ADVISORY COMMITTEE
ON
CRIMINAL RULES

Charleston, SC
April 4-5, 2005
Volume I

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 4-5, 2005
CHARLESTON, SOUTH CAROLINA

I PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of October 2004, Meeting in Santa Fe, New Mexico

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

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rule Amendments Approved by Congress, December 2004 (No Memo)

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 (No Memo)

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

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

C. Proposed Amendments to Rules Published for Public Comment.

1. Rule 5. Initial Appearance. Proposed amendment permits transmission of documents by reliable electronic means. (Memo)

2. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means. (Memo)

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. (Memo)

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

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. (Memo)

III REPORTS OF SUBCOMMITTEES

A. Rules 11, 32 & 35 (*Booker/FanFan* package of rules) (Memo)

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

C. Proposed New Rule 49.1, to Implement E-Government Act (Memo).

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Rules 4 and 5, Professor Malone's Proposal (Memo)

B. Rule 6, Grand Jury; Technical Amendment (Memo)

C. Rule 10, Waiver of Arraignment, Judge McClure's Proposal (Memo)

D. Rules 16 and 32, James Felman's Proposal (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. **Rules Affected by the Crime Victims Rights Act, Judge Cassell's Proposals (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**

A. **Fall Meeting – October 24-25, 2005, San Francisco**

B. **Other**

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			Start Date	End Date
Susan C. Bucklew	D	Florida (Middle)	Member: 1998	----
Chair			2004	2007
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Anthony J. Battaglia	M	California (Southern)	2003	2006
Lucien B. Campbell	FPD	Texas (Western)	1999	2005
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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	ACAD	Texas	1988	Open
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Judge David G. Trager
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Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on E-Government Act
Judge Harvey Bartle III, Chair
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Subcommittee on Rule 16/Brady
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Professor Nancy J. King
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March 17, 2005
Projects

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March 17, 2005
Projects

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

October 30, 2004
Santa Fe, New Mexico

The Advisory Committee on the Federal Rules of Criminal Procedure met at Santa Fe, New Mexico on October 30, 2004. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Bucklew, Chair of the Committee, called the meeting to order at 8:00 a.m. on Saturday, October 30, 2004. The following persons were present for all or a part of the Committee's meeting:

Hon. Susan C. Bucklew, Chair
Hon. Richard C. Tallman
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Prof. Nancy J. King
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

Mr. Robert Fiske participated by telephone conference call. 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; Professor Daniel Coquillette, Reporter to the Standing 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; Professor Dan Capra, Reporter to the Evidence Rules Committee; Hon. Edward E. Carnes, past chair of the Criminal Rules Committee; Mr. Jonathan Wroblewski of the Department of Justice; Professor Sara Sun Beale, Duke University School of Law, and Ms. Brooke Coleman, law clerk to Judge Levi.

Judge Bucklew welcomed a new member, Judge Tallman, who will replace Judge Edward Carnes. She praised Judge Carnes for his service as chairman and hard work during the restyling project and presented a resolution to him for his years of productive work on the Committee. Judge Carnes responded by noting that serving on the Committee had been a high honor and privilege. Judge Bucklew noted that Judge Reta Struhbar, who had retired, had resigned from the Committee but that no replacement had been selected.

II. APPROVAL OF MINUTES

Judge Battaglia moved that the minutes of the Committee's meeting in Monterey, California in May 2004 be approved. The motion was seconded by Judge Trager and, following corrections to the Minutes, carried by a unanimous vote.

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

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

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 in May 2004 and were currently pending before Congress.

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

Mr. Rabiej also reported that amendments to the following rules had been approved by the Standing Committee (at its June 2004 meeting) and the Judicial Conference, and that they had been forwarded to the Supreme Court with the understanding that if Congress enacted pending legislation regarding Rule 32 the amendment to that rule would be withdrawn. He noted that after the rules were forwarded to the Court, Congress had amended Rule 32 to expand victim allocution, and that following a poll of the executive committee of the Judicial Conference, the Committee's proposed amendment to Rule 32 was withdrawn:

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.

Judge Levi commented that Congress had become more active in proposing amendments to the rules and that it was important not to take an adversarial approach in addressing those proposed amendments. Professor Coquillette observed that a 1995 article in the American Law Review had chronicled what can go wrong when the Rules Enabling Act is not followed and Congress directly amends the rules.

Judge Levi also reported that the Criminal Law Committee was studying the impact of the Supreme Court's decision in *Blakely v Washington* on federal sentencing procedures. Judge Friedman added that the American Bar Association had formed a special committee on the same subject, and Ms. Rhodes informed the Committee that the Sentencing Commission was also studying the problem.

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

Professor Schlueter informed the Committee that the following rules had been published for comment, that the comment period ends on February 15, 2005, and that a public hearing on the proposed amendments had been scheduled for January 21, 2005 in Tampa, Florida.

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 set conditions for release where the person was arrested for violating conditions set in another district.

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

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

IV. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

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

Judge Bucklew stated that three members of the Committee had served on a Subcommittee for the E-Government Act (Judges Bartle and Struhbar, and Ms. Rhodes). Ms. Rhodes represented the Criminal Rules Committee at the same subcommittee meeting.

Judge Levi (chair of the Standing Committee) had appointed an E-Government Subcommittee with liaisons from each of the Rules Advisory Committees. The Subcommittee had met in June 2004 and had provided comments on a template for a standard rule for implementing Congress' directive that the courts develop rules for maintaining privacy in electronic filings.

Professor Dan Capra, Reporter to the Evidence Rules Committee and Reporter for the E-Government Subcommittee, provided background information on the work of the Subcommittee and expressed the hope that each of the various committees would adopt uniform language for their rules that would accomplish Congress' intent. He reported that after the Subcommittee meeting in June, he had prepared yet another version of the standard template language, which in turn had been provided to the Criminal Rules Committee. In doing so, he added that the Subcommittee had identified several areas where the Criminal Rules Committee might wish to modify or delete certain provisions. He noted that the Subcommittee recognized that each of the Committees would have to tailor the standard language of the template to meet the purposes and needs of a particular area of practice. In particular, he noted that the Bankruptcy rules presented particular problems that would not necessarily be faced by the Criminal Rules Committee.

He also stated that the Civil Rules Committee had provided some suggested style changes to the template language. They had also added a special provision for court orders and recommended that language be added to the template Committee Note that would state that the list of items exempted from inclusion in the filings was only a "baseline" provision and that other material might be included in that list.

Professor Capra stated that the Subcommittee hopes that the various Committees will be able to finalize the language for their individual rules by their Spring meetings, with the view toward publishing them for public comment in August 2005.

Professor Schlueter pointed out that he has used Professor Capra's template and attempted to tailor it for criminal practice. He noted that the Criminal Rules Committee would have to address certain questions about the draft.

