committee to initiate discussion on a particular rule by adopting amendments. Judge Weis recommended that the Committee recommend an amendment and thus give notice to Congress that the area needs some attention. Judge Hodges moved to table the proposal and Judge Huyett seconded the motion which passed.

4. Proposed Amendments to Rule 17 (Motions to Quash Subpoenas by Non-Party Witnesses). [The discussions on Rule 17 took place on the afternoon of May 18 and the morning of May 19. They are reflected here in their entirety for purposes clarity]. The Committee discussed the possibility of amending Rule 17 to reflect amendments being considered in Civil Rule 45 which permits non-party witnesses to move to quash subpoenas. The impetus for the change is apparently coming from the American Bar Association which is interested in the rights of witnesses. The Chairman suggested that the matter be deferred until the next meeting at which time the Committee could consider draft amendments prepared by the Reporter. Judge Everett suggested that the Reporter also consider problems associated with discovery of an expert's opinion. Mr. Pauley suggested that it would be prudent, in light of the differences in civil and criminal practice, to wait until amended Civil Rule 45 had been used to see how well it functions. Judge Keenan ultimately moved that the matter be deferred until the Committee's next meeting. Judge Everett seconded the motion which carried unanimously.

5. Proposed Amendments to Rule 24 (Voir Dire). The Reporter indicated that Senator Heflin had introduced legislation which would amend Rule 24(a) and Civil Rule 47(a) to provide counsel with a greater opportunity to conduct voir dire of prospective jurors. Judge Bilby, Chairman of the Judicial Improvements Committee, is taking the lead in opposing the legislation and in encouraging judges to allow questioning by attorneys. The Committee took no further action on this matter.

MEMO TO: Criminal Rules Committee

FROM: Dave Schlueter

RE: Rule 16: Brady Requests

DATE: November 6, 1989

At a part of the general discussion on "discovery" at the Committee's May 1989 meeting, Mr. Marek proposed that Rule 16(a)(1) be amended to provide as follows:

> Material Favorable to the Defense. The attorney for the government shall disclose to the defendant any material or information within the possession or control of the government which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

After some discussion, the Committee decided to defer consideration of the proposal until the November meeting. The portion of Mr. Marek's February 1989 memo addressing the proposal is attached.

The proposed rule change is grounded on Brady v. Maryland, 373 U.S. 1194 (1963), and its progeny which provided that suppression of evidence favorable to the defense, upon request, violates due process where the requested evidence is material either to guilt or punishment. Whether the defense request is general or specific will determine the test to be applied in determining whether the requested evidence is material; a conviction must be set aside if the prosecution failed to respond to a specific request and the suppressed evidence might have affected the outcome of the trial. If the request was general in nature, or if there was no request, the test is whether the omitted evidence creates a reasonable doubt that would not otherwise have existed.

At the May meeting, several committee members observed that one of the problems with codifying Brady is the question of timing of the disclosure. How early in the pretrial process should Brady be applied? The Brady cases are not uniform in their application of "when" the disclosures must be made. See, e.g., United States v. Dutton, 400 F.2d 797, cert denied, 393 U.S. 1105 (1968)(evidence must be produced at an appropriate time); United States v. Librach, 520 F.2d 550 (8th Cir. 1975)(disclosure of contradictory testimony of gov. witness

three days before trial not [illegible] [illegible] F.2d 577 (3rd Cir. [illegible]) [illegible] results inevitably in trial delay).

Ed Marek indicates in his [illegible] proposed amendment would change the timing [illegible] requiring the prosecution, without any request from the defense, to disclose the favorable information as soon as the information is known to the prosecution. That would seem to be much earlier than any caselaw has recognized to this point. See generally United States v. Presser, 844 F.2d 1275 (6th Cir. 1988)(attached)(court's discovery order for government to produce all impeachment evidence before trial was too broad). Interestingly, in deciding that case, the court at page 1285 noted the absence of a codification of Brady in Rule 16.

Assuming that the Committee agrees that Brady should be codified, Rule 16 could be amended to reflect the current caselaw. First, the Rule could be amended to reflect the caselaw which requires the Defense to trigger Brady with a request. Second, the requirements of Brady itself could be incorporated so as not to extend the Rule to all helpful information but only evidence which is both favorable to the defendant and material to the issues of guilt or punishment. Third, the issue of timing could be left to the caselaw or language could be added which reflects that the disclosure should be made in time for effective use by the defense. In any event the issue of timing would have to be addressed in the Committee Note.

A draft proposal, which does not address the issue of timing, is attached.

[illegible]

[illegible] OF EVIDENCE BY THE GOVERNMENT

Information Subject to Disclosure

* * * * *

(D) INFORMATION FAVORABLE TO THE DEFENDANT. Upon request of the defendant, the attorney for the government shall disclose to the defendant any materials or information within the possession or control of the government which is favorable to the defendant and is material to the issue of guilt of the charged offense or to the issue of an appropriate sentence.

Committee and should continue to receive the careful attention of the Department of Justice.

2. Proposed Amendment to Rule 16 (Brady materials). As a continuation of its discussion at the May 1989 meeting, the Committee further considered an amendment to Rule 16 which would require the prosecution to disclose Brady material to the defense before trial. Mr. Marek indicated that the purpose of his original proposal was to move up the time for production of this information and that the fact that some of the material was Jencks Act materials should not deter pretrial production. Mr. Pauley expressed concern about pretrial disclosure of sentencing evidence and stated that in his view Brady would continue to evolve. After continued discussion on whether it would be appropriate to codify Brady, Judge DeAnda moved to table the proposal. Judge Keenan seconded the motion which carried by a vote of [illegible] to 3.

3. Proposed amendment to Rule 17 (Motions to quash subpoenas to witnesses). The Reporter noted that at its May 1989 meeting the Committee had decided to defer the issue of whether to consider any amendments to Rule 17 with regard to procedures whereby a witness could move to quash a subpoena. The Reporter added that the Civil Rules Committee was currently circulating for public comment an amended Civil Rule 45 which would accomplish the same purpose and might serve as a model for similar amendments to Rule 17. After a short discussion in which the general feeling was that it would be better to wait and see the results of the public comments on Civil Rule 45, Mr. Pauley moved that the matter be deferred until at least the next meeting of the Committee. The motion was seconded by Judge Everett and passed by a unanimous vote.

4. Proposed amendment to Rule 24(b) (Number of peremptory challenges). The Commitee was informed that Congress, at the suggestion of the American Bar Association, was considering an amendment to Rule 24(b) to equalize the number of peremptory strikes available to the defense and the prosecution. The amendment was included in the the Drug Bill (S. 1711). The consensus of the discussion was that the the Rules Enabling Act procedures should be followed. In particular, Mr. Pauley indicated that the Committee should make its views known to Congress. He also indicated that he believed the Department of Justice would agree to an amendment to Rule 24(b) which would provide that in felony cases each side should have five peremptory challenges. Judge Huyett so moved but the motion failed for lack of a second.

APPENDIX "E"

CM 5602-51-54

(E)

California Attorneys for Criminal Justice CACJ

August 30, 1990

Committee on Rules of Practice
and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comment on Proposed Rule Amendments

Dear Members of the Committee:

This letter is written on behalf of the California Attorneys for Criminal Justice (CACJ), a statewide organization composed of 2,500 members who practice in both the state and federal courts. Our members handle cases ranging from misdemeanors to death penalty prosecutions and have a demonstrated long term interest in federal court practice.

The following comments represent the views of CACJ regarding the proposed amendments to Rules 16, 24 and 35 and Federal Rule of Evidence 404(b)

1) <u>Rule 16(a)(1)(A), Statement of Defendant</u>.

We support this slight expansion of Rule 16(a)(1)(A). However, this amendment offers little to solve the enormous problems with discovery in federal criminal cases. CACJ urges a complete revamping of Rule 16 to provide for open pre-trial discovery including advance production of witness statements, agents reports and notes, <u>Roviaro</u>, <u>Giglio</u> and <u>Brady</u> material and guideline sentencing information. Our members try cases in both the state and federal courts and see the federal criminal trial as a trial by ambush. Federal case witnesses are typically either government agents or individuals who have felt the intimidating control of a federal agent and refuse to talk to the defense. Representing a defendant in a major conspiracy case is a nightmare given the little information that is available to any individual defendant. Many California prosecutors are happy to be "cross-designated" to try their case in federal court because of the prosecution-oriented discovery rules. We believe the pendulum has swung so far that having a "fair trial" in federal court is close to impossible

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Pre-plea discovery of guideline sentencing factors is also critical. The guidelines are a trap for even the experienced practitioner and the inability to discover relevant conduct and various aggravating specific offense characteristics and adjustments exacerbate the problems. The courts have given broad construction to "relevant conduct" including in the sentencing decision not only dismissed counts but also uncharged misconduct. It is a travesty of justice to preclude the defendant from the right to pre-plea discovery of the factors which so dramatically affect his or her liberty interests

The concern of the government for the security and/or safety of witnesses in particular cases could be adequately handled by motion to the court to limit discovery or enter a protective order.

2) Rule 24, Defense Preemptory Challenges

We strenuously object to the proposed amendment. The Committee's stated reasons for the proposal do not support the reduction in defense peremptory challenges to six. There is simply no statistical or widespread evidence of the use of defense peremptories to exclude classes of persons from juries. Even if such evidence existed, the reduction to six would not solve the problem. The amount of time to be saved would be minuscule. The average two to three day federal jury trial probably consumes less than two hours in jury selection. Indeed, several of our members recounted repeated experiences of 45 minute jury selections in federal court in California. The reduction of peremptory challenges may involve more time because of the need to more effectively use the smaller number of preemptory challenges

A change in the number of peremptory challenges should not be considered unless and until federal judges permit some regular attorney-conducted voir dire.[2]

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[2] NACDL concurs with the position taken by Hawaii Federal Public Defender Michael Levine as set forth in a letter to the Committee dated May 17, 1990

3) Rule 35 Reduction of Sentence

We support the proposed amendment to allow the motion to be brought outside of one year, even though we believe that the Rule itself unfairly places complete power in the hands of the Executive Branch. The defendant should be permitted to request the court to consider his or her cooperation in a post-sentence motion to reduce the sentence. The power over the decision should rest with the court and either party should be permitted to bring the issue to the court's attention.

We also support the proposed amendment to allow the court to correct a sentence within seven days. However, again we believe the Committee does not go far enough in amending Rule 35. We are aware that the Committee considered and rejected the Federal Court Study Committee recommendation regarding Rule 35 but urge reconsideration. Rule 35 should be amended to reinstate the defendant's right to request modification of the sentence within 120 days of sentencing or appeal. This return to the "old Rule 35" should permit a sentencing court to reconsider guideline application issues and departure requests. The motion would, of course, be most effective where new evidence came to light. An opportunity to revisit a sentence would return important discretion to the district court (even within the guideline restrictions) and could have the effect of encouraging many defendants to abandon sentencing appeals in the hope of a reconsidered sentence within a shorter period of time.

4) Rule 404(b), Notice Requirement.

We support the proposal to require notice of the government's intent to use other act evidence. However, we recommend that instead of "reasonable notice in advance of trial," the Rule should require notice 30 days before trial except for good cause shown. In addition, the Rule should specify a greater obligation than notice of the "general nature" of the evidence. The government should be compelled to provide notice of the date, time and place of the other act as well as the identity of witnesses who will be called to prove the other act evidence.

We also ask the Committee to consider an additional amendment to Rule 404 to overrule the decision in United States v. Huddleston, 108 S. Ct. 1496 (1988). The pre-Huddleston standard in the Ninth Circuit was clear and convincing evidence (see United States v. Brashier, 548 F.2d 1315, 1325 (9th Cir. 1976) relying on United States v. Fineberg, 535 F.2d 1004, 1009 (7th Cir. 1976)). This clear and convincing evidence standard did not unduly hamper successful prosecutions and was a workable standard which provided some protection to the defendant against the prejudicial use of other act evidence. Without some increase in the standard above that permitted by Huddleston, there is a danger of misuse of the rule.

On behalf of the members of this organization, I thank you for the opportunity to provide input regarding these proposed rule amendments.

Sincerely,

Elisabeth Semel
President

ES/smf

APPENDIX "F"

III-D-ii
Appendix F

(F)

CM 5711-31-
46

TO: Advisory Committee on Criminal Rules

FROM: Prof. Dave Schlueter, Reporter

RE: ABA Proposed Amendment to Rule 16(a)(1), Disclosure of Brady Materials.

DATE: September 26, 1991

Attached is a copy of materials reflecting a pending ABA Resolution which proposes an amendment to Rule 16. The resolution, in part, recommends that that Rule specifically include a provision for disclosure of Brady materials. The pertinent portion of the accompanying ABA Report is also attached. Please note the proposed language which appears on the first page of the report is not the language ultimately adopted by the resolution. The language urged by the ABA is on the first page of the resolution itself.

The Advisory Committee visited this issue at its meetings in May 1989 and November 1989. See attached materials. The matter was ultimately tabled at the November 1989 meeting by a vote of 7 to 3 in view of the difficulty of codifying Brady. The pertinent portion of the minutes of the November 1989 meeting are attached.

I attended the ABA meeting (Criminal Justice Section Council) in which this resolution was discussed. Although the Council ultimately adopted a resolution urging codification of Brady, it was clear that not all of the participants could agree on the best way to do it. In the course of discussion, several possible amendments were debated. And the general language of the pending resolution apparently leaves open the question of just what should be codified. The Council decided to leave itself some flexibility should it become necessary for it to officially comment on any draft submitted by the Advisory Committee.

DRAFT

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges the Judicial Conference to adopt the following proposed rules and amendments to the Federal Rules of Criminal Procedure in the interest of improving the fairness and efficacy of pretrial discovery proceedings:

I.

Proposed Rule 16(a)(1)(E)

Upon request by a defendant or as it otherwise becomes known to the government, the government shall promptly furnish to the defendant all evidence within the possession, custody or control of the government which tends to exculpate the defendant of the crimes charged in the indictment or tends to mitigate the defendant's sentence. The government shall have a continuing obligation to furnish the defendant such material as it becomes known or available to the government.

II.

Proposed Amendment to Rule 16(a)(1)(A) 1/

Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known,

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1/ Material to be deleted is bracketed; material to be added is underscored.

DRAFT DRAFT

11. REPORT WITH RECOMMENDATIONS OF WHITE COLLAR CRIME COMMITTEE - AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE RE: PRETRIAL DISCOVERY PROCEEDINGS

Bernard Bailor, Council Liaison to the White Collar Crime Committee, presented the following resolution on behalf of the Committee:

(INSERT RESOLUTION FROM PAGES 49-51 HERE)

Prof. David Schlueter gave an overview of how the discovery issues encompassed by this resolution had been dealt with in the past by the Judicial Conference of the United States Advisory Committee on Criminal Rules. Robert Fertitta, Council Liaison to the Section's Rules Committee, raised a number of questions on behalf of the Committee.