The Committee then considered proposed Rule 49.1(a), which provides that if a filing (whether paper or electronic) includes listed identifiers, only certain information may be disclosed. First, the Committee addressed the question of whether information about a person's home address should be limited to city and state. Following a brief discussion, the Committee approved the proposed language limiting a home address to city and state. As part of that discussion, a question was raised about whether a person's driver license number or alien registration number should be exempted from redaction. Judge Friedman commented that the overall purpose of Congress' intent was to make as much information public as possible. The Committee ultimately decided not to include those items in the list.

The Committee engaged in an extensive discussion about the E-Government Act in general and in particular the concerns about protecting the privacy of certain information and at the same time providing public access to important information. That discussion in turn led to the question of whether additional items should be added to the list of exemptions in proposed Rule 49.1(d). Following a brief discussion, the Committee agreed to add to the list, "official records of a state court proceeding in an action removed to federal court;" "filings in any court in relation to a criminal matter or investigation...;" arrest warrants; charging documents; and criminal case cover sheets.

Although several members raised questions about the applicability of the rule to criminal forfeiture proceedings, no proposed change or amendment to the rule was offered.

Following a discussion on whether some provision should be made for habeas petitions, Judge Trager moved that the Committee add a provision exempting §§ 2241, 2254, and 2255 petitions. Following a brief discussion, the motion carried by a vote of 7 to 2.

Finally, there was a discussion about how trial exhibits should be treated under the proposed rule. Professor Capra responded that if exhibits are filed, they are subject to the rule. At Judge Friedman's suggestion, Professor Capra stated that some language could be added to the Committee Note that would address that point.

B. Amendment to Criminal Rules Regarding Local Rules for Electronic Filings.

Professor Schlueter informed the Committee that it had been asked to consider whether to amend Rule 49 to provide that courts could require electronic filings. He noted that the Committee on Court Administration and Management had recommended that each of the Committees consider the issue, draft amending language, and publish those rules for public comment on an expedited basis.

Mr. Rabiej provided background information on the proposal, noting that the intent was to provide a means of critical cost-savings for the courts. He noted that the Civil and Bankruptcy Committees had already decided to publish proposed amendments on an expedited basis. Mr. Rabiej and Judge Bucklew noted that some issue had been raised about whether any proposed amendment should exempt pro se filers.

Judge Levi noted that roughly one-half of the courts are already requiring parties to use electronic filing, even though the rules do not explicitly provide for that. He added that the proposed amendments would authorize the courts to require mandatory electronic filing.

Professor Schlueter pointed out that Rule 49(d) already provides that filing in criminal cases is determined by the Civil Rules and that he had drafted a new provision that would explicitly address the ability of courts to require electronic filing. Following a discussion on whether the Criminal Rule should be amended, Professor King moved that the proposed language be amended to provide an exemption for pro se filers. Judge Friedman seconded the motion, which failed by a vote of 4 to 6. Judge Jones then moved that no amendment be made to Rule 49 and that the rule continue to rely on an amendment to the Civil Rules. Judge Battaglia seconded the motion which carried by a vote of 6 to 3.

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

Judge Bucklew pointed out that Judge David Dowd, a former member of the Committee, had proposed an amendment to Rule 11 that would permit a judge to inquire of the defense counsel and defendant during a plea inquiry as to whether all plea offers from the prosecution had been conveyed to the defendant. She stated that he had offered similar amendments to Rule 11 in the past and that on those occasions, following discussion, the Committee had decided not to amend the rule. Following a brief discussion, a consensus emerged that there was insufficient need to pursue the proposed amendment.

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

Judge Bucklew called on Mr. Goldberg, Chair of the *Brady* Subcommittee to report on the Subcommittee's findings and recommendations. Mr. Goldberg informed

the Committee that the Subcommittee had reviewed the materials included in the agenda book and had reached a consensus that the Committee should proceed with a proposed amendment to the rules that would require the prosecution to disclose to the defense, 14 days prior to trial, information that was favorable to the defense, either because it tended to be exculpatory or because it was impeaching evidence.

Judge Carnes observed that on earlier occasions the Committee had not recommended other amendments to the Criminal Rules because there was insufficient statistical data to support the need for an amendment. That problem, he noted, could also exist with regard to any amendment concerning *Brady* information.

Ms. Rhodes spoke in opposition to proceeding further with an amendment. She pointed out that the amendment would be a tough sell to the Department of Justice because in its view, Rule 16 and *Brady* are working and there is no need to further amend Rule 16. Even assuming there was a problem, she added, the proposed language in the amendment would not fix the problem. Assistant United States Attorneys, she stated, are trained to treat *Brady* material liberally and that in her 20 years of experience at the DOJ, she can say that it is not the culture of the DOJ to withhold important information from the defense. She recognized that in this area of the law, the courts are necessarily required to apply hindsight for purposes of determining whether a violation occurred, and if so, what the remedy should be. But prudent prosecutors, she added, will not push the issue. If prosecutors do violate *Brady*, there are remedies, including the possibility of a new trial, and serious consequences for the prosecutors involved.

She continued by observing that it would be important for the Committee to consider the impact of the amendment on the Courts of Appeals. Furthermore, there has been no showing that a problem exists, and an ABA survey shows that 70% of prosecutors already turn over more than they are required to. She added that according to the statistics, only 1.7 federal cases per year involve a potential *Brady* issue.

Ms. Rhodes acknowledged that in a recent terrorist trial in Detroit, the prosecutor had withheld important information, but pointed out that it was the Department that had come forward, presented the problem to the trial court, and had recommended corrective action. The Department, she said, is committed to recognizing and addressing the problems associated with discovery. In her view, the proposed rule would only reflect the current status of discovery practices in federal criminal courts and it would not fix any particular problem.

Judge Bucklew observed that this is really the flip side of the Rule 29 problem that had been discussed at earlier meetings where there was insufficient data to support an amendment.

Mr. Goldberg stated that every defense counsel would support the proposed rule and that he did not understand why the Department opposes a simple rule that only requires the prosecution to do what the case law already requires. He provided examples

of cases where important information was not disclosed and added that in his view, the amendment was very important for the system.

Mr. Fiske questioned whether the Department could include the proposed requirement in its United States Attorneys' manual.

Judge Battaglia pointed out that 30 districts had developed local rules addressing this very issue and that those rules had taken various approaches in dealing with the *Brady* issue. That in turn, he noted, might lead to a lack of uniformity and provide more reason for an amendment to Rule 16.

Ms. Rhodes indicated that she would attempt to review those rules. Mr. Wroblewski observed that it is a myth that there is a national, uniform, practice in criminal cases and that it is not essential that there be absolute uniformity. In response, Professor Coquillette reminded the Committee that § 1273 requires that the local rules be consistent with the national rules.

Judge Jones observed that if there was a national rule on this issue, the Department would ultimately benefit.

Judge Bartle expressed interest in pursuing discussion of the amendment. If the Department has already addressed the issue, why not adopt a rule to that effect?