Terry MacCarthy moved that the language of proposed Rule 16(a)(1)(D) be amended by striking the words, "during its case-in-chief" and substituting, "at trial". The amendment was seconded and approved.

[illegible] moved that [illegible] of proposed Rule [illegible](1)(E) be amended by [illegible] the words "[illegible] to the sentence of the defendant" [illegible] the words, "[illegible] the defendant". Judge [illegible] moved that the proposed rule be further amended by inserting the [illegible] it occurs [illegible] the government, the government shall [illegible] immediately [illegible] words, "Upon request by a defendant the government [illegible] amendment [illegible] seconded and approved (3-1

[illegible] Delegate, moved that general language be substituted for the specific changes to the rules. He expressed concern that it would be difficult to have the resolution, as currently drafted, approved by the House of Delegates. Furthermore, he noted that it would place the Association in the position of not being able to support any changes to the rules unless they conformed exactly to the specific language [illegible] in the [illegible] resolution. He favored general language to give [illegible] latitude in endorsing any proposed changes that accomplished the intended purpose.

In response to these comments, the following alternative language was prepared to be substituted for the resolve clause:

> BE IT RESOLVED, That the American Bar Association urges the Judicial Conference of the United States to recommend rule changes to implement the concepts embodied in the following proposed rule changes in the interest of improving the fairness and efficacy of pretrial discovery proceedings:

A vote was taken on this alternative language and it was approved.

A vote was taken on each proposed rule change with the following results:

- Amendment in Paragraph I - Approved
- Amendment in Paragraph II - Approved
- Amendment in Paragraph III - Approved
- Amendments in Paragraph IV - Recommitted to the Committee with a request that the reciprocal provisions be redrafted.

[illegible]

[illegible] COLLAR CRIME

[illegible] CRIMINAL [illegible]

May 18 [illegible]

Washington, D.C.

PROPOSED RULES AND AMENDMENTS

1. Proposed Rule 16(a)(1)(E)

> "Upon request by a defendant the government shall furnish to the defendant all evidence within the possession, custody or control of the government which tends to exculpate the defendant of the crimes charged in the indictment. The government shall have a continuing obligation to furnish the defendant such material as it becomes known or available to the government."

Commentary

Proposed Rule 16(a)(1)(E) is intended to require prompt pre-trial disclosure and production of all Brady material by the prosecution. Under current law, the prosecution may delay Brady disclosure until after the start of trial, or even until the close of the government's case. By that time, the defendant may be committed irrevocably to a particular theory in its case,

[illegible] trial, the defendant [illegible] defense is [illegible] of the same time as [illegible] would obviate, to [illegible] degree, the need for retrospective [illegible] by appellate courts which must apply a stringent "materiality" standard to suppression cases.

Brady imposes a constitutional obligation on the government to reveal exculpatory evidence in its possession to the defendant. In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material to guilt or punishment, irrespective of the good or bad faith of the prosecution. Id. at 87. Favorable evidence under Brady includes impeachment information. Giglio v. United States, 405 U.S. 150, 154 (1972).[1]

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[1] This Proposed Rule is concerned primarily with directly exculpatory, "classic" Brady material, and not with impeachment material or Giglio information regarding promises made by the government to witnesses in exchange for testimony. As one commentator has noted, "impeachment evidence has always been a sticking point in the administration of Brady. Not only must the prosecutor turn over the playbook, but he also must point out which players are the weakest; a paradigmatically less adversarial role." Babcock, "Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel," 34 Stanford L. Rev. 1133, 1154 (1982). Examples of "classic" Brady material would include eyewitness accounts identifying someone other than defendant, or a confession to the crime by another person. Deliberate misrepresentations by the prosecution or the

(continued...)

Under U.S. v. Bagley, 473 U.S. 667 (1985), suppressed evidence is material "only if there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable possibility' is a probability sufficient to undermine confidence in the outcome." Id. at 682. This strict materiality standard applies where a defendant makes a specific or general request for the exculpatory evidence, as well as where the defendant makes no request at all. Id. at 682.

Courts have provided little guidance as to the appropriate time for disclosure of Brady material requested by the defense. See Cissell, Federal Criminal Trials § 7-6(b) (1982). In cases where a defendant contends that the prosecution turned over Brady material too late, courts generally focus on whether the tardy production so prejudiced defendant that he was unable to make any use of the exculpatory material at trial. See, e.g. Nassar v. Sissel, 792 F.2d 119 (8th Cir. 1986)(due process satisfied as long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence); U.S. v. Juvenile Male, 864 F.2d 641 (9th Cir. 1988) (no Brady violation in government's failure to make timely disclosure of victim's earlier conviction when court as trier of fact agreed to weigh late evidence); U.S. v. Gordon, 844 F.2d

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1/ (...continued)
presentation of perjured testimony are covered by other available sanctions, and are not intended to be included in this "classic" Brady category. We suggest that comments to the Proposed Rule include this explanation.

[illegible] C. Cir. [illegible] requires pre-trial [illegible]closure); [illegible], 60[illegible] F.Supp. 1354, 1358 (N.D. Ill. 198[illegible]) (on defendants' pre-trial motion, court orders impeachment evidence produced three days before trial to ensure adequate time for eff[illegible]tive use).

While most courts have held that delayed disclosure does not amount to a material due process violation, a defendant may nonetheless be seriously prejudiced, tactically speaking, by deprivation of exculpatory evidence. In U.S. v. Boschetti, 794 F.2d 416 (8th Cir. 1986), for example, Boschetti was named as a source by an individual arrested for attempting to sell cocaine. Well before trial, Boschetti's counsel requested any Brady material resulting from electronic surveillance. The day before trial, the government informed defense counsel that 36 tape recordings were being made available; on the third day of trial, the government indicated at least three tapes contained exculpatory material, including conversations between Boschetti's alleged distributor and an undercover agent. Defense counsel's motion for a continuance to review the tapes was denied, and Boschetti was ultimately found guilty.

[illegible]

> [illegible] court [illegible] [illegible] holding, we do not condone the prosecutor's conduct in this case. We [illegible] emphatically state the prosecutor's nondisclosure of possibly exculpatory information is inconsistent with the Supreme Court's holding in Brady v. Maryland, although the nondisclosure in this case does not require reversal.

[illegible] F.2d at 419.[3]

The "better late than never" standard of retrospective review does little to achieve the ideal of equitable access to exculpatory evidence promised by Brady. Permitting the prosecution to withhold Brady material until after the beginning of trial exacerbates a major flaw in the Brady process, namely that the "ultimate question of favorability remains with the understandably biased prosecutor." Capra, "Access to Exculpatory Evidence," 53 Fordham L. Rev. 391, 406 (1984). Even a prosecutor acting in good faith cannot avoid approaching the case

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[3] Solles v. Israel, 868 F.2d 242 (7th Cir. 1989), provides another example of serious Brady delay that does not rise to the level of Brady violation. In Solles, a murder case, the defense contended that the victim was shot by an accidental ricochet. The prosecution failed to provide all bullet fragments retrieved from the victim's skull before trial and concealed until the first day of trial that the victim's brain had been preserved. Nevertheless, the court rejected defendant's due process claim noting that "defense counsel not only managed in mid-trial, without a continuance, to have the brain centrifuged, but also obtained a mid-trial exhumation of the body...the evidence thus obtained was presented to the jury, and the prosecutor conceded that less than a full bullet was recovered." Id. at 248.

[illegible] prosecution, but in doubtful cases the defense is certainly in a better position to know what is or is not exculpatory.[1]

Proposed Rule 16(a)(1)(F) could have a significant impact on the guilty plea process. At present, a prosecutor has no obligation to disclose Brady material during plea negotiations. Yet under Brady v. United States, 397 U.S. 742 (1970), a plea can only be considered "voluntary and intelligent" when it is not made in ignorance of the "relevant circumstances and likely consequences." Id. at 748. During plea bargaining, suppression of exculpatory evidence could lead to an innocent defendant pleading guilty or to a guilty defendant pleading to charges more serious than could be proved at trial. See Note, "The Prosecutor's Duty to Disclose to Defendants Pleading Guilty," 99 Harv. L. Rev. 1004, 1013 (1986). "Because a defendant's bargaining power depends on his knowledge of the evidence in the state's possession, suppression of exculpatory

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[1] While disagreements over whether evidence qualifies as exculpatory will still arise under the Proposed Rule, a pre-trial in camera review by the court as impartial arbitrator would ensure early resolution of Brady disputes, and allow the defense to plan its case accordingly. See Capra at 427-30.

[illegible]

[illegible] prejudice [illegible]

[illegible] Rule [illegible]

[illegible] prosecutorial obligations under [illegible] and Giglio, [illegible] ethical rules that require the prosecution to disclose [illegible] evidence to a defendant. See, e.g., ABA Model Rule of Professional Conduct 3.8(d), which requires that a prosecutor must

> [illegible] disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

See also ABA 1 Standards for Criminal Justice 3-3.11(a)("It is unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused"), quoted in Rosen, "Disciplinary Sanctions Against Prosecutors for Brady Violations," 65 North Carolina L.Rev. 693, 712 (1987).

APPENDIX "G"

III-D-ii
Appendix G

(6)

CM 57.3-18

[illegible] the [illegible] indicated [illegible] view that [illegible] organization. [illegible] that [illegible] Rule 1[illegible] definition of "organization." [illegible] the view that the [illegible] "vicarious admissions," such as [illegible] co-conspirators. Judge Keeton agreed that [illegible] some clarification with regard to [illegible] and that they should be placed in [illegible].

[illegible]

[illegible] Rule 16(a)(1)(D). Disclosure of Expert[illegible].

The Reporter indicated that the subject of the ABA proposed amendment to Rule 16, regarding disclosure of expert witnesses, had already been the subject of a proposed [illegible] which was currently out for public comment. No [illegible] was made concerning this proposal.

4. Rule 16(a)(1)(E), Codification of Brady.

The Committee was informed by the Reporter that the ABA had also proposed a codification of Brady and that the Committee had previously considered and rejected a similar proposal a year earlier. Mr. Marek indicated that the ABA's final position on this proposal would be significant and although he was not moving adoption of the proposal at this time, he believed that the matter was important. Professor S[illegible] noted that some United States Attorneys have taken the position that Brady does not extend to sentencing; Mr. Pauley responded that he has assumed that it does extend to sentencing. No motion was made on this proposal.

5. Rule 17(c), Issuance of Subpoena.

[illegible] ABA proposals also included a provision for [illegible] Rule 17 to permit expedited delivery of materials [illegible]. After briefly reviewing the proposal, no [illegible] was forthcoming.

APPENDIX "H"

CM 6/01 65-70

(H)

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 10, 1995
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Administrative Office of the United States Courts in Washington, D.C. on April 10, 1995. These minutes reflect the actions taken at that meeting.

I.CALL TO ORDER & ANNOUNCEMENTS

Judge Jensen, Chair of the Committee, called the meeting to order at 8:30 a.m. on Monday, April 10, 1995. The following persons were present for all or a part of the Committee's meeting:

Hon. D. Lowell Jensen, Chair
Hon. W. Eugene Davis
Hon. Sam A. Crow
Hon. George M. Marovich
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. B. Waugh Crigler
Hon. Daniel E. Wathen
Prof. Stephen A. Saltzburg
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Roger Pauley, Jr., designate of Ms. Jo Ann Harris, Asst. Attorney General
Professor David A. Schlueter, Reporter

Also present at the meeting were: Judge William R. Wilson, Jr., a member of the Standing Committee on Rules of Practice and Procedure and a liaison to the Committee, Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; and Mr. James Eaglin from the Federal Judicial Center.

The attendees were welcomed by the chair, Judge Jensen who introduced a new member of the Committee, Mr. Josefsberg. Judge Jensen also noted that he had asked Judge Crow to serve as the Committee's liaison to a subcommittee of the Court Administration and Case Management Committee; that subcommittee is studying the issue of management of criminal cases. At this point, he noted, no action was required by the Advisory Committee.

II. APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Marovich moved that the minutes of the Committee's October 1994 meeting in Santa Fe, New Mexico, be approved. Following a second, the motion carried by a unanimous vote.

III. CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which became effective on December 1, 1994: Rule 16(a)(1)(A)(statements of organization defendants); Rule 29(b)(Delayed ruling on judgment of acquittal); Rule 32 (Sentence and Judgment); and Rule 40(d) (Conditional release of probationer). The final version of the amendments to Rule 32 included a victim allocution provision inserted by Congress.

IV. RULES APPROVED BY JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

The Reporter informed the Committee that the Judicial Conference had approved several proposed amendments and forwarded them to the Supreme Court for its review: Rule 5(a)(Initial Appearance Before the Magistrate); Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). As of the date of the Committee's meeting, the Supreme Court had not acted on the proposed amendments.

V. RULES APPROVED BY STANDING COMMITTEE FOR PUBLICATION AND COMMENT

The Committee was informed by the Reporter that written comments and testimony had been submitted on the two rules which the Standing Committee had approved publication and comment: Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements); and Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing). He informed the Committee that the deadline for submitting written comments on the proposed amendments was February 28, 1995 and that a public hearing on the proposed amendments was held on January 27, 1995 in Los Angeles, California.

A. Rule 16(a)(1)(E), (b)(1)(C) (Discovery of Experts); Rule 16(a)(1)(F), (b)(1)(D) (Disclosure of Witness' Names and Statements)

The Reporter informed the Committee that although several commentators approved of all of the changes in Rule 16, almost all of the comments specifically addressed the proposed amendments in Rule 16(a)(1)(F) and (b)(1)(D) dealing with disclosure of witness names and statements. All of the comments expressed support for the proposed amendments; but some suggested changes to the text. No commentator expressed disagreement with the provision governing discovery of experts in Rule 16(a)(1)(E) and 16(b)(1)(C)..

Following a brief summary of the written comments and testimony, Judge Crigler raised the question of whether the provision addressing disclosure of witness names and statements should apply to misdemeanor cases. He noted that the trial of petty offense and misdemeanor cases does not lend itself to the notification provision proposed in the rule. Other members agreed with Judge Crigler, who ultimately moved that the rule be limited to felony trials. Judge Davis seconded the motion. Following additional brief discussion, which focused on the issue of whether the disclosure provision would ever be practicable in misdemeanor cases, because of the highly abbreviated pretrial processing times, the Committee adopted the proposed change to the amendment by a unanimous vote.

Regarding the seven-day provision in the proposed amendment, Mr. Pauley urged the Committee to reduce the time to three days. He noted that United States attorneys often do not know for sure who their witnesses will be within seven days of trial. In those cases, he stated, the defense will argue that the government has not complied with the rule. He recommended that preclusion of testimony should only take place where the government has intentionally failed to disclose the information. In response to a comment from Professor Saltzburg, Mr. Pauley stated that the Department of Justice's proposed changes were not being offered as a compromise, but rather to improve the rule. Even if all of the amendments were adopted, he said, the Department's opposition to the rule would remain.

Judge Marovich expressed concern about any further delays in considering DOJ proposed changes. The question, he said, is whether the federal courts should adopt a system which is widely used and accepted in the state courts and in most federal trials. In his view, the current draft of the amendment gives the government absolute control over disclosure The timing issue, he said, was simply a red herring.

Judge Smith echoed the concerns expressed by Professor Saltzburg and Judge Marovich but observed that the Department of Justice had a right to be heard on the

issues being discussed. Judge Wilson responded that the Department was making a political issue out of the proposed amendment.

Judge Dowd indicated that perhaps the rule should be amended to extend the time to a period of 14 days before trial. Judge Jensen noted that other rules include a 10-day notice provision. Judge Marovich indicated that at worst, a late disclosure would delay the trial. Mr. Pauley reminded the Committee that Congress has adopted a three-day notice provision in capital cases. Judge Jensen observed that the Department had supported 15-day notice provisions in newly enacted rules of evidence governing use of propensity evidence in sexual assault cases -- Rules 413-415.

Professor Saltzburg observed that the Department of Justice did not oppose the seven-day notice provision in the amendments to Rule 32 dealing with sentencing and he encouraged the Committee to reject any amendment which would focus on the willfulness of delayed notification. Mr. Pauley responded that the Department was not as concerned about losing discovery motions as it was about the practicality of the seven-day provision. Justice Wathen observed that in his experience the parties deal with a more realistic list of witnesses. Judge Marovich added that the hallmark of a federal prosecution should be a good witness list.

Mr. Pauley moved that the rule be amended to reflect a three-day notice provision. The motion failed for lack of a second.

Responding to several commentators who urged the Committee to include provision for disclosure of government witnesses' addresses, Judge Jensen reminded the Committee that the provision had been in an original draft but removed at the urging of the Department of Justice. Judge Crigler expressed serious reservations about requiring the government to produce the witnesses for defense interviews. And Mr. Martin indicated that the Committee Note is silent regarding the Department's assurance that it would assist the defense in speaking to witnesses.

In the absence of any motion to change the draft with regard to disclosure of witness addresses, the discussion turned to the question of whether the rule or the accompanying note should specifically include reference to FBI 302's which may include witness statements. Several members questioned whether such documents were statements within the meaning of Rule 26.2. Judge Jensen pointed out that including such reports within the definition at this point might be considered a major change to the proposed amendment which would probably require re-publication for public comment. Following further discussion, the consensus was that the matter should not be included in the current amendment.

Judge Jensen advised the Committee that several commentators had raised the

issue of what was meant by "unreviewable" in the proposed amendment; a number expressed concern that that language placed too much power in the hands of the prosecutor. Judge Wilson responded that the current language was a workable package which would be acceptable to Congress. Judge Marovich noted that the current language was a major compromise. Mr. Martin raised the question of whether a judge might see nondisclosed evidence in such nonreviewable statements which might later be considered on sentencing. Judge Jensen responded that if the sentencing judge is considering such factors, he or she must disclose that information to the defense.

Following a discussion on how much information the prosecutor should disclose under the amendment, the Reporter suggested a minor amendment in the language. The Committee ultimately voted 9 to 0, with two abstentions, to substitute the following language: "an unreviewable written statement indicating why the government believes in good faith that either the name or statement of a witness cannot be disclosed."

Mr. Pauley expressed concern that in certain types of cases, such as in civil rights cases, a witness may fear economic reprisals, which is not a reason under the proposed amendment for not disclosing the witness' name or statement. Professor Saltzburg pointed out that the Department's position would swallow the rule because the exception proposed would be entirely too large. Judge Marovich noted that the names will become known when the witnesses are called so at the most, the witness may receive some pretrial protection from disclosure. Judge Crigler noted that the Department should protect its witnesses and Judge Smith noted that the same potential problem exists with regard to disclosing the names of jurors. Mr. Jackson observed that the defendant has a strong interest in being presumed innocent.

In the absence of any motion to amend the proposal, Mr. Pauley commented on his continuing concern with the potential conflict with the Jencks Act. He stated that the Advisory Committee had not yet tested the supersession clause in the Rules Enabling Act and argued that the judiciary should pursue the legislative process for seeking a change. Mr. Martin responded by pointing out that the Department's argument had been implicitly rejected in the procedures for establishing and amending the sentencing guidelines. Professor Saltzburg added that the Standing Committee's amendment several years ago to Federal Rule of Evidence 609 was clearly an example of offering an amendment to rules specifically promulgated by Congress.

Judge Dowd raised again the question of whether FBI 302's would be covered under the proposed amendment to Rule 16. Judge Jensen suggested that the matter should be considered at the Committee's next meeting as a possible amendment to Rule 26.2(f). Judge Dowd moved that the Rule 16 be amended to substitute the words, "a brief summary of the witness' testimony." The motion failed for lack of a second. The Reporter indicated that the issue could be addressed in the Committee's report to the

Standing Committee.

The discussion turned to the issue of reciprocal discovery under the proposed amendment. The consensus was that the proposed language presented a workable compromise. Mr. Martin moved that the amendment requiring reciprocal defense discovery be revised to make an exception for "impeachment witnesses." The motion failed for lack of a second. Judge Dowd noted that the defense may not always know who its witnesses will be and Professor Saltzburg responded that both sides have a continuing duty to disclose.

Judge Marovich moved that the amendments to Rule 16 be forwarded to the Standing Committee with a recommendation to approve and forward them to the Judicial Conference. Judge Crow seconded the motion which carried by a vote of 11 to 1.

C. Rule 32(d) (Sentence and Judgment; Forfeiture Proceedings Before Sentencing)

The Reporter summarized the few comments which had been received on the proposed amendment to Rule 32, including a number of proposed changes from the Department of Justice. Mr. Pauley noted the Department's changes focused on three areas. First the newer version of the rule would permit the forfeiture proceedings to begin earlier in the process; second, the newer version of the amendment would remove the requirement of a hearing; and third, the rule would require the judge to enter an order as soon as practicable. He explained that the newer version tracked a version sent to Congress by the Department.

Professor Saltzburg raised the question about the political reality of the Department's proposal. Mr. Pauley responded that he was not sure what Congress would do with the Department's proposed amendment.

Judge Dowd noted that the question about forfeiture proceedings only arises if the indictment raises the issue; the Ninth Circuit has ruled that if the forfeiture proceeding is conducted separately it violates double jeopardy. Following brief discussion about whether the proposed changes by the Department of Justice amounted to major changes, Judge Crigler moved that the amendment, as changed, be forwarded to the Standing Committee. Judge Davis seconded the motion, which carried by a vote of 11 to 0, with Mr. Josefsberg abstaining. It was also suggested that the Committee Note include reference to the fact that the final order might include a modification of the court's preliminary order and that the amendment would benefit the defense because counsel will now know what procedures are to be used.

APPENDIX "I"

CM 6101-78

(I)

II.APPROVAL OF MINUTES OF OCTOBER 1994 MEETING

Judge Crow moved that the minutes of the Committee's April 1995 meeting in Washington, D.C., be approved. Following a second by Judge Marovich, the motion carried by a unanimous vote.

III.CRIMINAL RULES APPROVED BY THE SUPREME COURT AND FORWARDED TO CONGRESS

The Reporter informed the Committee that the Supreme Court had approved and forwarded to Congress proposed amendments to four rules, which will become effective on December 1, 1995, absent any further action by Congress: Rule 5(a) (Initial Appearance Before the Magistrate Rule 43 (Presence of Defendant); Rule 49(e) (Repeal of Provision re Filing of Dangerous Offender Notice); and Rule 57 (Rules by District Courts). The Reporter noted that in its consideration of the rules, the Supreme Court had changed the word "must" to "shall" in order to maintain consistency within all of the rules.

IV.RULES CONSIDERED BY THE JUDICIAL CONFERENCE AND FORWARDED TO THE SUPREME COURT

Judge Jensen reported on the disposition of Rules 16 and 32 which had been forwarded by the Committee to the Standing Committee for action.. After considerable discussion at its July 1995 meeting, the Standing Committee had approved a modified version of the Committee's proposed amendments to Rule 16, which would have required the government to produce the names and statements of its witnesses prior to trial. In order to avoid any conflict with the Jencks Act, the Standing Committee deleted any requirement to produce a witness' statement. The Standing Committee had approved, without change, the Committee's proposed amendment to Rule 32 regarding forfeiture procedures.

Although the Judicial Conference approved Rule 32 for transmittal to the Supreme Court, it rejected altogether the proposed amendments to Rule 16 regarding production of witness names and statements. Although it was not clear from the Judicial Conference's action whether they specifically intended to reject the amendment to Rule 16 which addressed disclosure of expert witness testimony, the consensus of the Committee was that that amendment had also been implicitly rejected because the changes to Rule 16 had been treated as single unit by the Conference.

APPENDIX "J"

Mr. Spaniol asserted that if routine fax filing were allowed, the guidelines would be very important. If, however, only emergency filing were allowed by fax, the guidelines would not be important. In that case, the guidelines needed to say only that for technical purposes the equipment must be compatible with the equipment in the clerk's office.

Mr. Perry circulated his own proposed draft for consideration by the committee. Some members stated that they liked Mr. Perry's approach, but they preferred the revised draft of the appellate committee.

Judge Stotler summarized Mr. Spaniol's recommendation, stating that it proposed to send the guidelines and model local rules to the Court Administration and Case Management Committee and the Automation and Technology Committee for their consideration and then to the Judicial Conference.

Judge Wilson moved to approve Mr. Spaniol's recommendations and the concept of the appellate committee's guidelines, as revised.

Judge Easterbrook and Mr. Perry offered a number of changes in the guidelines and model local rules, which were approved without objection. Mr. Perry added the words "transmissions directly to the clerk" in lieu of "filing" on line 5 of Part V of the guidelines. The words "directly to the clerk" were also added in model local rule --.1. Judge Easterbrook added a provision that additional copies of the papers must be mailed or delivered to the clerk before the end of the next business day. The local rules were also clarified regarding service by elimination of model rule --.8 and including a provision in model rule --.6 that all applicable rules governing service must be followed.

The committee then approved the proposed guidelines and model rules, as amended, and voted to send them to the Court Administration and Case Management Committee and the Automation and Technology Committee.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of December 9, 1993. (Agenda Item XI)

Fed.R.Crim.P. 16

Judge Jensen reported that the advisory committee had approved a proposed amendment to Fed.R.Crim.P. 16 requiring the government, on request of the defendant, to disclose the names, addresses, and statements of witnesses at least seven days before trial. He noted that a similar proposed rule change had been approved by the Supreme Court in

1974, but had been rejected by the Congress as a result of vigorous opposition from the Department of Justice.

Judge Jensen stated that there was a natural tension between the need for a fair trial and the need to protect government witnesses. The draft rule approved by the advisory committee presented a good balance between these two principles. The rule provided a presumption of disclosure, but allowed exceptions freely in the unreviewable discretion of the United States attorney where there could be danger to witnesses or obstruction of justice.

He added that a series of changes had been made in the criminal rules over the years to require disclosure of information before trial, all with the theme of eliminating surprise, including Fed.R.Crim.P. 12.1 (notice of alibi), 12.2 (notice of insanity defense or expert testimony of defendant's mental condition), and 12.3 (notice of a defense based on police authority). He pointed out that the changes had been promoted by the Department of Justice to prevent surprise to the government at trial. He added that surprises occurring during a trial lead to interruptions in the process in order to obtain additional information.

Judge Jensen noted that in the state courts there was a clear movement towards greater disclosure. State systems generally provide for open disclosure, with exceptions made for security reasons. In most federal prosecutions, too, open file discovery prevailed. So, as a practical matter, disclosure of witnesses and other information already occurred in most cases.

He explained that the 1974 rule proposal had contained a provision for protective orders. The current rule, however, went much further to protect the government. It recognized the good faith of the prosecutor and made the prosecutor's determination unreviewable. This would avoid collateral litigation. It would also require reciprocal discovery, for the defendant must disclose witnesses when the government must.

Judge Jensen stated that the advisory commitee had discussed a potential conflict between the proposed rule and the Jencks Act. Nevertheless, the committee saw Jencks as just a timing issue. Moreover, Congress always has the prerogative to reject the proposal, just as they did in 1974.

In summary, Judge Jensen concluded that the thrust of the rule was to prevent surprise at trial and to strike a proper balance between competing considerations.

Professor Schlueter stated that the vote in the advisory committee to approve the amendments to Rule 16 was overwhelming, at 9-1. The matter had been discussed by the committee at two previous meetings and had been considered by a subcommittee consisting of Professor Saltzburg and Judge Wilson. Action had been deferred by the committee

expressly to allow Attorney General Reno an opportunity to study and comment on the proposal. Yet, the Department of Justice returned to the committee with a very hard position against any change.

Mr. Nathan stated that he had read in the advisory committee reports criticism of the Department of Justice for being too partisan. This, he stated, was clearly not Attorney General Reno's wish. He pointed out that the department wore two hats: (1) to work for the good of the justice system, and (2) to prosecute criminal offenses. It had an obligation to protect the second interest.

Mr. Nathan complimented Judge Jensen for a great job on the proposal, stating that the current draft was far superior to the 1974 proposal. It was well balanced, but the Department still had problems with it and would like to work with the committee to address these problems. He requested that the proposed amendments be deferred for one more meeting and not be published in their current form.

Mr. Nathan stated that the Department saw a direct conflict with the Jencks Act. The proposal effectively would amend the Act by rule.

Mr. Nathan pointed out that the reason for the Department's delay in responding to the committee's proposal was that it did not have an Assistant Attorney General for the Criminal Division. The new Administration would like to take a fresh look, particularly at local disclosure practices in the federal courts. The Department was sincere on the matter, wished to obtain additional information, and wanted to reach an accommodation with the committee, if possible.

He emphasized that if the committee and the Department were able to work out their differences, the proposal would have much more credibility in the Congress since it would have Department of Justice support. He concluded, though, that if the proposal as presently written were to be published, the Department would have to oppose it. Moreover, publication would harden positions.

Judge Wilson stated that he recognized that there was a danger to witnesses in some criminal cases. But in white collar crimes, the idea of going to trial without pretrial disclosure of the names of witnesses was ludicrous. He argued that the proposal of the Advisory Committee on Criminal Rules was very modest and promoted fundamental fairness. He asserted that he was extremely skeptical that the Department of Justice would change its position at the next meeting.

Chief Justice Veasey stated that he came from an open disclosure state and had found the issue to be controversial only as to its inconsistency with the Jencks Act.

Several other members expressed their support for the proposed amendment on its merits, but were also concerned about the Jencks Act problem. Professor Wright pointed out that 28 U.S.C. § 2072(b) provided that the amended rule would supersede the Act in any event.

Judges Ellis and Easterbrook stated that they were troubled about the supersession clause in the Rules Enabling Act and suggested that it might be unconstitutional. Judge Easterbrook added that the advisory committee note was not completely candid. He suggested that the issue was whether the committee should openly confront the Jencks Act problem and rely on the supersession mechanism.

Judge Ellis moved to defer publication of the amendments to Fed.R.Crim.P. 16 until the next meeting of the committee, subject to the Department of Justice's planned study of current practices and problems.