Judge Friedman provided extensive comments on the proposed amendment, observing that he believes that prosecutors are acting in good faith, but that a lot of mistakes do not get any attention. He added that there may be a difference between the Department's policy and what is happening in the field. Judge Friedman said that there was some appeal to uniformity.

Judge Tallman stated that in his view the proposed amendment provided for more discovery than *Brady* required. He noted that California has had an open file policy and that it seems to work well. He stated that he believed Congress should address the issue and indicated that he was generally not supportive of the proposal. He added that as an appellate judge, there is a problem in deciding whether the failure to disclose had an impact on the case.

Judge Trager stated that the fact that 30 districts had addressed the problem was not in itself reason to amend Rule 16. He observed, however, that there do not seem to be many complaints from the prosecutors about how the rules work and that he was not unhappy with the proposal.

Mr. Campbell stated that the Jencks Act and *Brady* could be harmonized but that the cases demonstrate how perilous this area can be for prosecutors. In his view, the matter should be studied further.

In a straw poll on whether to proceed, nine members indicated that they believed that the matter should be considered further. One member voted not to proceed with an amendment and one member abstained.

Judge Kravitz suggested that the Committee consider the possibility of unintended consequences and Ms. Rhodes added that she believed that the real issue in the amendment is the timing requirement.

E. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal.

Judge Bucklew provided background information on the Department of Justice's proposal to amend Rule 29 to require the court to defer any ruling on a motion for a judgment of acquittal until after the jury has returned its verdict; the amendment would protect the government's right to appeal an adverse ruling on the motion. Although the Committee at its Fall 2003 meeting had initially approved the amendment in concept, at the May 2004 meeting the Committee, following extensive discussion, voted to reject the proposed amendment.

Ms. Rhodes reported that at the Standing Committee's meeting in June 2004, Judge Carnes had explained the Committee's action on the proposed amendment and pointed out the lack of data showing that an amendment was needed. At the same meeting, the Department informed the Standing Committee that it would present the proposal directly to the Standing Committee at its January 2005 meeting.

Ms. Rhodes indicated that because the Department feels so strongly about the proposal it anticipates presenting additional data to the Standing Committee. But that process, she added, has taken much time because it involves reviewing transcripts in the cases in which the court granted the motion on what the Department believed were impermissible grounds. She said that she expected that the information would be ready for the January meeting of the Standing Committee.

Judge Levi noted that if the Department presented additional data and the Standing Committee believed that it was appropriate to consider the amendment further, that the Standing Committee would be very deferential to the Criminal Rules Committee.

F. Rule 41, Status of Amendments Concerning Tracking Device Warrants.

Judge Levi and Professor Schlueter provided background information on a proposal to amend Rule 41 to provide for tracking-device warrants. Professor Schlueter stated that in June 2003, the Committee presented a proposed amendment to Rule 41 that would, inter alia, address the topic of tracking-device 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 made several changes to the rule and committee note to address several concerns raised by the Department of Justice.

At the Standing Committee meeting in June 2003, the 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.

Professor Schlueter also pointed out that the Criminal Rules 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.

Judge Battaglia reported that he had polled magistrate judges and that there was still high interest in the amendment.

Following additional discussion about the fact that from a technical standpoint, the amendment is still pending before the Standing Committee, Ms. Rhodes was asked to determine the status of the Department's review of the proposed amendment.

G. Rule 45; Amendment to Provide for Extending Time for Filing.

Professor Schlueter pointed out that 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. He informed the Committee that the Civil Rules Committee has proposed an amendment to 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. He added that Judge Carnes has suggested that the Criminal Rules Committee might wish to consider whether to make a similar amendment to Rule 45.

Mr. Campbell expressed some concern about not using the term "calendar" and Mr. McCabe indicated that the Civil Rules Committee had discussed the issue and had decided not to use the term "calendar" days.

Following brief discussion, the Reporter was asked to draft a proposed amendment to Criminal Rule 45, which would parallel the Civil Rule, and present it to the Committee at its Spring 2005 meeting.

H. Use of Section 2254 and 2255 Official Forms.

Judge Bucklew informed the Committee that Judge Tommy Miller, a former member of the Committee, had recommended in a letter to the Chief Judge in his district that that district should begin using the newly revised and adopted forms for §§ 2254 and 2255 proceedings. Judge Jones recommended that a letter be written to the district courts pointing out that the new forms are available and that the courts be encouraged to use them. Following additional brief discussion, Judge Bucklew determined that the Administrative Office would draft the letter to the district courts.

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew asked for suggestions on a location for the Spring 2005 meeting. There was a consensus that the Administrative Office should attempt to secure a location in Charleston, South Carolina. Members were asked to contact Mr. Rabiej concerning available dates.

The meeting adjourned at 2:30 p.m. on Saturday, October 30, 2004

Respectfully submitted

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 13-14, 2005
San Francisco, California
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 13 and 14, 2005. The following members were present:

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

Member David M. Bernick was unable to participate in the meeting.

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; 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 for Thomas S. Zilly, 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 Susan C. Bucklew, Chair
Professor David A. Schlueter, Reporter
Professor Sara Sun Beale, Consultant
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Patrick F. McCartan, former member of the committee, and John S. Davis, Associate Deputy Attorney General, also participated in the meeting. Associate Deputy Attorney General Christopher A. Wray made a presentation on behalf of the Department of Justice on the second day of the meeting. Attorneys Elizabeth J. Cabraser and Melvyn R. Goldman participated in a panel discussion on the second day. Professor R. Joseph Kimble participated by telephone in the committee's discussion of the report of the Advisory Committee on Civil Rules.

INTRODUCTORY REMARKS

Judge Levi reported with regret that the term of committee member Patrick McCartan had expired. He noted that Mr. McCartan had made many major contributions to the work of the committee over the course of the past six years, and he presented him with a framed certificate of appreciation signed by the Chief Justice. Mr. McCartan expressed his appreciation for the honor, and he emphasized that serving on the committee had been one of the highlights and great privileges of his professional career.

Judge Levi welcomed and introduced Mr. Kester as a new member of the Standing Committee and Professor Beale as the next reporter to the Advisory Committee on Criminal Rules. He added that the Standing Committee would honor Professor Schlueter at its next meeting for his long and distinguished service as reporter to the criminal rules committee over the past 17 years.

Judge Levi noted with particular sadness the recent death of Judge H. Brent McKnight, whom he praised as an outstanding member of the Advisory Committee on Civil Rules and a wonderful human being. He pointed out that Judge McKnight had been responsible for heading the committee's efforts in producing new Admiralty Rule G, which brings together in one place the key procedures governing civil forfeiture actions.

Judge Levi also reported that John Rabiej had recently been honored by election to membership in the American Law Institute.