The motion was approved without objection.

Internal Operating Procedures

Judge Jensen reported that the advisory committee had adopted two internal operating procedures:

(1) In discussing proposals for rules amendments, the burden would be placed on the reporter to provide a history of prior, similar proposals for consideration of the members. Issues may be raised anew, but the members should be made aware of past actions of the committee on similar suggestions.

(2) The appropriate place for people to make oral presentations to the advisory committee was at the scheduled public hearings, rather than at committee business meetings. Yet, if people are present at the meetings, they may be asked, in the committee's discretion, to participate in discussions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 10, 1993. (Agenda Item VIII)

Professor Resnick reported that the advisory committee had no recommendations for action by the standing committee. He pointed out that the advisory committee had deferred seeking authority to publish additional rules amendments because it was sensitive to the perception that there had been too many recent changes in the rules. He added that the committee was anticipating a busy meeting in February 1994 and had an active subcommittee on technology. The subcommittee was in the process of examining the state

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: **October 5, 2004**

Over the course of three meetings, starting with the Spring 2003 meeting in Santa Barbara, California, the Committee 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.

At the Fall 2003 meeting, the Committee approved in concept (by a vote of 7 to 4) the proposed amendment At Judge Carnes' request, the Department continued working on two 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 Before the Spring 2004 meeting, Judge Levi suggested an amendment that would involve the defendant waiving his or her double jeopardy rights vis a vis an early ruling on a Rule 29 motion. The proposed amendments were discussed again at length at the Spring 2004 meeting in Monterey and by a vote of 9 to 3, the Committee decided not to pursue the amendment

At the June 2004 Standing Committee meeting in Washington, D C., Judge Carnes reported on the matter as an information item At the conclusion of his comments—as noted in the attached report to the Judicial Conference—the Department's representative to the meeting stated the Department's intent to raise the issue again at the Standing Committee's January 2005 meeting; he also stated that the Department would provide additional empirical data

This item will be on the agenda for discussion at the meeting in Santa Fe

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 17-18, 2004 Robert D. McCallum, Associate Attorney General, attended the meeting on behalf of the Deputy Attorney General, James B Comey All the other members attended

Representing the advisory rules committees were: Judge Samuel A Alito, chair, and Professor Patrick J Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A Thomas Small, chair, and Professor Jeffrey W Morris, reporter, of the Advisory Committee on Bankruptcy Rules, Judge Lee H Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules, Judge Edward E Carnes, chair, and Professor David A Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E Smith, chair, and Professor Daniel J Capra, reporter, of the Advisory Committee on Evidence Rules

Participating in the meeting were Peter G McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter, John K Rabiej, Chief of the Administrative Office's Rules Committee Support Office, James Ishida and Robert P Deyling, attorney advisors

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to the bench and bar for comment

Informational Item

The advisory committee declined to proceed with amendments to Rule 29 proposed by the Department of Justice that would require a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict Under the present rule, a judge's ruling on a judgment of acquittal motion, if made before the return of the jury verdict, is rendered unappealable by the Double Jeopardy Clause The advisory committee concluded that the number of these rulings granting a judgment of acquittal before a jury verdict is relatively small and did not warrant a rule change The Department of Justice notified the Committee of its intent to ask the Committee to reconsider the proposal at its January 2005 meeting along with some additional empirical information.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules proposed amendments to Rules 404, 408, 606, and 609 with a recommendation that they be published for comment. Each of the proposed amendments addresses a longstanding conflict among the courts of appeals

The proposed amendment to Rule 404(a) resolves the conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case The original purpose of the rule was to bar the admission of character evidence when offered to prove a person's conduct, because the evidence might lead to a trial of personality and cause a jury to decide the case on improper grounds A limited exception was recognized in criminal cases in deference to the possibility that character evidence might be the defendant's sole defense Over

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Status of Proposed Amendment to Rule 41 re Tracking-Device Warrants**

DATE: **October 5, 2004**

In June 2003, the Committee presented a proposed amendment to Rule 41 that would, inter alia, address the topic of tracking-devices warrants. That proposal had been generated during the restyling project several years ago and was driven in large part by magistrate judges who believed it would be very helpful to have some guidance on tracking-device warrants. The proposal also included language regarding delayed notice of entry. Following the comment period in the Spring 2003, the Committee had made several changes to the rule and committee note to address several concerns raised by the Department of Justice

At the Standing Committee meeting that Committee initially voted to approve and forward the amendment After the meeting, however, the Deputy Attorney General (who had abstained on the vote) asked the Committee to defer forwarding the proposal to the Judicial Conference, in order to permit the Department to consider and present its concerns to the Standing Committee Because there was a belief that the Department had proposed the tracking-device amendments, the proposed amendment was deferred

The Committee was apprised of these developments at the Fall 2003 meeting in Oregon. But to date, there has been no further report from the Department of Justice on the proposed amendment

I have briefly reviewed my notes on the history of the proposed amendment Apparently, the idea was generated in a 1998 memo from Roger Pauley, Department of Justice, to Magistrate Tommy Miller (member of the committee), asking whether there was any interest among the magistrate judges for such a rule In 1999, the chair, Judge Davis, appointed a Rule 41 Subcommittee, chaired by Judge Miller, that developed the amendment in 2000 The Department was also pursuing an amendment to Rule 41, which would permit "covert" searches Initially, the magistrate judges were more interested in addressing the topic of sneak and peak warrants and were less interested in the tracking-device warrants The amendments to Rule 41 were delayed and not included in the substantive amendments during the restyling project

I am also including a copy of the portion of the Minutes of the April 2002 meeting where the tracking-device warrant language was discussed and approved unanimously by the Committee for forwarding with a request for publication

Although it could be argued that the tracking-device amendment was the Department of Justice's proposal, it would be more correct to say that the Department initially raised the question of whether there was any interest in the subject There clearly was The minutes, memos, and public comments on the proposed amendment reflect the desire for an amendment on tracking-device warrants

From a technical standpoint, the amendment is still pending before the Standing Committee Nonetheless this item is on the agenda for the October 2004 meeting, with the thought that the Department may be able to provide a status report on the amendment

I have attached the Rule 41 amendment as it was presented to the Standing Committee in 2003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2003
Philadelphia, Pennsylvania
Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Philadelphia, Pennsylvania, on Monday and Tuesday, June 9 and 10, 2003 The following members were present:

Judge Anthony J Scirica, Chair
David M. Bernick, Esquire
Charles J Cooper, Esquire
Judge Sidney A Fitzwater
Dean Mary Kay Kane
Mark R. Kravitz, Esquire
Patrick F McCartan, Esquire
Judge J Garvan Murtha
Judge A Wallace Tashima
Deputy Attorney General Larry D. Thompson
Judge Thomas W Thrash, Jr
Chief Justice Charles Talley Wells

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes, Judge Trager, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachments of May 15, 2003 (Agenda Item 6)

Amendments for Judicial Conference Approval

FED R CRIM P 35(c)

Judge Carnes reported that the proposed amendment to Rule 35 (correcting or reducing a sentence) would add a new a subdivision (c) defining "sentencing" as the oral announcement of the sentence by the court He explained, however, that the proposal, in the form published for public comment, had defined sentencing as the entry of judgment. The public comments, he noted, had been mixed, and the Department of Justice was among the opponents of the proposed change He reported that the advisory committee had found the objections persuasive and had decided to recast the amendment to define sentencing as the oral announcement of sentence The amendment, he added, reflects the majority view of the courts of appeals addressing the issue.

The committee without objection approved the proposed amendment by voice vote.

FED R CRIM P 41

Judge Carnes reported that several changes were being proposed in Rule 41 (search and seizure) to address tracking-device warrants. The proposed amendments, he noted would: (1) provide procedural guidance to judges in issuing tracking-device warrants, and (2) add a provision for delaying any notice required by the rule Professor Schlueter added that magistrate judges favor the proposed amendments, and there is general public support for them

Judge Carnes explained that the amendments would not require a warrant for a tracking device in every instance. And they would not resolve the issue of whether a tracking-device warrant may issue only upon a showing of probable cause They provide merely that the magistrate judge must issue the warrant if probable cause is shown.

The committee approved the proposed amendments, with Deputy Attorney General Thompson abstaining.

Following the meeting, the deputy attorney general expressed some concerns about the proposed changes to Rule 41, and he asked the committee to defer transmitting

them to the Judicial Conference for final approval In light of his concerns — and because the Department of Justice itself originally had proposed the rule changes — the committee decided to defer transmitting the amendments in order to give the Department additional time to consider the proposal

REVISION OF THE RULES GOVERNING § 2254 CASES AND § 2255 PROCEEDINGS

Judge Carnes reported that following the successful restyling of the Federal Rules of Criminal Procedure, the committee obtained approval from the Standing Committee to proceed with a review of the § 2254 and § 2255 Rules He asked Judge Trager, who had chaired the subcommittee that had taken the lead in restyling the rules, to describe the proposed changes

Judge Trager noted that there had not been any significant changes to the habeas rules for nearly 25 years. He stated that there were relatively few differences between the § 2254 Rules and the § 2255 Rules, and the advisory committee was recommending similar changes to both sets of rules One necessary difference between the two, he noted, is in Rule 5(b) (addressing the allegations) because there is no requirement in § 2255 cases that a movant exhaust remedies Professor Schlueter added that the district court in a § 2255 case already has the file and knows what has already happened.

Judge Trager reviewed each rule in turn and focused on the most significant changes First, he pointed out that Rule 1(b) (scope) will continue to specify that any or all of the rules may be applied in a case brought under 28 U.S C § 2241 He also pointed to a significant substantive change in Rule 3 (filing the petition) of the § 2254 and § 2255 Rules Under the current rules, he said, the clerk may reject a petition that does not comply with the rules The advisory committee, however, was of the view that this approach is too punitive given enactment of the short one-year statute of limitations for § 2254 petitions in the Antiterrorism and Effective Death Penalty Act of 1996 The revised rules, instead, require the clerk to accept a defective petition and enter it on the docket This approach, moreover, is consistent with FED. R. CIV P 5(e), which provides that the clerk may not refuse to accept a civil filing solely for the reason that it fails to comply with the federal rules or with local rules of court

Judge Trager pointed out that a change was being made in Rule 4 (preliminary review by the court) in the § 2254 and § 2255 Rules to substitute "motion or other response" for the current term "pleading " This reflects the common practice for responses in habeas corpus cases to be made by way of motion A related change was being made in Rule 5 (answer and reply) of the § 2254 Rules In addition, a reference to "affirmative defenses" in the published draft had been deleted, and the committee note points out a potential substantive change in the rule in that it requires that the answer address procedural bars and any statute of limitations Judge Trager noted that the

APPENDIX B

RULE 41. SEARCH AND SEIZURE

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **GAP Report**

Rule 41. Search and Seizure

(a) Scope and Definitions.

* * * * *

(2) ***Definitions.*** The following definitions apply under this rule:

* * * * *

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government.

(1) a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is

issued but might move or be moved outside the district before the warrant is executed; ~~and~~

(3) a magistrate judge—in an investigation of domestic terrorism or international terrorism ~~(as defined in 18 U.S.C. § 2331) having~~ with authority in any district in which activities related to the terrorism may have occurred, ~~may~~ has authority to issue a warrant for a person or property within or outside that district~~.~~; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

* * * * *

(d) Obtaining a Warrant.

(1) ~~***Probable Cause***~~ ***In General.*** After receiving an affidavit or other information, a magistrate judge—or if authorized by Rule 41(b), ~~or~~ a judge of a state court of record—must issue the warrant if

there is probable cause to search for and seize a person or property or to install and use a tracking device ~~under Rule 41(c)~~

* * * * *

(e) Issuing the Warrant.

(1) ***In General.*** The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, ~~T~~the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

~~(A)~~(i) execute the warrant within a specified time no longer than 10 days;

~~(B)~~(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution

at another time; and

~~(C)~~(iii) return the warrant to the magistrate judge designated in the warrant.

(B) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause

expressly authorizes installation at another time, and

(iii) return the warrant to the ~~magistrate~~ judge designated in the warrant.

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

* * * * *

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

~~(1)~~(A) *Noting the Time.* The officer executing the warrant must enter on ~~its face~~ the exact date and time it is was executed.

~~(2)~~(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in

the presence of at least one other credible person

~~(3)~~(C) *Receipt*. The officer executing the warrant must ~~: (A)~~ give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or ~~(B)~~ leave a copy of the warrant and receipt at the place where the officer took the property

~~(4)~~(D) *Return*. The officer executing the warrant must promptly return it—together with the copy of the inventory —to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) ***Warrant for a Tracking Device.***

(A) *Noting the Time.* The officer executing a tracking-device warrant must enter on it the date and time the device was

installed and the period during which it was used

(B) *Return.* Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the ~~magistrate~~ judge designated in the warrant.

(C) *Service.* Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked, or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the magistrate

judge may delay notice as provided in 41(f)(3).

(3) ***Delayed Notice.*** Upon request of the government, a magistrate judge—or if authorized by Rule 41(b), a judge of a state court of record—may delay any notice required by this rule if the delay is authorized by statute.

* * * * *

COMMITTEE NOTE

The amendments to Rule 41 address two issues: first, procedures for issuing tracking device warrants and second, a provision for delaying any notice required by the rule.

Amended Rule 41(a)(2) includes two new definitional provisions. The first, in Rule 41(a)(2)(D), addresses the definitions of "domestic terrorism" and "international terrorism," terms used in Rule 41(b)(2). The second, in Rule 41(a)(2)(E), addresses the definition of "tracking device."

Amended Rule 41(b)(4) is a new provision, designed to address the use of tracking devices. Such searches are recognized both by statute, *see* 18 U.S.C. § 3117(b) and by caselaw, *see, e.g., United States v. Karo*, 468 U.S. 705 (1984); *United States v. Knotts*, 460 U.S. 276 (1983). Warrants may be required to monitor tracking devices when they are used to monitor persons or property in areas where there is a reasonable expectation of privacy. *See, e.g., United States v. Karo, supra* (although no probable cause was required to install beeper, officers' monitoring of its location in defendant's

home raised Fourth Amendment concerns). Nonetheless, there is no procedural guidance in current Rule 41 for those judicial officers who are asked to issue tracking device warrants. As with traditional search warrants for persons or property, tracking device warrants may implicate law enforcement interests in multiple districts.

The amendment provides that a magistrate judge may issue a warrant, if he or she has the authority to do so in the district, to install and use a tracking device, as that term is defined in 18 U.S.C. § 3117(b). The magistrate judge's authority under this rule includes the authority to permit entry into a area where there is a reasonable expectation of privacy, installation of the tracking device, and maintenance and removal of the device. The Committee did not intend by this amendment to expand or contract the definition of what might constitute a tracking device. The amendment is based on the understanding that the device will assist officers only in tracking the movements of a person or property. The warrant may authorize officers to track the person or property within the district of issuance, or outside the district

Because the authorized tracking may involve more than one district or state, the Committee believes that only federal judicial officers should be authorized to issue this type of warrant. Even where officers have no reason to believe initially that a person or property will move outside the district of issuance, issuing a warrant to authorize tracking both inside and outside the district avoids the necessity of obtaining multiple warrants if the property or person later crosses district or state lines.

The amendment reflects the view that if the officers intend to install or use the device in a constitutionally protected area, they must obtain judicial approval to do so. If, on the other hand, the officers intend to install and use the device without implicating any Fourth Amendment rights, there is no need to obtain the warrant. *See, e.g. United States v. Knotts, supra*, where the officers' actions in installing and following tracking device did not amount to a search under the Fourth Amendment.

Amended Rule 41(d) includes new language on tracking devices. The tracking device statute, 18 U.S.C. § 3117, does not specify the standard an applicant must meet to install a tracking device. The Supreme Court has acknowledged that the standard for installation of a tracking device is unresolved, but has reserved ruling on the issue until it is squarely presented by the facts of a case. *See United States v. Karo*, 468 U.S. 705, 718 n. 5 (1984). The amendment to Rule 41 does not resolve this issue or hold that such warrants may issue only on a showing of probable cause. Instead, it simply provides that if probable cause is shown, the magistrate must issue the warrant. And the warrant is only needed if the device is installed (for example in the trunk of the defendant's car) or monitored (for example, while the car is in the defendant's garage) in an area in which the person being monitored has a reasonable expectation of privacy.

Amended Rule 41(e)(2)(B) is a new provision intended to address the contents of tracking device warrants. To avoid open-ended monitoring of tracking devices, the revised rule requires the magistrate judge to specify in the warrant the length of time for using the device. Although the initial time stated in the warrant may not exceed 45 days, extensions of time may be granted for good cause. The rule further specifies that any installation of a tracking device authorized by the warrant must be made within ten calendar days and, unless otherwise provided, that any installation occur during daylight hours.

Current Rule 41(f) has been completely revised to accommodate new provisions dealing with tracking device warrants. First, current Rule 41(f)(1) has been revised to address execution and delivery of warrants to search for and seize a person or property; no substantive change has been made to that provision. New Rule 41(f)(2) addresses execution and delivery of tracking device warrants. That provision generally tracks the structure of revised Rule 41(f)(1), with appropriate adjustments for the particular requirements of tracking device warrants. Under Rule 41(f)(2)(A) the officer must note on the warrant the time the device was installed and the period during which the device was used. And under new Rule 41(f)(2)(B), the officer must return the tracking device warrant to the magistrate designated in the warrant, within 10 calendar days after use of

the device has ended.

Amended Rule 41(f)(2)(C) addresses the particular problems of serving a copy of a tracking device warrant on the person who has been tracked, or whose property has been tracked. In the case of other warrants, current Rule 41 envisions that the subjects of the search typically know that they have been searched, usually within a short period of time after the search has taken place. Tracking device warrants, on the other hand, are by their nature covert intrusions and can be successfully used only when the person being investigated is unaware that a tracking device is being used. The amendment requires that the officer must serve a copy of the tracking device warrant on the person within 10 calendar days after the tracking has ended. That service may be accomplished by either personally serving the person, or by leaving a copy at the person's residence or usual abode and by sending a copy by mail. The Rule also provides, however, that the officer may (for good cause) obtain the court's permission to delay further the delivery of the warrant That might be appropriate, for example, where the owner of the tracked property is undetermined, or where the officer establishes that the investigation is ongoing and that disclosure of the warrant will compromise that investigation.

Use of a tracking device is to be distinguished from other continuous monitoring or observations that are governed by statutory provisions or caselaw. *See* Title III, Omnibus Crime Control and Safe Streets Act of 1968, *as amended* by Title I of the 1968 Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520; *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (use of video camera); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984) (television surveillance)

Finally, amended Rule 41(f)(3) is a new provision that permits the government to request, and the magistrate judge to grant, a delay in any notice required in Rule 41. The amendment is co-extensive with 18 U.S.C. § 3103a(b). That new provision, added as part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, authorizes a court to

delay any notice required in conjunction with the issuance of any search warrants

SUMMARY OF PUBLIC COMMENTS ON RULE 41.

The Committee received seven written comments on Rule 41. The commentators generally approved of the concept of including a reference to tracking-device warrants in the rule. Several commentators, however, offered suggested language that they believed would clarify several issues, including the definition of probable cause vis a vis tracking device warrants, and language that would more closely parallel provisions in Title III of the Omnibus Crime Control Act of 1968.

Mr. Jack E. Horsley, Esq. (02-CR-003)
Matoon, Illinois
October 25, 2002.

Mr. Horsley believes that the proposed amendments concerning tracking-device warrants should be adopted

Hon. Joel M. Feldman (02-CR-007)
United States District Court, N.D. Ga,
Atlanta, Georgia
December 2, 2002

Judge Feldman suggests that the Committee consider further amendments to Rule 41 regarding warrants used to obtain electronic records from providers of electronic communications services. He attaches a written inquiry from one of colleagues pointing out a number of questions that are likely to arise in such cases.

Hon. Dennis G. Green (02-CR-011)
United States Magistrate Judge
President, Federal Magistrate Judges Assn.
Del Rio, Texas
January 14, 2003.

The Magistrate Judge's Association generally supports the proposed amendments to Rule 41. But the Association believes that either the rule itself or the committee note should be changed to clarify whether a separate warrant is needed to enter constitutionally protected property to install the device. The Association states that the current rule and note are not clear on that point, and believe that as written, unnecessary litigation will result.

Mr. Kent S. Hofmeister (02-CR-014)
President, Federal Bar Association
Dallas, Texas
February 14, 2003

The Federal Bar Association approves of the amendments to Rule 41, noting that they fill a void

Mr. Saul Bercovitch (02-CR-015)
Staff Attorney
State Bar of California's Committee on Federal Courts
December 14, 2003

The Committee on Federal Courts for the State Bar of California generally approves of the proposed amendments to Rule 41. But it raises two points that it believes should be addressed. First, the amendments do not clarify what the probable cause finding must be made upon, or whether a showing less than probable cause will suffice.

Second, the rule does not address the consequences of failure to comply with the delayed notice provisions in Rule 41(f)(2).

Mr. Eric H. Jaso (02-CR-019)
Counselor to the Assistant Attorney General
Criminal Division
United States Department of Justice
Washington, D.C.,
February 20, 2003

Mr. Jaso, on behalf of the Department of Justice, offers several suggested changes to the proposed amendments to Rule 41. First, the Department is concerned that the language in Rule 41(d) might be read to require that a warrant is required anytime a tracking-device is installed; he suggests alternative language. Second, he states that some members of the Appellate Chiefs Working Group recommend deletion of the requirement that the installation occur during daylight hours. And third, he recommends a change to Rule 41(f)(2)(C), which permits delayed notification following execution of a tracking device; he believes that it would be better to delete the "good cause shown" language, and simply cross reference Rule 41(f)(3), which is the general provision dealing with delayed notice.

Mr. William Genego & Mr. Peter Goldberger (02-CR-021)
National Association of Criminal Defense Lawyers
March 21, 2003

NADCL offers a number of suggestions on Rule 41. First, it urges the Committee to use two benchmarks in amending Rule 41: tradition and jurisprudence of issuing warrants and Title III of the Omnibus Crime Control Act of 1968. Second, it notes that there is a lack of parallelism in Rule 41(b)(3) and (b)(4) from (b)(1) and (b)(2); it notes that use of the words "may issue" in (b)(4) are ambiguous. Third, NADCL also suggests

that the rule contain some reference to the fact that a warrant may be issued by district judges as well as magistrate judges. Fourth, it offers suggested language that would require that the probable cause focus on the specific need for installing the tracking device and that the government first show that there is a genuine need for using a tracking device. Fifth, regarding Rule 41(e), NADCL again urges the Committee to follow Title III. And finally, with regard to Rule 41(f)(2), it states that the current language is open-ended and vague; it suggests new wording that it believes would require the magistrate judge to specify a particular period of time.

GAP REPORT--RULE 41

The Committee agreed with the NADCL proposal that the words "has authority" should be inserted in Rule 41(c)(3), and (4) to parallel similar language in Rule 41(c)(1) and (2). The Committee also considered, but rejected, a proposal from NADCL to completely redraft Rule 41(d) , regarding the finding of probable cause. The Committee also made minor clarifying changes in the Committee Note

The Reporter pointed out that, as reflected in the comment submitted by the Department of Justice, the Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment He noted that the Committee had opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered

Mr Campbell indicated that he favored a change to the proposed amendment that would substitute the words "entry of judgment" in place "sentencing" throughout the rule That option, he stated, would avoid the necessity of a separate definitional provision in the Rule Mr Elwood stated that the Department of Justice was opposed to the proposed amendment because it interjects yet another delay in the finality of the sentence for purposes of triggering the Rule 35 provisions. He noted that he favored substituting the words "oral announcement" or "oral pronouncement" of the sentence as the preferred language in place of entry of the judgment, which might not actually take place until weeks or perhaps months after the court announces the sentence

Judges Bucklew and Roll, and Mr Goldberg indicated that in their experience the entry of judgment usually follows the oral announcement of sentence within a short period of time

Following additional discussion on whether to use the term "oral announcement" or "oral pronouncement," Mr Campbell moved that the proposed amendment be changed to the effect that the proposed definitional provision in Rule 35(a) be dropped and that the term "entry of judgment" be used throughout the rule Mr. Goldberg seconded the motion, which failed by a vote of 4 to 6.

Judge Roll moved that the amendment be revised by dropping the definitional provision in proposed Rule 35(a), and the term "oral announcement" be used throughout the rule and that the rule be forwarded to the Standing Committee for action Judge Bucklew seconded the motion. Following additional brief discussion, the Committee approved the motion by a vote of 6 to 4 The Reporter responded that he would make the necessary changes in the Rule and the Committee Note and circulate the draft for the Committee's consideration

V. PENDING PROPOSED AMENDMENTS TO RULES

A. Rule 41. Tracking Device Warrants

Judge Miller, as chair of the Rule 41 Subcommittee, reported that the Subcommittee had agreed on a number of proposed changes to Rule 41 that would

address first, the issue of tracking-device warrants and second, delayed notification that a search warrant has been executed

He provided a brief overview of the proposed changes, noting that the Department of Justice had raised the issue of tracking-device warrants in 1998 and that as a result of that proposal, he had polled magistrate judges on how they were handling those types of searches, in the absence of any guidance in Rule 41 itself The response indicated that the practice varied throughout the districts. Any proposals to address the issue, however, were held pending the restyling project. He further noted that the issue of delayed notification that warrants had been executed had been addressed in Section 213 of the USA PATRIOT Act and that some amendment to Rule 41 would be appropriate

Judge Miller reported that the Rule 41 Subcommittee had considered a number of issues in relation to the USA PATRIOT Act First, it had considered whether Section 209 of the Act, which addresses the ability of the government to access unopened voicemail messages should be addressed in Rule 41 He reported that the Subcommittee recommended that the topic not be included. Second, the Subcommittee had decided not to address Section 216 of the Act, which concerns government's ability to capture certain addressing information from electronic facilities He noted that such orders were not search warrants covered by Rule 41 And third, the Subcommittee decided not to address Section 220 of the Act, which addresses nationwide service of search warrants for electronic evidence He noted that the section has a sunset provision of December 31, 2005

The Committee concurred in the Subcommittee's recommendations not to amend Rule 41 to account for those three new statutory provisions

Judge Miller also reported that Judge D Brock Hornby (Chief Judge, D. Maine) had recommended that Rule 41 be amended to permit law enforcement officers to return executed search warrants to the clerk of the court, and not necessarily the issuing judge or magistrate. Judge Miller noted that the issue had been addressed during the restyling project and that the Committee had determined that it was preferable to have the returns made to the magistrate judge designated in the warrant He also noted that the sense of the Subcommittee was that it would be better to maintain judicial monitoring of the warrants and that requiring the warrant to be returned to a judicial officer would further that interest. Judge Bartle spoke in favor of the proposed change, noting that in practice, warrants are returned to the clerk of the court and not to the issuing magistrate Following additional discussion by the Committee, it voted 8 to 1 to reject the proposal to amend Rule 41 by requiring the return to be made to the clerk.

Turning to the Subcommittee's proposed amendments to Rule 41, Judge Miller noted that the Subcommittee had proposed that two new definitions for "domestic terrorism," "international terrorism," and "tracking device" be added to Rule 41(a)(2) He also pointed out the proposed language in revised Rule 41(b)(4) that would explicitly address the authority of a magistrate judge to issue a tracking device warrant. He noted

that the proposed amendment would authorize only magistrate judges, and not state judicial authorities, to issue tracking-device warrants He noted that the Subcommittee believed that because such warrants often include monitoring across state and district lines, it would be preferable to vest that authority in federal judicial officers. Following additional brief discussion, the Committee voted 8 to 0 to adopt the proposed changes

Professor Stith raised the question whether amendments to Rule 41 concerning tracking-device warrants might supersede other types of searches The Committee generally agreed that amending Rule 41 would not preclude the development or recognition of others types of searches, not otherwise addressed in Rule 41 Several members noted that the traditional caselaw view is that Rule 41 is not intended to provide an exhaustive list of permissible search warrants

Judge Miller noted that Subcommittee had decided to amend Rule 41(e)(2) into two main subdivisions, (e)(2)(A), which deals with contents of regular search warrants, and (e)(2)(B), which addresses the contents of tracking-device warrants. The Subcommittee used similar parallel construction in Rule 41(f), concerning executing and returning the warrant Judge Miller informed the Committee that the Subcommittee had considered several possible alternatives for specifying the length of time a tracking-device warrant might be used and that it had settled on 45 days. Mr Elwood responded that the Department of Justice would favor using time limits similar to those used in Title III wiretaps Mr Fiske agreed with that view. Other members, however, expressed reservations about including the Title III deadlines in Rule 41 and noted that the 45-day limit should normally provide ample time for authorities to install and monitor tracking devices In addition, the proposed rule permitted officers to seek additional time periods The Committee rejected the proposal to adopt the Title III time limits, instead of the Subcommittee's 45-day provision, by a vote of 2 to 7.