He noted that the major team effort to restyle the civil rules for public comment was nearing an end, and a complete package of restyled rules would soon be ready for publication. He described the contributions of the many participants as incredible, and he said that special thanks were due to the members of the Style Subcommittee (Judge Murtha, Dean Kane, and Judge Thrash), the chair of the Advisory Committee on Civil Rules (Judge Rosenthal), the chairs of the two subcommittees of the civil rules committee (Judges Kelly and Russell), the committee reporters and consultants (Professors Kimble, Cooper, Marcus, and Rowe and Mr. Spaniol), and the staff (Messrs. McCabe, Rabiej, and Deyling).

Judge Levi reported that two important decisions had helped to assure the success of the project. First, he said, the committee had decided to avoid making any substantive changes in the rules and to use a high standard to make sure that changes affect only style, and not substance. Second, he noted, it had been agreed that the Style Subcommittee would have the final word on matters of pure style, but the civil rules committee would have the final word as to whether a particular change is substantive or affects substance. He pointed out that some members of the bar may be concerned when they see changes in familiar language, but, he emphasized, the advisory committee believes that no changes have been made to the substance of the rules. He predicted that the reformatting,

reorganization, modernization, and sheer readability of the rules will be a very pleasant surprise for users.

Judge Levi reported that the Judicial Conference at its September 2004 session had approved all the recommendations of the committee without discussion. He also briefly described some of the proposed amendments that had been published for comment in August 2004, noting that they will be presented to the committee for final approval at its next meeting. He reported that the Advisory Committee on Civil Rules had just conducted the first of three public hearings on the proposed electronic discovery rules amendments and pointed out that there had been a huge amount of public interest.

Judge Levi also mentioned two potential future projects under consideration by the advisory committees. The first would address the way that time is described in the different federal rules. It would take a broad look at all the various time provisions to make sure that they are realistic and internally consistent. The second potential project would address certain overlaps and conflicts between the civil rules and the evidence rules.

Judge Levi reported that the civil and evidence advisory committees had reviewed the Supreme Court's decision in *Blakely v. Washington,* 542 U.S. ___, 124 S.Ct. 2531 (2004), invalidating a state court sentence because it had violated the defendant's Sixth Amendment right to jury trial in that aggravating factors enhancing the defendant's sentence had been found by the court, and not found by a jury or admitted by the defendant. He said that the advisory committees had been considering the need to amend the federal rules if the Supreme Court were to invalidate the federal sentencing system and to require fact-finding by juries.

On January 12, 2005 — the day before the committee meeting — the Supreme Court issued its decision in *United States v. Booker and United States v. Fanfan,* ___ U.S. ___, 125 S. Ct. 738 (2005). Copies were provided to the members, and they offered their initial personal reactions to the opinions. They agreed that the Court had retained the federal sentencing guidelines in place, but had made them advisory in nature, rather than mandatory. Judge Levi noted that the result was very satisfactory to the judiciary and mirrored the proposed recommendations of a special five-judge *Blakely/Booker/Fanfan* working group, comprised of the chair and two members of the Criminal Law Committee, himself, and Judge Robert Hinkle of the evidence rules committee.

Professor Capra pointed out that he had served as the reporter for the special working group and had conducted research for it. He noted that his review of all district-court decisions following *Blakely* had revealed that federal district judges were in fact continuing to adhere to the federal guidelines, had imposed sentences within the prescribed ranges of the guidelines in about 90% of the cases, and were carefully

explaining their reasons for departures. He added that research had shown that appellate review had worked effectively in those state-court systems that use advisory sentencing guidelines. He concluded that the advisory-guidelines system left by *Booker/Fanfan* would be workable, but he questioned whether Congress would leave it in place for the long run.

Professor Capra noted that, in light of *Booker/Fanfan,* there was no need to change FED. R. EVID. 1101 to make the evidence rules applicable in sentencing, or to make other changes in the evidence rules generally. Judge Bucklew said that the Advisory Committee on Criminal Rules would consider the need for changes in the criminal rules at its next meeting, but it did not appear at first glance that major changes would be needed. Judge Levi added that the Criminal Law Committee would take the lead for the Judicial Conference in developing substantive positions and legislative options.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 17-18, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Judicial Conference at its September 2004 session had approved the committee's proposed victim allocution amendments to FED. R. CRIM. P. 32 (sentencing and judgment). He noted, though, that the committee had been aware of pending legislation that would provide a broader array of rights to victims than the proposed rule. As soon as the legislation was enacted, he said, the amendments were withdrawn by pre-arrangement. Mr. Rabiej noted that it is the responsibility of the Department of Justice under the legislation to alert victims as to the times and places of various court proceedings. He added that the Advisory Committee on Criminal Rules was examining the legislation to determine whether any other changes were needed in the criminal rules.

Judge Levi pointed out that the legislation contains an extraordinary appellate provision under which victims may seek mandamus on an expedited basis to enforce their rights and receive a determination by a single appellate judge within 72 hours. It was pointed out by the participants that the provision is inconsistent with existing statutes and rules. Mr. Rabiej said that Congressional staff had been alerted to the deficiencies of the provision, but they had not corrected them.

Mr. Rabiej reported that legislation enacted in the wake of 9/11 had amended FED. R. CRIM. P. 6 directly to permit grand jury information to be shared with foreign officials. But, he said, the statutory provision had been superseded by the restyled body of criminal rules. He explained that the Administrative Office had advised Congressional staff of the supersession problem and had drafted an amendment to correct it. But, he said, the language actually used by Congressional staff was not fully consistent with the restyled rules.

Mr. Rabiej reported that legislation had passed the House of Representatives in the last Congress that would amend FED. R. CIV. P. 11 (pleas) to require a court to impose sanctions for every violation of the rule. The bill, however, died because the Senate did not act on it. He noted, moreover, that similar legislation had been introduced in the last several Congresses and had been opposed by the judiciary. He added that the legislation was likely to be reintroduced again in the 109th Congress, and the committee had asked the Federal Judicial Center to conduct a new, follow-up survey of federal judges on the operation of the current rule.

Mr. Rabiej reported that legislation had been introduced to amend FED. R. CRIM. P. 11 to require a judge to make specific findings that a sentence imposed pursuant to a plea agreement reflects the "seriousness of the actual offense behavior." He said that the Administrative Office had written to the House Judiciary Committee opposing the provision, and it had been deleted during a mark-up session.

Mr. Rabiej noted that the Sunshine in Litigation Act of 2003, among other things, would regulate confidentiality provisions in settlement agreements. He reported that the Federal Judicial Center had conducted an exhaustive study of all sealed settlement cases in the federal courts and had concluded that sealed settlements are rare and do not present a problem. He said that the Center's report had been sent to Senator Kohl, sponsor of the legislation.

Mr. Rabiej reported on a technical problem with the portion of the federal rules website that allows the public to submit comments or request a hearing directly through the website. He noted that the system had worked well in the past, but for some reason it stopped receiving comments and requests in late 2004. As a result, he said, a notice had been placed on the site informing the public of the defect and extending the comment period.

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 undertaken by the Federal Judicial Center. (Agenda Item 4)

He reported briefly on research requested by the Advisory Committee on Appellate Rules. He described the Center's work in evaluating the possible impact of permitting citation of unpublished appellate opinions in the courts of appeals under proposed FED. R. APP. P. 32.1. He noted that the Center was conducting both a study of actual cases and a survey of judges and attorneys.

Judge Alito noted that the study was quite sophisticated and was aimed at ascertaining whether a policy that permits citation of unpublished opinions increases the time of judges and leads to a decrease in the number of precedential opinions. He also pointed out that the Administrative Office was conducting a statistical survey of median disposition times and any other pertinent events that might show workload impact, such as the number of cases decided by summary decisions. Up to this point, he said, there was no sign that there had been any changes in disposition times or in the number of summary dispositions in the circuits permitting citation of unpublished opinions.

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 attachment of December 13, 2004. (Agenda Item 5)

Judge Alito reported that the advisory committee was not seeking approval of any amendments. But, he said, it was continuing to consider various proposed amendments to the appellate rules that would eventually be presented to the Standing Committee as a package, rather than in piecemeal fashion.

Informational Items

FED. R. APP. P. 4(a)(1)(B) and FED. R. APP. P. 40(a)(1)

He noted that the advisory committee at its last meeting had approved amendments to FED. R. APP. P. 4(a)(1)(B) (appeal of right — when taken) and FED. R. APP. P. 40(a)(1) (petition for panel rehearing). They would make it clear that the additional time the government is given to file an appeal or a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued either in an individual capacity or an official capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. He explained that additional time is given the Department of Justice to accommodate its internal review procedures.

FED. R. APP. P. 28 and 32

Judge Alito reported that complaints had been received from the bar regarding the many variations among local circuit rules as to requirements for briefs. As a result, he said, the advisory committee had asked the Federal Judicial Center to conduct a comprehensive study of local briefing requirements. He noted that the Center's report was excellent, and it documented that there is a great deal of local rulemaking in this area and considerable diversity in practice among the circuits.

The report, he said, showed that some of the local-rule requirements contradict FED. R. APP. P. 28 (briefs). But, he observed, achieving complete uniformity would be very difficult, particularly since the circuits feel very strongly about their local rules on this topic. He added, though, that the advisory committee would try to promote more uniformity by proposing some discrete changes in Rule 28 from time to time, by encouraging improvements in local rules, and by trying to make it easier for lawyers to ascertain the local requirements.

Professor Schiltz pointed out that the local briefing requirements are scattered among local rules, internal operating procedures, manuals, and other sources. He said that the advisory committee would pursue getting these various materials posted on the Internet, and it would try to pinpoint certain changes for potential inclusion in the national rules.

One member complained that local rule requirements for briefs appear to be proliferating, change frequently, are generally confusing, and can be a snare for attorneys. Other participants added that many of the variations are not justified, and some urged the rules committees to be more active in promoting national uniformity. Others pointed out, however, that the Rules Enabling Act specifically authorizes local rulemaking, and it is no simple task to determine whether a particular local provision is actually in conflict with the national rules.

Professor Coquillette pointed out that the 1988 amendments to the Rules Enabling Act vested oversight of local appellate court rules in the Judicial Conference and gave it authority to abrogate local circuit court rules that conflict with the national rules. He suggested that the Advisory Committee on Appellate Rules might be asked to take another look at whether, as a matter of policy, it would be appropriate to preempt local rulemaking by the individual courts of appeals in certain, specific areas, while leaving other areas open to local procedural variations.

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 Zilly's memorandum and attachments of December 1, 2004. (Agenda Item 6)

Amendments for Publication

FED. R. BANKR. P. 1014

Judge Small reported that the advisory committee had approved for publication in August 2005 a proposed amendment to FED. R. BANKR. P. 1014 (dismissal and change of venue) recommended by the joint Venue Subcommittee of the Advisory Committee on Bankruptcy Rules and the Bankruptcy Administration Committee. The problem, he said, is that large cases are often filed in the wrong district. The proposed amendment would explicitly allow a court on its own motion to initiate a change of venue. He pointed out that most bankruptcy judges believe that they have that authority now, but some do not. Professor Morris added that the committee note to the proposed amendment attempts to make it clear that the rule does not grant any new authority to a court, but merely recognizes existing authority and provides a requirement for notice and a hearing.

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

FED. R. BANKR. P. 3007

Judge Small reported that the last sentence of current FED. R. BANKR. P. 3007(a) (objections to claims) states that if an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it "becomes" an adversary proceeding. He pointed out that there are serious problems with this language, including problems of issue preclusion. He said that the proposed amendment would eliminate the problematic sentence and make it clear in a new subdivision (b) that a party asking for relief of the type that requires an adversary proceeding must actually file an adversary proceeding. The party could no longer simply include the demand for relief in its objection to claim.

Professor Morris pointed out that an adversary proceeding generally asks for positive relief, unlike an objection to a claim. In addition, he said, an adversary proceeding requires the filing of a complaint and service of a summons, but an objection to claim does not. Finally, he observed, a court can always consolidate matters for processing.

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

Amendment for Final Approval

FED. R. BANKR. P. 7007.1

Judge Small reported that the proposed amendment to FED. R. BANKR. P. 7007.1 (corporate ownership statement) would correct an oversight in the rule. The rule, which took effect on December 1, 2003, currently states says that a party must file the required corporate ownership statement with its "first pleading." But, he said, the rule does not go far enough. The time for filing the statement should be when the party files its first paper in a case — whether or not it is a "pleading." Accordingly, the proposed revised language would be broadened to specify that the statement must be filed with a party's "first appearance, pleading, motion, response, or other request addressed to the court."

Judge Small pointed out that the advisory committee was asking the Standing Committee to approve the change without publication because it is a technical amendment comporting with the original intention of the drafters of the rule. Professor Morris added that the proposed amendment would make the rule almost identical to the counterpart provision in the civil rules, FED. R. CIV. P. 7.1.

Judge Levi pointed out that the proposed amendment did not require immediate implementation, and he suggested that it might be better to provide an opportunity for the public to comment on it. The committee concurred.

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

Informational Items

FED. R. BANKR. P. 2002(g), 9001(9), and 9036

Judge Small reported that several proposed amendments to the bankruptcy rules had been published in August 2004, with a comment deadline of February 15, 2005. He noted that three of the amendments could have positive budget effects for the courts and should be processed on an expedited basis. He pointed out that the proposals had been studied at length, were not controversial, and had received no public comments following publication.

Judge Small explained that the proposed amendment to FED. R. BANKR. P. 2002(g) (addressing notices) would permit a creditor to make arrangements with a "notice

provider" to receive all its court notices, either electronically or by mail, at an address specified by the creditor. Proposed FED. R. BANKR. P. 9001(9) (definitions) would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors. FED. R. BANKR. P. 9036 (notice by electronic transmission), as amended, would eliminate the requirement that the sender of an electronic notice obtain confirmation that the notice has been received. He pointed out that many Internet providers do not provide for confirmation of receipt. Thus, many entities are unable to take advantage of electronic noticing. The revised rule, he said, would encourage creditors to sign up for centralized noticing, particularly electronic noticing. In addition to the benefits accruing to creditors themselves, the change would save considerable mailing and administrative expenses for the courts.