Discussion on the time limits continued with focus on the 10-day period for installing tracking devices in Rule 41(e)(2)(B)(i) Following additional discussion, the Committee voted 11-0 to amend the proposed rule to provide for 10 calendar days for installation, which would provide ample time for installation

Several members raised the question whether in light of the time requirements, AO Form 93 was still correct Mr. MaCabe indicated that those forms are the responsibility of the Director of the Administrative Office and they could be conformed to meet the Rule's requirements

Judge Miller continued by pointing out that the Subcommittee had suggested a major revision of Rule 41(f) to accommodate the differences in regular warrants and warrants for tracking devices. Following discussion, the Committee agreed to provide in Rule 41(e)(2)(A) that the officer executing the warrant should be required to note on tracking-device warrants the date the device was installed, and the periods during which the device was used The Committee also agreed to the Subcommittee's proposed

amendments for serving a tracking device warrant on the person who was tracked or whose property was tracked

Finally, Judge Miller pointed out that the Subcommittee had recommended that Rule 41(f)(3) be added to the rule That provision, which is co-extensive with Section 213 of the USA PATRIOT Act, permits a judge (including a state judicial officer) to grant a delay for any provision in Rule 41 The Committee discussed the question of whether that provision would extend only to the "sneak and peek" searches. There was general agreement that it was not so limited

In that regard, Mr. Pauley urged the Committee to reconsider its decision not include amendments to Rule 41 that would provide explicitly for covert, or sneak and peek, searches He pointed out that there was caselaw supporting such searches. Judge Miller responded that following the comment period for a proposed amendment in 2001 that would have addressed such searches, the Subcommittee had decided not to address that topic, given the great difficulty in addressing the variety of questions and objections to any attempt to include coverage of those searches in Rule 41. The Subcommittee had decided to recommend that the issue be left with any developing caselaw

Following additional discussion on proposed changes to the proposed Committee Note, Judge Miller moved that the proposed amendments to Rule 41 be approved and forwarded to the Standing Committee with a recommendation that they be published for public comment Judge Bucklew seconded the motion, which carried by a vote of 12-0.

B. Rules Governing § 2254 and § 2255 Proceedings

1. Consideration of Substantive Issues

Judge Trager, chair of the Habeas Rules Subcommittee, reported that the Subcommittee had considered style and substantive amendments to the Rules Governing § 2254 and § 2255 Proceedings He began the discussion by noting that the Subcommittee had considered several substantive issues that might change current practice. First, he noted that the Subcommittee had addressed the issue of handling defective petitions or motions. He pointed out that before the Antiterrorism and Effective Death Penalty Act of 1996, defective petitions and motions were rejected and returned to the petitioner or moving party That Act, however, created a one-year statute of limitations and thus if a court rejects a petition or motion because it does not conform to the rules, may penalize the person. Thus, the Subcommittee proposed eliminating Rule 2(e) of the § 2254 rules and Rule 2(d) of the § 2255 rules, and including a new provision in Rule 3 of each of those rules that would parallel Rule 5 of the Federal Rules of Civil Procedure and require the clerk to file such papers, even if they were in some way defective If the papers are defective, the Subcommittee envisioned that the court would direct the petitioner or moving party to correct the deficiencies

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Rule 45. Computing and Extending Time; Proposed Amendment**

DATE: **October 5, 2004**

Under Rule 45(c), additional time for service is provided if service is by mail, leaving with the clerk of the court, or by electronic means, under Civil Rule 5(b)(2)(B), (C) or (D) respectively The Civil Rules Committee has proposed an amendment o Civil Rule 6, which would clarify that the three-day period is added *after* the prescribed period in the rules That amendment has been approved by the Judicial Conference and is pending before the Supreme Court. The Appellate Rules Committee is considering a similar amendment to its rules

The Civil Rule 6 amendment and Committee Note are attached

Judge Carnes has suggested that the Criminal Rules Committee might wish to consider whether to make a similar amendment to Rule 45

This item is on the agenda for the October meeting in Santa Fe

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of Service ~~Under Rule 5(b)(2)(B), (C), or (D)~~. Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may act within a prescribed period after ~~the service of a notice or other paper upon the party and the notice or paper is served upon the party~~ service and service is made under Rule 5(b)(2)(B), (C), or ~~(~~D), 3 days ~~shall be~~ are added ~~to~~ after the prescribed period would otherwise expire under subdivision (a).

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days.

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

If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day when the prescribed period would otherwise expire under Rule 6(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 6(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act. If the period prescribed expires on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 6(e) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 6(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 6(e) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

Rule 6(e) as Published

This recommendation modifies the version of Rule 6(e) that was published for comment as follows:

(e) Additional Time After Certain Kinds of Service ~~Under Rule 5(b)(2)(B), (C), or (D).~~ Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may

act within a prescribed period after ~~the service of a notice or other paper upon the party and the notice or paper is served upon the party~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the ~~prescribed~~ period.

The changes from the published version eliminate ambiguities that were detected in the published version. Since the primary purpose of the amendment is to eliminate ambiguities, recognizing that the actual number of days allowed is a secondary concern, the changes do not require republication.

Discussion

Publication of any day-counting amendment inevitably attracts suggestions that all the time periods in the rules should be reconsidered. Improvements are urged both in expression and in function. The most satisfactory approach to this large task is likely to involve all the sets of procedural rules, establishing uniform methods that can be relied upon in all federal-court settings. The Standing Committee has recognized these pleas; the long-range agenda includes a joint project to reconsider the time rules. Until that project matures, room remains for smaller-scale improvements in individual sets of rules. The Appellate Rules Committee is considering changes to Appellate Rule 26(c) to parallel the proposed Rule 6(e) changes — indeed, it was the Appellate Rules Committee that referred these questions to the Civil Rules Committee for consideration. The proposal made here reflects helpful advice and comments made by the Appellate Rules Committee and its Reporter, Professor Schiltz. Both Professor Schiltz and the Reporter to the Bankruptcy Rules Committee, Professor Morris, are in agreement with the approach the Civil Rules Committee is taking.

Cases and commentary have recognized four possible means of calculating the three days added by present Rule 6(e). Practicing

attorneys report that much time is devoted to nervous counting and recounting the days. Achieving a clear answer is the first concern. In the abstract, there is much to be said for counting the three added days before the prescribed period is counted — the underlying theory is that a paper served by mail or the other means incorporated in Rule 6(e) may take up to three days to arrive. But an informal survey of practicing attorneys revealed that almost all add the three days at the end. Transition to a clear new rule will work best if the new rule conforms closely to what most attorneys have been doing anyway.

The premise that three days should be added at the end of the prescribed period could be implemented in different ways. The shortest extension would be provided by adding three days after counting the days in the original period without regard to any Saturday, Sunday, or legal holiday. If the last prescribed day is a Saturday, for example, day 1 would be Sunday, day 2 would be Monday even if Monday is a legal holiday, and day 3 would be Tuesday. The act would be due on Tuesday; in this illustration, the 3 added days would not extend the time to act. An intermediate extension could be provided by looking to the last day to act under Rule 6(a) before counting the three added days. In the example just given the original period would expire on Tuesday, the first day that is not a Saturday, Sunday, or legal holiday. Wednesday, Thursday, and Friday would be the three added days.

In determining how to express in the rule the method of calculating the addition of three days, the Civil Rules Committee has attempted to be clear, resolving the ambiguities that the public comment had pointed out; consistent with proposed Appellate Rule 26(c) and with the corresponding Bankruptcy Rules; and to provide the maximum time to act that meets these goals. The method of calculation that achieves all these objectives is to count to the end of the prescribed period under Rule 6(a), using all the time-counting rules except the three-day extension, and then add three days. The

rule language set out above is clear and consistent with the Appellate Rules. After the end of the prescribed period is identified, three days are added. The Notes provide explicit direction on how to treat intermediate Saturdays, Sundays, and legal holidays. The last day to act is the third day, unless the third day is a Saturday, Sunday, or legal holiday. The last day to act in that case is the next day that is not a Saturday, Sunday, or legal holiday.[1]

This formulation is consistent with the Appellate Rule calculation and as generous as that consistency allows. Application is illustrated in the Committee Note. One way to explain the result is that no Saturday, Sunday, or legal holiday is to be counted against more than one exclusion. Adoption of this recommendation reflects the view that such an extension will not often interfere with the real-world pace of litigation.

Rule 6(a) states that the last of the counted days is included in calculating time limits unless, among other things, the required act is filing a paper in court and the day is one on which weather or other conditions have made the clerk's office inaccessible. There is no

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[1] In April 2004, the Civil Rules Committee agreed on language that would have excluded intermediate Saturdays, Sundays, and legal holidays in the calculation of the three days following the expiration of the prescribed period.

The full Committee has agreed unanimously to revise that language The revision resulted from the recognition that the Committee mistakenly believed its approach was consistent with the approach of proposed Appellate Rule 26. The Appellate Rule approach is simply to count the prescribed period, making use of all of the timecounting rules save the three-day extension. After the end of the prescribed period is identified, three "real" (i e , calendar) days are added. The effect of the language the Civil Rules Committee first adopted in April 2004 excluded intermediate Saturdays, Sundays, or holidays in calculating the three days, which was inconsistent with the Appellate Rules approach.

apparent reason to address this circumstance in Rule 6(e). If the clerk's office is inaccessible on the last day counted under Rule 6(e), the time to act is extended by Rule 6(a). Inaccessibility during the period before the last day counted under Rule 6(e) does not warrant any additional extension.

Changes Made After Publication and Comment

Changes were made to clarify further the method of counting the three days added after service under Rule 5(b)(2)(B), (C), or (D).

Summary of Comments

03-CV-001, Thomas J. Yerbich (Court Rules Attorney, D.Alaska): (1) Suggests that Rule 6(a) should be amended to ensure that the three days added by Rule 6(e) do not convert all 10-day periods to 13-day periods: "**(a)** * * * When the period of time prescribed or allowed is less than 11 days determined without regard to subdivision (e), intermediate Saturdays * * *"

(2) Urges that a further change should be made to ensure that time is not extended too much, and computations are not complicated too much, for situations in which the period ends on a Saturday, Sunday, or legal holiday. If the period ends on a Saturday, for example, the three Rule 6(e) days should begin on Sunday, not Monday or the next day that is not a legal holiday. Possible confusion arises from referring to a "period" to act — the period ends not on Saturday but on Monday, implying that the three days are added after Monday. To fix this problem, substitute "number of days" for "period":

> Whenever a party must or may act within a prescribed ~~period~~ number of days after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the ~~period~~ number of days [expires?].

(This comment includes several examples of ways to calculate in "business days" and "calendar days.")

(3) Offers a proposal for the "counting backward" question — what happens if you must act "10 days before" a defined day and the tenth day before is a Saturday, Sunday, or legal holiday. May you file on Monday, or the next day that is not a legal holiday, even though it is less than 10 days before the defined day? The proposal relies on "not later than" to say that you must file before the 10th day:

> **(f)** Whenever a party has the right or is required to do some act or take some proceedings within a period of time before a specified date or event prescribed or allowed by these rules, by the local rules of any district court, or by order of court, or by any applicable statute, the right must be exercised, the required act performed or the proceedings taken, not later than the prescribed time preceding the specified date or event.

03-CV-003, Professor Patrick J. Schiltz: Professor Schiltz describes a draft Committee Note for the parallel amendment of Appellate Rule 26(c), recommending the opposite answer to the question addressed by Comment 03-CV-001:

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2). After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day

is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 1, 2005.
(If the Appellate Rules version is adopted, it should be in the form approved by the Appellate Rules Committee.)

03-CV-007, S. Christopher Slatten, Esq.: Amended Rule 6(e) remains ambiguous. Do we add 3 "calendar days" or 3 "business days"? It would be good to emulate appellate Rule 26(c) by providing that "3 calendar days are added after the period." If the period ends on Friday, for example, Saturday, Sunday, and Monday are the 3 days.

03-CV-008, State Bar of California Committee on Federal Courts: Supports the clarification.

03-CV-009, State Bar of Michigan Committee on United States Courts: (1) Federal time-counting rules are too complicated. A uniform set of rules, based on calendar weeks, should be substituted for Civil, Criminal, and Appellate Rules. (2) The Committee Note rejects the argument that the 3 added days are an independent period of less than 11 days, so that Saturdays, Sundays, and legal holidays are excluded. But the Rule remains ambiguous. It should say: "3 consecutive calendar days are added after the period." (3) The rule remains ambiguous as to the time when the "prescribed period" ends. If the last day is a Saturday, Sunday, or legal holiday, does it end only on the next day that is none of those? Clarity can be achieved

by saying: "The 3 days must be added before determining whether the last day of the period falls on a day that requires extension under Rule 6(a)."

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U.S. Department of Justice: Suggests one addition: "3 calendar days are added after the period." "[T]his addition will make absolutely clear the Committee's intention that parties include weekends and holidays when counting the three extra days."

03-CV-012, Alex Manners, CompuLaw: Ambiguities remain. First, the 3 additional days should be described as "calendar days," to ensure that Saturdays, Sundays, and legal holidays are counted. Second, it may be uncertain when a period ends if the last day is a Saturday, Sunday, or legal holiday. Are the 3 days added after the last day to act if there were no extension? This can be made clear by adding this at the end: "If the original period is less than 11 days, the original period is subject to Rule 6(a), whereby holidays and weekends are excluded from the computation, and then three calendar days are added."

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports the proposal. But time calculations under Rule 6 are still "rather complex," and indeed "border on being labyrinthian and require 'finger counting,' a very fallible method." The Standing Committee and Advisory Committee should "revisit Rule 6 in its entirety with an eye toward promulgating a rule based in 'running time' tied to a calendar week or multiples thereof."

Rule 27(a)(2)

The Advisory Committee recommends approval for adoption of amended Rule 27(a)(2) as follows:

(c) [Rescinded].	
(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court Such an order may for cause shown be made on ex parte application When a motion is supported by affidavit, the affidavit shall be served with the motion, and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions **(A)** when the motion may be heard ex parte, **(B)** when these rules set a different period or **(C)** when a court order — which a party may, for good cause, apply for ex parte — sets a different period **(2)** ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1[1] day before the hearing, unless the court permits service at another time
(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period	**(d) Additional Time After Certain Kinds of Service.** When~~ever~~ a party must or may act within a specified time~~prescribed period~~ after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period [2]

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only

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1 **Kimble:** global check whether we use the numeral 1

2 **Cooper** The Judicial Conference has sent to the Supreme Court a proposed amendment of present Rule 6(e) We need to find a way to flag this development when we publish the Style package One approach would be to retain present Rule 6(e) in the left column, and add a footnote to Style 6(d) "A proposed amendment of present Rule 6(e) is pending If it is adopted, the Style Rule 6(d) will conclude "3 days are added after the time would otherwise expire under (a) "

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

FROM: **Professor Dave Schlueter, Reporter**

RE: **Official Forms for § 2254 and § 2255 Filings**

DATE: **September 30, 2004**

Attached is a letter from Magistrate Judge Tommy Miller, a former member of the Committee, concerning the use of the soon-to-be new national forms for § 2254 and § 2255 actions. Unless Congress acts to amend the rules governing those actions, or the forms themselves, both the amended rules and forms will be effective on December 1, 2004.