He said that the proposed amendments would be expedited by having the Advisory Committee on Bankruptcy Rules vote on them by e-mail ballot right after the end of the public comment period. The Standing Committee in turn would poll its members by e-mail in time to present the amendments to the Judicial Conference at its March 2005 meeting. If the Conference approves them, the amendments would be transmitted immediately to the Supreme Court, which could act on them by May 1, 2005. The rules could then take effect by operation of law on December 1, 2005 — one year sooner than usual.

One member expressed some concern about the problem of a creditor not receiving a notice, and he asked the advisory committee to consider adding a provision to the rule at a later date that would address the issue.

FED. R. BANKR. P. 4002(b)

Judge Small reported that the advisory committee had published proposed amendments to FED. R. BANKR. P. 4002(b) (duties of the debtor) that would require the debtor to bring certain documents to the § 341 meeting of creditors. He said that the advisory committee would present the amendments for final approval at the June 2005 Standing Committee meeting.

Judge Small explained that the Executive Office for United States Trustees had initiated the proposal. In its proposal, the Executive Office would have required the debtor to bring a great many documents to the § 341 meeting. But, he pointed out, the recommendation had attracted substantial opposition from consumer bankruptcy attorneys, and more than 80 negative comments had been received by the advisory committee before the matter was even on its formal agenda.

He noted that a special subcommittee had been appointed to review the proposal, and it had conducted a conference with interested parties and made recommendations to the full committee. The full advisory committee then studied the proposal and approved a shortened list of required documents for the debtor to bring to the meeting, *i.e.,* picture identification, a pay stub or other evidence of current income, the most recent federal income tax return, and statements of depository and investment accounts.

He added that the committee had received a detailed comment from a bankruptcy judge who recommended expanding the list of documents. He noted that the judge had asked to testify at the hearing, but withdrew his request and stood on his written statement when informed that the hearing had been cancelled for lack of other witnesses.

Finally, Judge Small reported that the advisory committee would consider additional rules proposals from the Venue Subcommittee, and it would seek permission to publish them at the June 2005 Standing Committee meeting.

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 December 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. CIV. P. 5.1 and 24(c)

Judge Rosenthal reported that the advisory committee was recommending final approval of proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) . She noted that the rule had been published in August 2003, and it had attracted little comment and no criticism. The advisory committee, she said, further polished the rule at its last meeting, and the revisions made since publication did not require republication.

She explained that both 28 U.S.C. § 2403 and FED. R. CIV. P. 24(c) (intervention) require a court to certify to the Attorney General of the United States, or the attorney general of a state, when the constitutionality of a federal or state statute affecting the public interest is drawn into question and the pertinent government is not a party to the proceeding. But, she pointed out, the requirement has often been ignored, largely because court employees are simply unaware of it.

She said that the proposed new rule had been initiated by the Department of Justice, which had recommended two principal rule changes. First, the Department

suggested that the existing certification requirement be moved from Rule 24(c) and placed in a new Rule 5.1, immediately following FED. R. CIV. P. 5 (service) to emphasize its importance. Second, the notice to the attorney general should be strengthened by adding to the requirement of court certification a new requirement that the party who challenges the constitutionality of a statute also notify the appropriate attorney general.

She noted that some concern had been expressed in the advisory committee over the new notice requirement placed on parties challenging a statute. But, she added, the Department of Justice had convinced the committee that notice by the court alone has been insufficient to protect the government's interests. Moreover, experience in the several states imposing the same notice requirement has shown that no undue burdens are placed on the challenging party.

Judge Rosenthal pointed out that, as published, the rule would have required the court to set a time not less than 60 days for the government to intervene. Following the comment period, though, the advisory committee modified the provision to state that unless the court sets a later time, the attorney general may intervene within 60 days after notice is filed or the court certifies the challenge, whichever is earlier. The court, moreover, may extend the time on its own motion.

In addition, the committee moved language up from the committee note to the text of the rule to make it clear that before the time to intervene expires, the court may reject the constitutional challenge, but it may not enter a final judgment holding the statute unconstitutional. Thus, the court can reject unsound challenges quickly, grant interlocutory relief, continue pretrial activities, and conduct other proceedings to avoid delay.

Judge Rosenthal explained that the rule also provides for service on the attorney general by certified or registered mail or by electronic notice to an address designated by the attorney general. She said that no such addresses are currently in place, but they would likely be established by the Department of Justice in the near future. Finally, she pointed out, the rule clarifies that if a party fails to give notice, it does not forfeit a challenge to a constitutional right.

One member noted that the new rule is broader than the statute and the current rule, which govern challenges only to statutes "affecting the public interest." Judge Rosenthal replied that the advisory committee had deliberately broadened the scope of the reporting requirement to make sure that notice is given in every case in which a challenge is made to a statute. She noted that the expansion tracked the language of the counterpart provision in the appellate rules, FED. R. APP. P. 44.

One member expressed concern that the rule did not provide for a sanction against a party who fails to notify the attorney general. It was pointed out, though, that judges have adequate authority under the rules to deal with non-compliance. In addition, it was noted that a party challenging the constitutionality of a statute cannot effectively obtain the relief requested until the government enters the case. Another member expressed concern as to the internal consistency of the language of the proposed rule and asked the advisory committee to take another look at it before it is published.

Judge Small added that the new rule had implications for the bankruptcy rules because the current FED. R. CIV. P. 24 is incorporated in adversary proceedings by virtue of FED. R. BANKR. P. 7024. He said that the bankruptcy advisory committee would consider the matter at its next meeting and make appropriate recommendations to the Standing Committee in June 2005.

The committee approved the proposed new rule and proposed amendment for final approval by voice vote with two objections.

Proposed Style Revisions for Publication

Judge Rosenthal reported that the advisory committee was recommending that Rule 23 and Rules 64-86 be added to the list of restyled rules previously approved for publication by the Standing Committee. She explained that the advisory committee had made a number of further style changes in the rules previously approved for publication, consistent with the directions of the Standing Committee to continue polishing the document and to pick up minor errors and inconsistencies.

She added that three more non-controversial "style-substance" amendments would be included as part of the publication package, along with the "style-substance" amendments previously approved for publication by the Standing Committee. She pointed out that the package would also include a memorandum prepared by Professor Kimble explaining the key style conventions adopted by the committee. That document would give readers an appropriate context by which to judge the revisions.

Accordingly, she asked the Standing Committee to approve the entire package of restyled civil rules for publication, subject to final review for typographical errors, formatting, cross-references, and the like. She suggested that if members had any additional suggestions, they would be considered by the advisory committee during the public comment period.

Judge Rosenthal reported that the committee would schedule public hearings before the end of the comment period. She added that Professor Cooper had written an

excellent law review article on the style project that deserved attention — *Restyling the Civil Rules: Clarity Without Change,* 79 NOTRE DAME L. REV. 1761 (Oct. 2004)

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

Informational Items

Judge Rosenthal reported that proposed class action fairness act legislation would be re-introduced in the new Congress, be considered by the Senate early in February 2005, and proceed directly to the Senate floor without a hearing. The bill would then be taken up by the House Judiciary Committee.

She reported that on January 12, 2005, the day before the Standing Committee meeting, the advisory committee had conducted the first of three public hearings on the proposed electronic-discovery amendments. She noted that many of the participants in the Standing Committee meeting had attended the hearing, and a full transcript would be made public. She said that the committee continues to receive a heavy volume of written comments on the proposed amendments, and many more comments were expected before the February 15, 2005, comment deadline.

Judge Rosenthal noted that the advisory committee would meet in April 2005 to consider all the comments and testimony. At that time, she said, the committee would decide whether to proceed with the published changes, whether to republish any amendments, and whether to send proposals on to the Standing Committee for final approval.

She noted that the advisory committee had set forth in the agenda book the various future projects that it was considering, including: (1) a suggestion by the Department of Justice that the committee clarify how indicative court rulings should be handled; (2) a proposal to amend FED. R. CIV. P. 48 to deal with jury polling; and (3) a suggestion to improve the practice of taking depositions under FED. R. CIV. P. 30(b)(6). The committee, she said, had also been asked to consider possible changes in the pleading rules and the summary judgment rule. She pointed out that the committee had deferred action on these various substantive matters until completion of the style project.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachment of December 2, 2004. (Agenda Item 8)

Informational Items

Judge Bucklew reported that the advisory committee had no action items to present to the Standing Committee. She noted that amendments to five criminal rules had been published for public comment in August 2004 and explained that they were noncontroversial and had attracted only one comment.

Three of the five amendments, she said, would allow the government to transmit documents to the court by "reliable electronic means" — FED. R. CRIM. P. 5(c)(3) (initial appearance); FED. R. CRIM. P. 32.1(a) (revocation or modification of probation or supervised release); and FED. R. CRIM. P. 41(d) and (e) (search and seizure). The proposed amendment to FED. R. CRIM. P. 40 (arrest for failing to appear in another district) would fill a gap in the rule and allow a magistrate judge to set conditions of release for a person who fails to appear. The proposed amendment to FED. R. CRIM. P. 58 (petty offenses and other misdemeanors) would eliminate a conflict with FED. R. CRIM. P. 5.1 (preliminary hearing) and clarify the advice that a magistrate judge must give at an initial appearance in a petty offense or misdemeanor case.

Judge Bucklew reported that the advisory committee had a number of important matters on the agenda for its April 2005 meeting. Among other things, the members would consider a proposed new FED. R. CRIM. P. 49.1 (privacy in court filings) to implement the E-Government Act's requirement that federal rules be promulgated to meet privacy and security concerns raised by posting court files on the Internet. She said that the advisory committee should be able to forward a rule to the Standing Committee in June 2005 for publication.

Judge Bucklew reported that the advisory committee at its last two meetings had discussed a proposal from the American College of Trial Lawyers for rule amendments to address problems that the college perceives with implementation of the government's duties under *Brady v. Maryland* to turn over exculpatory evidence to the defendant. She said that one proposal under consideration would call for the government to provide information to the defendant 14 days before trial. But, she cautioned, the Department of Justice was likely to oppose any amendment codifying *Brady*. Professor Schlueter added that discussions are sensitive and on-going, and it was very unlikely that any proposal would be submitted to the Standing Committee in June 2005.

Judge Bucklew reported that the advisory committee was looking closely at the *Booker/Fanfan* case to determine what changes might be needed in the criminal rules. She also pointed out that the committee would look again at FED. R. CRIM. P. 6 (grand jury) to see whether additional changes are needed in light of the recent 9/11 statute. She added that the committee would also look at FED. R. CRIM. P. 11 (arraignment and plea)

to consider the need for an amendment to require a judge to make a finding on the record that a plea agreement recognizes the seriousness of the defendant's behavior.

She reported that the advisory committee had approved proposed amendments to FED. R. CRIM. P. 41 (search and seizure) to provide procedures for tracking device warrants, noting that magistrate judges have said clearly that they would like additional guidance in this area. She explained that the Standing Committee had approved the proposed rule at its June 2003 meeting and had forwarded it to the Judicial Conference. But the amendments were later deferred and have been in limbo ever since. She said that the advisory committee would like to know their status and whether the committee should proceed further. She noted that a recent poll of the magistrate judges had shown that there was still strong support for the amendments.

Judge Levi explained that the amendments had been deferred after the September 2003 Judicial Conference meeting at the request of the deputy attorney general. Assistant Attorney General McCallum reported that the Department of Justice's Criminal Division was looking into the matter and would present its definitive view to the committee soon. Judge Bucklew added that the advisory committee could take up the matter at its April 2005 meeting.

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee at its last two meetings had considered the Department of Justice's proposal to amend FED. R. CRIM. P. 29 (motion for judgment of acquittal) to require a judge to defer ruling on a motion to acquit until after the jury returns a verdict. The committee, she said, failed to approve the proposal, but the members stood ready to reconsider the issue. She pointed out that they had read the supplemental materials submitted by the Department to the Standing Committee.

Mr. Wray presented the government's position and emphasized the importance of the matter to the Department. He explained that Rule 29 authorizes a judge to grant a verdict of acquittal either before or after the return of a jury verdict. The main problem, he said, is that the Double Jeopardy Clause of the Constitution precludes an appeal by the government when a trial judge grants an acquittal before return of a verdict. He explained that the committee note to the 1994 revision of Rule 29 encouraged judges to await the jury's verdict before ruling on an acquittal motion. He noted, too, that the Supreme Court has stated that it is preferable for trial judges to await the jury's verdict before granting an acquittal.

Mr. Wray pointed out that the proposal to amend Rule 29 was fully supported by the leadership of the Department of Justice, but the impetus for the change was coming from the ground up — from front-line prosecutors. He stressed that a pre-verdict

acquittal is an anomaly under the rules. It may be the only action of a trial judge that is both dispositive and unappealable. Moreover, he said, a pre-verdict acquittal overrules the conscience of the community, as expressed through the action of a jury of citizens. And it may result in significant injustice in a given case.

Mr. Wray suggested that the advisory committee may not have been aware of the extent of the problem, and he acknowledged that the Department may not have been as persuasive as it could have been. But, he said, the supplemental materials submitted by the Department make the case for a change. He noted, for example, that the numbers alone are significant, even though statistics in this area are inherently imperfect and underinclusive. He pointed out that over a four-year period, there had been 259 Rule 29 judgments of acquittal. Of that total, 72% had been granted before the jury returned a verdict — not the preferred method under Rule 29. About 70% of these pre-verdict acquittals had disposed entirely of the prosecution, rather than just certain counts in a multi-count case.