This item is on the agenda for discussion at the meeting in Santa Fe

September 3, 2004

The Honorable Claude M. Hilton, Chief Judge
United States District Court for the
Eastern District of Virginia
401 Courthouse Square
Alexandria, VA 22314-5799

Re: Revised Habeas Corpus Forms for 28 U S C § 2254 and § 2255 Proceedings

Dear Chief Judge Hilton:

I request that you place on the agenda for the district meeting in October at the Tides Inn the question of whether this district should begin using the revised § 2254 and § 2255 forms. These forms will go into effect nationally as recommended forms on December 1, 2004 and accompany the revision of the rules for § 2254 and § 2255 actions

During my time on the Criminal Rules Committee, I was assigned to a subcommittee which revised the § 2254 and § 2255 rules, as well as the accompanying forms. The purpose of the revision was to incorporate stylistic changes in the rules, as well as to make the rules comply with substantive changes in the law since their adoption in 1976 We rewrote the recommended national forms, in an effort to simplify the language for the mostly pro se petitioners, and to make the life of the assigned judge easier The forms also require information that will alert the Court to possible statute of limitations issues, as well as successive petition issues. I have attached a copy of the forms for your consideration.

It is my recommendation that the judges of the Eastern District of Virginia adopt these forms and require the petitioners to use them in all filings subsequent to December 1, 2004. To implement the use of the § 2254 forms, it is also my recommendation that we seek the agreement of the judges in the Western District of Virginia to use the revised national forms to minimize confusion in Virginia If all agree to the use of the new forms, then I think it would be appropriate to alert the Attorney General of Virginia, as well as the Virginia Department of Corrections, to the change and require the Department of Corrections to provide the updated forms to the state inmates on December 1, 2004 or as soon thereafter as the state bureaucracy can comply with the order.

Implementing the use of the § 2255 forms may be more difficult, since the prisoners are

scattered at many federal institutions across the country. The Rules Committee may soon contact the Bureau of Prisons to request the distribution of the new forms to prisoners

Respectfully submitted,

Tommy E. Miller
United States Magistrate Judge

TEM:plc

Enclosures

IV

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K RABIEJ
Chief

Rules Committee Support Office

WASHINGTON, D.C. 20544

October 7, 2004

MEMORANDUM TO CRIMINAL RULES COMMITTEE

SUBJECT: *Victims' Rights and Rule 11 Amendments Legislation*

Victims' Rights Act

The House of Representatives passed the Justice for All Act of 2004 (H.R. 5107) on October 6, 2004. The first part of the bill provides victims with certain rights of allocution broader than the rights provided them under the proposed amendments to Rule 32, which were approved by the Judicial Conference in September 2004. The Senate earlier passed provisions similar to the House version in the Scott Campbell, Stephanie Roper, Wendy Preston, Lourana Gillis, and Nila Lynn Crime Victims' Rights Act (S. 2329) But the House-passed bill combined the victims' rights provisions with major provisions dealing with DNA evidence, which the Department of Justice opposes. It is unlikely that the Senate will pass the House version at this late date.

In accordance with the recommendation of the Criminal Rules Committee, the Committee on Rules of Practice and Procedure recommended to the Judicial Conference that the proposed amendments to Criminal Rule 32 be withdrawn "prior to the September Judicial Conference session if the pending legislation were to be enacted in the meantime." We advised the staff of the House Judiciary Committee of the amendments to Rule 32 in the attached memorandum and pointed out the differences between the two versions. In a later memorandum (attached), we raised concerns with another provision in the pending bill that provided victims with a right to petition the court of appeals for a writ of mandamus if the district court denies the relief sought by a victim. Under the bill, the court of appeals must consider the petition within 72 hours, and it must indicate in writing its reasons on the record for denying relief. Moreover, a single judge of the court of appeals can issue the mandamus writ.

Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004 (H.R. 4547)

On September 23, 2004, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security marked up H R. 4547, which increases the mandatory minimum sentences on drug offenses involving children No similar bill is pending in the Senate, and it is unlikely that the legislation will pass at this late date

Section 9 of H.R. 4547 would have amended Rule 11 to impose conditions on a court before it could accept a plea agreement. The conditions were designed to ensure that the acceptance of every plea agreement is consistent with the "statutory purposes of sentencing and the sentencing guidelines." For example, a court would be required to make specific findings that certain plea agreements adequately reflect the "seriousness of the actual offense behavior." On September 20, 2004, we advised Congress that the proposed amendment of Rule 11 was inconsistent with the Rules Enabling Act. We also expressed opposition to the sentencing provisions. The Rule 11 provision was deleted from the bill during the September 23 mark-up session. A copy of the letter sent to Congress and an excerpt of the bill containing the Rule 11 provisions are attached.

John K. Rabiej

Attachments

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

June 22, 2004
Via Fax

MEMORANDUM TO BLAINE S. MERITT

SUBJECT: *Proposed Amendments to Criminal Rule 32 Regarding Victim Allocution*

Judge David F. Levi asked me to send you a copy of the amendments to Criminal Rule 32 proposed by the Advisory Committee on Criminal Rules. At its June 17-18 meeting, the Committee on Rules of Practice and Procedure (Standing Committee) concurred with the advisory committee's recommendation to forward the amendments to the Judicial Conference for transmission to the Supreme Court. If approved by the Conference and Supreme Court, the amendments will be submitted to Congress by May 1, 2005, and they will take effect on December 1, 2005, unless Congress acts otherwise.

The proposed amendments provide a victim with an opportunity to address the court before it imposes a sentence. Under the amendments, a court may limit the number of victims who may address it in cases involving multiple victims. The advisory committee noted that legislation is pending that would provide victims with an allocution right at any "public proceeding involving release, plea, or sentencing" (H.R. 4342). If Congress passes the legislation before action is taken by the Judicial Conference, the Standing Committee agreed with the advisory committee's recommendation to withdraw the proposed amendments.

There are several noteworthy differences in the allocution rights accorded victims in the proposed amendments from those accorded in the pending legislation. First, the amendments extend allocution rights only to a victim of a felony offense. The pending legislation extends the right to all victims, including a victim of a petty offense. Second, the amendments provide a court with some discretion about the manner in which victims are to be heard, authorizing a court to require, in some cases, that the victim present information only in the form of a written statement. Under the pending legislation, a victim is entitled to be heard at the public proceeding. Third, the amendments apply to sentencing proceedings. The pending legislation applies to any proceeding involving release, plea, or sentencing. The advisory committee was aware of the expanded allocution rights accorded a victim in the pending legislation, but determined that the better course was to retain the scope of the amendments in the form that they were published for public comment.

If you have any questions regarding this material, please call me at 502-1820. Thank you.

John K. Rabiej

Attachment

cc: Honorable David F. Levi
Honorable Ed Carnes
Michael Blommer
Peter McCabe

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

September 22, 2004

MEMORANDUM TO MARK EVANS

SUBJECT: *Mandamus Provision in H.R. 5107*

Section 102 of H.R. 5107 adds new § 3771(d)(3) to title 18, United States Code. The new section provides a victim the right to petition a court of appeals for a writ of mandamus and sets out procedures governing consideration of the petition. We have several concerns about it.

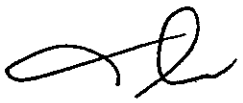
The new provision requires a court of appeals to "take up and decide" an application for a writ of mandamus within "72 hours." Setting the deadline in terms of "hours" raises problems. The Federal Rules of Appellate Procedure have specific provisions determining time periods based on "days" that account for intervening weekends and holidays. (F.R.A.P. 26.) Nowhere in the rules are there provisions on counting hours set as a deadline. If a petition is filed at 4:00 p.m. on a Thursday, for example, must the court act on it by 4:00 p.m. on Sunday? More importantly, the 72-hour period is too short and unworkable. Under Appellate Rule 21(b), the court must provide the respondent an opportunity to answer within a fixed time. It also authorizes the court to invite the trial-court judge to address the petition. It would be extremely difficult if not impossible in most cases for the court to: (1) review the petition; (2) decide whether to ask for an answer; (3) give the respondent time to file an answer; (4) read that answer; and (5) make a decision – all in 72 hours.

The issues that can be expected to arise in petitions for a writ of mandamus under the Act appear to be straightforward and likely can be disposed expeditiously in most cases. But 72 hours does not seem feasible. We suggest that the time period be revised to refer to "days" and that more time be allotted.

A new sentence has been added to the mandamus provision that may generate confusion and litigation. It should be deleted. Under the Act, "[t]he court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure." Assuming that issuing a writ of mandamus is intended to mean the same thing as deciding to grant the writ of mandamus, the provision conflicts with the national rules. Federal Rule of Appellate Procedure 27(c) permits a single judge to act on behalf of the court in ruling on routine procedural motions, but not in deciding an appeal or other proceeding on the merits. The rule provides that: "[a] circuit judge may act alone on any motion, but may not dismiss or otherwise

determine an appeal or other proceedings." In other words, a single judge can issue procedural orders regarding such things as page limits or deadlines, but a single judge may not decide any "proceeding," including a writ of mandamus, on the merits. Since the circuit rules cannot be inconsistent with the federal rules, the added sentence becomes meaningless, because a single judge cannot decide the mandamus petition "pursuant to circuit rule or the Federal Rules of Appellate Procedure." Although meaningless, the sentence will likely cause confusion and unnecessary satellite litigation. A single judge cannot act alone in any other proceeding, and there is no good reason to provide an exception in this case.

Please feel free to contact me to talk about any of this.



John K. Rabiej

cc: Honorable David F. Levi
Honorable Samuel A. Alito
Professor Daniel R. Coquillette
Professor Patrick J. Schiltz
Peter G. McCabe, Secretary
Kim M. Whatley

Union Calendar No. 434

108TH CONGRESS
2D SESSION

H. R. 5107

[Report No. 108–711]

To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes

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IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 21, 2004

Mr. SENSENBRENNER (for himself, Mr CONYERS, Mr CHABOT, Mr COBLE, Mr DELAHUNT, Ms PRYCE of Ohio, Mr. GREEN of Wisconsin, Mr. SCOTT of Virginia, Mr JENKINS, Mr SCHIFF, Mr. WEINER, Ms. HART, Mr. BACHUS, Ms BALDWIN, Mr KELLER, and Mr. NADLER) introduced the following bill, which was referred to the Committee on the Judiciary

SEPTEMBER 30, 2004

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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A BILL

To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime labora-

tories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Justice for All Act of 2004".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—SCOTT CAMBELL, STEPHANIE ROPER, WENDY PRESTON, LOUARNA GILLIS, AND NILA LYNN CRIME VICTIMS' RIGHTS ACT

SEC. 101. SHORT TITLE.

This title may be cited as the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act".

SEC. 102. CRIME VICTIMS' RIGHTS.

(a) AMENDMENT TO TITLE 18.—Part II of title 18, United States Code, is amended by adding at the end the following:

"CHAPTER 237—CRIME VICTIMS' RIGHTS

"§ 3771. Crime victims' rights

"(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

"(1) The right to be reasonably protected from the accused.

"(2) The right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release or escape of the accused.

"(3) The right not to be excluded from any such public court proceeding, unless the court determines that testimony by the victim would be materially ~~affected if~~ altered the victim heard other testimony at that proceeding.

"(4) The right to be reasonably heard at any public proceeding involving release, plea, ~~or~~ sentencing, or any parole proceeding.

"(5) The reasonable right to confer with the attorney for the Government in the case.

"(6) The right to full and timely restitution as provided in law.

"(7) The right to proceedings free from unreasonable delay.

"(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

"(b) RIGHTS AFFORDED.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before ~~denying a crime victim the right~~ making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

"(c) BEST EFFORTS TO ACCORD RIGHTS.—

"(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

"(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

"(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

"(d) ENFORCEMENT AND LIMITATIONS.—

"(1) RIGHTS.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

"(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

"(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the dis-

trict in which the crime occurred. The district court shall take up and decide ~~such motion~~ forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five ~~day, or affect the defendant's right to a speedy trial,~~ days for purposes of enforcing this chapter.

"(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

"(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a new trial, ~~or to reopen a plea or a sentence, except in the case of restitution as provided in title 18.~~

"(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to

any motion asserting a victim's right

If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

See attached insert

Insert

Page 7, line 20, strike ", or" and all that follows through the end of line 22 and insert ". A victim may make a motion to re-open a plea or sentence only if—

"(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

"(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

"(C) in the case of a plea, the accused has not pled to the highest offense charged.

"This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.".

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 20, 2004

Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
207 Cannon House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter provides the views of the Judicial Conference of the United States with regard to H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004," as introduced on June 14, 2004.

This bill moves sentencing law in a diametrically opposite direction from that required for the fair and responsible administration of criminal justice in the federal courts. Rather than restoring the authority of judges to tailor sentences to the circumstances of individual offenses and offenders, which was significantly curtailed by the PROTECT Act,[1] this bill would further restrict the discretion of sentencing judges and thereby result in sentences that do not fit the crimes. The specific concerns and recommendations of the Judicial Conference are detailed below.

Mandatory Minimums

Various provisions of this legislation would expand the application of mandatory minimum sentences by creating new penalties, increasing existing penalties, or expanding the scope of offenses that expose defendants to such sentences. Specifically, the bill would:

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[1] Pub. L. No. 108-21, 117 Stat. 650 (2003).

- raise the mandatory minimum sentence for distribution of a controlled substance to a person under 21 years of age from 1 year to 5 years for a first offense, and from 1 year to 10 years for subsequent offenses (sections 2(a) and (b));

- establish a new mandatory minimum sentence of 10 years for a first offense of distribution of a controlled substance if the defendant is 21 years of age or older and the person to whom the distribution is made is under 18 years of age, and mandatory life imprisonment for a second offense (sections 2(a) and (b));

- expand the scope of offenses carrying mandatory minimum sentences with regard to distribution of controlled substances within 100 feet of schools, colleges, public housing, or facilities frequented by youths, by adding public libraries and daycare facilities to the list of protected facilities and by expanding the protected zone from 100 feet to 1000 feet, and increase the mandatory minimum sentence for the first of such offenses from 1 year to 5 years and for the second and subsequent offenses from 3 years to 10 years (sections 2(c) and (d));

- establish a new mandatory minimum sentence of 10 years for the first offense of employing a person under 18 years of age in drug distribution or manufacturing within 1000 feet of a protected facility, 15 years for the second offense, and mandatory life imprisonment for the third offense under certain circumstances (section 2(e));

- increase the mandatory minimum sentence for the first offense of employing a person under 18 years of age in a drug operation from 1 year to 5 years (section 2(i)), and for the second and subsequent offenses from 1 year to 10 years (section 2(j));

- establish a new mandatory minimum sentence of 5 years for distribution of a controlled substance to a person under 18 years of age in the course of employing such person in a drug operation (section 2(k));

- establish a new mandatory minimum sentence of 5 years for the manufacture or distribution of a controlled substance within 1000 feet of a drug treatment facility (section 4(a));

- establish a new mandatory minimum sentence of 5 years for the first offense of offering a controlled substance to a person enrolled or previously enrolled in a drug treatment program or facility, and 10 years for second and subsequent offenses; in those instances in which serious bodily injury or death results from the use of such substance, the first offense would carry a mandatory minimum sentence of 10 years, and the second offense would result in life imprisonment (section 4 (a)); and

- establish a mandatory minimum sentence of 3 years for creating a substantial risk of harm to human life due to possession or storage of harmful substances or chemicals used in the manufacture of controlled substances, and 5 years if the risk is posed to minors (section 11).

The Judicial Conference has repeatedly expressed strong opposition to mandatory minimum sentences because they severely distort the federal sentencing system. Mandatory minimums also undermine the sentencing guideline regimen Congress carefully established under the Sentencing Reform Act of 1984 by preventing the rational and systematic development of guidelines that reduce unwarranted disparity and provide proportionality and fairness in punishment.

The United States Sentencing Commission has determined that mandatory minimum sentences skew the "finely calibrated...smooth continuum" of the sentencing guidelines, preventing the Commission from maintaining system-wide proportionality in the sentencing ranges for all federal crimes.[2] This pernicious effect of mandatory minimums stems from the fact that such provisions create dramatic discrepancies in sentences between defendants who fall just below the threshold of a mandatory minimum and defendants whose criminal conduct meets the statutory criteria. This "cliff" effect impedes the design of a guideline scheme that rationally enhances punishment according to the dangerousness of the underlying conduct.[3]

In addition to resulting in unwarranted sentencing disparities, mandatory minimums often lead to the treatment of dissimilar offenders in a similar manner by requiring courts to impose the same sentence on offenders when sound policy and common sense call for reasonable differences in punishment to reflect differences in the seriousness of the conduct or danger to society.

Thus, mandatory minimums have the dual untoward effect of subjecting similar offenders to dramatically different sentences and dissimilar offenders to substantially similar sentences. Chief Justice Rehnquist has stated that mandatory minimums are "a good example of the law of

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[2] U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991). *See also Federal Mandatory Minimum Sentencing*: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103rd Cong., 1st Sess. 64-80 (1995) (statement of Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

[3] By way of example, a first-time offender convicted of simple possession of 5.01 grams of crack cocaine is subject to a mandatory minimum sentence of 5 years. In contrast, had the offender possessed only 5.0 grams of crack cocaine (one-hundredth of a gram less), the mandatory minimum sentence would not apply, subjecting the defendant to a maximum sentence of 1 year. *See* 21 U.S.C. § 844(a).

unintended consequences [and] frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish."[4]

These provisions of the bill seriously aggravate the problems created by mandatory minimums by widening their scope and application. We urge that the Subcommittee delete these provisions from the bill, initiate legislation to repeal all current mandatory minimums, and allow the sentencing guidelines and the Sentencing Commission to operate in the fair and effective manner envisioned by the Sentencing Reform Act of 1984.

Sentencing Guidelines

Various provisions of this legislation either directly amend the sentencing guidelines or impose specific direction upon the United States Sentencing Commission so as to be tantamount to direct amendment of the guidelines. Specifically, the bill would:

- directly amend the sentencing guideline regarding the "mitigating role" of a defendant (section 3);

- direct the Sentencing Commission to amend the guideline regarding drug conspiracy offenses in a specified manner (section 5);

- direct the Sentencing Commission to amend the guidelines in a specified manner so as to assure sentencing enhancement for "relevant conduct" (section 7); and

- direct the Sentencing Commission to amend the guidelines in a specified manner to ensure progressive enhancements for persons possessing or using firearms (section 8).

The Judicial Conference opposes direct congressional amendment of the sentencing guidelines because such amendments undermine the basic premise underlying the establishment of the Sentencing Commission – that an independent body of experts appointed by the President and confirmed by the Senate, operating with the benefit of the views of interested members of the public and both public and private institutions, is best suited to develop and refine such guidelines. We recommend that these provisions of the bill be amended to direct the Sentencing Commission to study the amendment of these guidelines and either adjust the guidelines or report to Congress the basis for its contrary decision.

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[4] Chief Justice William H. Rehnquist, Address at the National Symposium on Drugs and Violence in America (June 18, 1993).

Safety Valve

Several provisions of this legislation diminish the availability of the statutory safety valve provision[5] and the corresponding sentencing guidelines.[6] Specifically, the bill would:

- amend one of the five current statutory safety valve criteria to preclude safety valve relief unless: (1) the government certifies that the defendant pleaded guilty to the most serious, readily provable offense, and (2) the defendant did not "at any time" provide false, misleading, or incomplete information or substantial assistance that was untimely (section 6);

- add an additional statutory criterion requiring a finding that neither the offense nor the relevant conduct occurred in or near the presence or residence of a minor, or constituted any of several offenses regarding protected persons and places (section 2(*l*)(2));

- require the Sentencing Commission to amend the guidelines to make the safety valve unavailable if the offense or relevant conduct occurred in or near the presence or residence of a minor, or constituted any of several offenses regarding protected persons or places (section 2(*l*)(1)); and

- delete sentencing guideline § 2D1.1(b)(6), which requires a two-level decrease for defendants satisfying the safety valve criteria (section 3(a)).

Congress enacted the safety valve provision in 1994 with the support of the Judicial Conference to ameliorate some of the harshest results of mandatory minimums by permitting judges to apply the sentencing guidelines instead of the statutory minimum sentences in cases of certain first-time, non-violent drug offenders. This bill proposes to greatly diminish the availability of the safety valve. For example, the bill would disqualify defendants from safety valve eligibility if they exercised their constitutional right to a trial. Even if a defendant pleaded guilty, the bill would foreclose a district judge from considering safety valve relief unless the government certified that the defendant pleaded guilty to the most serious, readily provable offense. Such a provision would allow the government to withhold the necessary certification on the grounds that the defendant did not plead guilty "to the most serious readily provable offense," notwithstanding that it had opted to bargain away that offense.

Because these provisions of the bill would give additional unwarranted authority to prosecutors to influence sentences and would expose more defendants to mandatory minimum

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[5] 18 U.S.C. § 3553(f).

[6] USSG §§ 2D1.1(b)(6) and 5C1.2.

electronic form -- 205(c)(3) speaks of rules that relate to "electronic filing of documents and the public availability * * * of documents filed electronically." A document filed in paper and converted to electronic form was not filed electronically, so it could be argued that 205(c)(3) does not contemplate rules that protect such documents. But that is a refined argument. Surely the Act should be read to expect protection with respect to anything that enters the court's electronic records and becomes available online. Perhaps a slight revision of the Committee Note would be cleaner: "The rule goes further than the E-Government Act by protecting personal identifiers in paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form will diminish continually. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed by the Act."

That's all that came to mind this time through; I am relying on the hope that the fresh eyes of the Advisory Committees will help find improvements in the June 16 draft that eluded all us as it was hammered out in our most productive meeting. -- Ed

"Daniel Capra"
<dcapra@law.fordham edu>
10/06/2004 12 13 PM

To <BColeman@caed uscourts gov>
cc <John_Rabiej@ao uscourts gov>
bcc
Subject Fwd Miscellaneous E-Government Template suggestions

To Brooke· Ed's suggested new amendment, for translation.

To John: Perhaps we should put Ed's email in the agenda books, along with the following:
1. Revised template
2. Meaningless-in-practice problem raised by bankruptcy interloper.
3. Ed's suggested change to "private personal information"
4. Your memo on the provenance of protecting the names of children
5. Bankruptcy proposal concerning mandatory e-filing.

----- Message from "Edward H. Cooper" <coopere@umich edu> on Wed, 29 Sep 2004 11 25 09 -0400 -----

To: "Daniel Capra" <dcapra@law.fordham.edu>

cc: Lee_Rosenthal@txs.uscourts gov, john_Rabiej@ao.uscourts.gov

Subject: Miscellaneous E-Government Template suggestions

Dan,

I become dangerous when I come back to something that has receded months into my stale memory banks. Reading over the Template yesterday I was struck by a few questions.

Footnote 5 in the version I have says that the subcommittee resolved to ask CACM about the reasons for protecting a child's full name. Do we have an answer?

A drafting suggestion for subdivision (f), though perhaps a bit drastic· **(f) Court Orders.** ~~In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by parties to a document filed with the court The court must be satisfied that a limitation on remote electronic access is~~ If necessary to protect against widespread disclosure of private or sensitive information [that is not otherwise protected under ~~subdivision~~ (a)], a court may [by order] limit or prohibit remote electronic access by nonparties to a document filed with the court (I am not sure we need the material in brackets. The "by order" is likely to be seen by the Style Subcommittee as a "tough call." The best argument for including it is that we want to imply that a local rule is not authorized.)

And a question about the first paragraph of the Committee Note. The last three sentences are, I think, technically correct. But the overall effect may be a bit misleading Section 205(c)(1) draws a distinction between a document that is filed electronically and a document that is filed on paper but converted to electronic form. After conversion, the paper-filed document is to "be made available online." It is clearly right to say, as the Note does, that the rule goes further than the Act because it applies to paper filings And I accept, without knowing, that it is correct to observe that most paper filings are scanned into electronic form and are as available over the internet as documents initially filed in electronic form. It is probably technically correct to imply that the rule goes beyond the act by protecting a document filed in paper form and converted to

sentences and constitute direct amendments of the sentencing guidelines, the Judicial Conference urges that they be deleted from the legislation.

Plea Agreements

Section 9 of H.R. 4547 would directly amend Rule 11 of the Federal Rules of Criminal Procedure to impose conditions on a court before it may accept a plea agreement. The conditions are designed to ensure that the acceptance of every plea agreement is consistent with the "statutory purposes of sentencing and the sentencing guidelines." The Judicial Conference has not taken a position on the merits of the specific proposed amendments. But passage of the legislation would thwart the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

Under the Rules Enabling Act, proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bar, and bench. As envisioned by Congress, the Rules Enabling Act rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. The rulemaking process is laborious, but the painstaking process reduces the potential for future satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons, including the public, who may be affected by a rule change have had an opportunity to express their views on it.

The amendments to Criminal Rule 11 under section 9 of the bill appear to codify present practices of the courts. But the amendments affect procedures at the core of the judicial process and must be carefully examined, particularly because the vast majority of criminal cases are disposed of in federal court by plea agreements. Rule 11 contains sensitive provisions that have been contested by thousands of litigants and parsed by courts in thousands of written opinions. Every change to the rule has been carefully considered because, no matter how apparently straightforward, it may have significant unintended consequences.

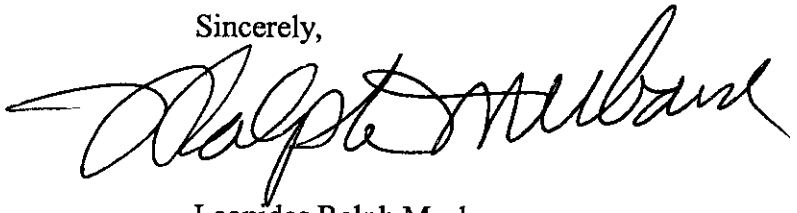
The exact language of the amendments in H.R. 4547 raises issues that are precisely the type best suited to be vetted under the rulemaking process. For example, the legislation requires a court to accept a plea agreement under Rule 11(c)(1)(A) in which the government agrees not to bring charges or dismiss charges only after the court makes specific findings that the plea agreement adequately reflects the "seriousness of the actual offense behavior." The procedures governing plea agreements under Rule 11 apply to all criminal cases, including petty offenses, like immigration and minor traffic offenses committed on federal property. In these cases, a presentence report may not be available to assess the defendant's actual offense behavior. Whether meeting the conditions imposed under the amendments in these high-volume cases would unduly interfere with the efficient administration of justice and impose additional budgetary requirements on an already overworked probation and pretrial services system is not

clear and is worthy of study. Undertaking the rulemaking process may identify and resolve other unforeseen issues and problems with the amendments.

Direct amendment of Rule 11 circumvents the careful rulemaking process established by Congress. The Judicial Conference has a longstanding policy opposing legislation directly amending the federal rules outside the rulemaking process, and consistent with this policy it opposes section 9 of the bill.

We appreciate this opportunity to provide the views of the Judicial Conference on this significant legislation. If you have any questions, please have your staff contact Michael W. Blommer, Assistant Director, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

cc: Honorable Bobby Scott
Ranking Minority Member

Members, House Judiciary Subcommittee on
Crime, Terrorism and Homeland Security

108TH CONGRESS
2D SESSION

H. R. 4547

To amend the Controlled Substances Act to protect vulnerable persons from drug trafficking, and for other purposes

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IN THE HOUSE OF REPRESENTATIVES

JUNE 14, 2004

MR SENSENBRENNER introduced the following bill, which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To amend the Controlled Substances Act to protect vulnerable persons from drug trafficking, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004".

(3) that the cumulative adjustments under paragraphs (1) and (2) shall not shall not exceed 10 levels, and

(4) that the specific characteristics under section 2D1.1 provide for an increase to the base offense level of 2 levels if the defendant committed any part of the instant offense after sustaining a felony conviction for a controlled substance offense.

SEC. 9. ASSURING JUDICIAL AUTHORITY CONSISTENT WITH LAW IN SENTENCINGS.

Rule 11(c)(3) of the Federal Rules of Criminal Procedure is amended by striking subparagraphs (A) through (B) and inserting the following:

"(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report The court may accept the agreement, whether before or after review of the presentence report, only if the court determines, for reasons stated on the record with specificity, that the charge or charges to which the defendant is pleading adequately reflect the seriousness of the actual offense behavior and that accepting the agreement is consistent with

the statutory purposes of sentencing and the sentencing guidelines and will permit a sentence within the applicable guideline range, or that the Attorney General has certified that the plea agreement is in the national security interest of the United States.

"(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request. The court may only follow the recommendation or request if the recommended or requested sentence is within the applicable guideline range or departs from the applicable guideline range for lawful and justifiable reasons, or that the Attorney General has certified that the recommended or requested sentence is in the national security interest of the United States.

"(C) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(C), the court may reject the agreement or defer a decision until the court has reviewed the presentence report. The court may only accept

the agreed sentence, and must so advise the defendant, if the agreed sentence is within the applicable guideline range or departs from the applicable guideline range for lawful and justifiable reasons, or that the Attorney General has certified that the agreed sentence is in the national security interest of the United States."

SEC. 10. MANDATORY DETENTION OF PERSONS CONVICTED OF SERIOUS DRUG TRAFFICKING OFFENSES AND CRIMES OF VIOLENCE.

Section 3145(c) of title 18 United States Code, is amended—

(1) by inserting "prior to sentencing" after "may be ordered released", and

(2) by striking "the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate" and inserting "the judicial officer if, the Government certifies that the defendant is engaged in ongoing active cooperation with the Government in contemplation of the defendant providing substantial assistance to the Government in the investigation and prosecution of another person pursuant to section 3553(e) of this title, section 994(n) of title 28, or United States Sentencing Guidelines section 5K1.1,

Calendar for March 2005 - May 2005 (United States)

March 2005

Su	Mo	Tu	We	Th	Fr	Sa
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

3 ◑ 10 ● 17 ◐ 25 ○

April 2005

Su	Mo	Tu	We	Th	Fr	Sa
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May 2005

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
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15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

1 ◑ 8 ● 16 ◐ 23 ○ 30 ◑

Holidays and Observances

Mar 25 Good Friday	Mar 28 Easter Monday	May 30 Memorial Day
Mar 27 Easter Sunday	May 8 Mother's Day	

Calendar generated on http //www.timeanddate.com/calendar/