He suggested that it cannot be determined whether these cases had been decided correctly because appellate review had been precluded by the trial judges' actions. But, he said, there is strong reason to suspect that a significant number of the pre-verdict acquittals had been erroneous and would have been reversed on appeal. He noted that the Department appeals about 60% to 70% of post-verdict acquittals, and about one published opinion a month reverses a trial judge's post-verdict action. He added that there is no reason to suppose that pre-verdict acquittals are less likely to be erroneous because they are often entered in the heat of trial.

Mr. Wray explained that the standards for granting an acquittal are stringent. The trial judge must assess the evidence in the light most favorable to the government and resolve all inferences and credibility questions in favor of the government. Then, an acquittal should be granted only if no rational trier of fact could find the defendant guilty beyond a reasonable doubt. Obviously, he argued, that is not the standard that some judges had used. He proceeded to describe the facts of some specific cases in which the Department believed that district judges had committed serious error by granting an acquittal before verdict.

He emphasized that the problem had to be fixed, but he added that there may be more than one way to address the problem by rule. He explained that the Department was not asking the Standing Committee to choose one particular solution, but was merely telling the committee that the status quo is unacceptable and should be remedied by the advisory committee. He suggested that providing the government an appellate remedy would be a modest response to an immodest problem.

He referred to Judge Levi's proposal made at the last advisory committee meeting to allow a judge to enter a pre-verdict judgment of acquittal, but only on condition that the defendant waive double jeopardy protection and permit an appeal by the government. He noted that this particular solution would allow judges to cull out individual defendants and counts in appropriate cases and protect the rights of both the defendant and the government. He said that Department attorneys had considered the proposal and found that, on balance, it was a good one. He added in response to a question that the defendant's waiver of double jeopardy protection appeared to be constitutional.

Judge Bucklew reported that the advisory committee would be pleased to take another look at the matter, and she suggested that part of the committee's problem with the proposal had been a lack of persuasive information. Judge Levi said that the advisory committee, not the Standing Committee, is the right body to draft a proposed rule. He suggested, moreover, that it would be inappropriate for the Standing Committee to tell the advisory committee that a rule should be published or to ask it to draft a particular rule. Rather, he said, the advisory committee, as the body with the relevant expertise, should be asked to consider the best formulation for a rule that would address the problems identified by the Department of Justice and then to make a separate recommendation as to whether that rule should be published for public comment. At its next meeting, then, the Standing Committee would have all the information it needs to make appropriate decisions on the matter.

He noted that the Advisory Committee on Criminal Rules had been very interested in the Department's proposal to defer acquittals until after verdict, and it had at first voted to proceed with an amendment to Rule 29. But, he added, the committee became concerned about deferring verdicts in hung-jury, multiple-count, and multiple-defendant cases. He said that the hung-jury problem had inspired his alternate suggestion that a pre-verdict acquittal might be conditioned on the defendant's waiver of double jeopardy rights. In essence, the proposal would offer the defendant a choice. If a defendant wants the judge to consider a pre-verdict acquittal, he or she must be willing to preserve the government's right to appeal. He noted that the advisory committee's reporter, Professor Schlueter, had reduced the proposal to text form, and it appears workable.

One member said that the waiver proposal looked very promising and should be pursued by the advisory committee. He added that the Standing Committee should express its sense that the advisory committee should seriously considering bringing forward a rule. Another member emphasized the advisory committee should document the analysis behind its recommendations and its reasons for chosing one alternative over another.

In light of the committee discussion, Judge Levi restated his suggestion and recommended that the advisory committee be asked to: (1) consider an amendment of Rule 29 as a serious topic that deserves further consideration; (2) formulate the best way to deal with the problems identified by the Department of Justice and draft the best rule and committee note; and (3) recommend to the Standing Committee whether that rule and note should be published for public comment. The advisory committee, he said, could then consider the matter at its spring meeting, and the Standing Committee would have all the information it needs to consider the proposal at its June 2005 meeting.

The Department of Justice representatives agreed to this course of action, and they expressed their commitment to resolving the matter through the rulemaking process.

The committee by voice vote without objection approved Judge Levi's proposal to the advisory committee.

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 December 10, 2004. (Agenda Item 9)

Informational Items

Judge Smith reported that the advisory committee had not held a separate autumn meeting, but had decided, instead, to conduct a meeting immediately following the Standing Committee meeting. He noted that proposed amendments to four evidence rules had been published for comment.

He said that the advisory committee had been surprised by the lack of public comment to date on the proposed amendments to FED. R. EVID. 408 (compromise and offers to compromise). Among other things, the use of statements and conduct during civil settlement negotiations would not be barred when offered in a later criminal case. He pointed out that the Department of Justice had asked for a broader rule, but the committee was proposing a compromise rule that allows use of comments made at settlement negotiations, but not the settlement itself.

He reported that the proposed change to FED. R. EVID. 609(a)(2) (impeachment by evidence of conviction of a crime) deals with the automatic impeachment of a witness by evidence that he or she has been convicted of a crime of "dishonesty or false statement." He explained that the amendment permits the mandatory admission of evidence of conviction only when it "readily can be determined" that the crime of conviction was one

of dishonesty or false statement, such as by the elements of the crime or by clear information set forth in the indictment or other key document.

Judge Smith said that the proposed amendment to FED. R. EVID. 606(b) (competency of a juror as a witness) would make it clear that testimony by a juror may be used only to prove that the verdict reported by the jury was the result of a clerical mistake. The amendment, thus, rejects some case law that interprets the current rule to allow jurors to be polled as to whether the jury understood the instructions.

Judge Smith noted that a preliminary reading of the *Booker/Fanfan* case shows that the advisory committee will not have to make any changes in the Federal Rules of Evidence. But, he added, the committee will have to wait to see what Congress does in the wake of the case. He added that the advisory committee had also decided not to proceed on any rules issues that may be impacted by the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), barring the use of "testimonial" hearsay against a criminal defendant in the absence of cross-examination. The committee, instead, will monitor case law development under *Crawford.*

Professor Capra said that a suggestion had been received recommending an amendment to FED. R. EVID. 803(8) (hearsay exception for public reports) to ensure that federal statutory standards are incorporated into the admissibility requirements of the rule. He noted that public records are considered presumptively trustworthy, and the courts do not seem to be having any difficulty in applying Rule 803(8). He added that the advisory committee would consider the suggestion at its January 2005 meeting.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater reported that the Technology Subcommittee had met in January 2004 and had prepared a template for the advisory committees to use in drafting rules to implement the E-Government Act of 2002. The statute requires that federal rules be issued to address the privacy and security concerns raised by posting court files on the Internet. He pointed out that the subcommittee had revised the template to incorporate views expressed by the advisory committees and some suggestions by the Department of Justice. Professor Capra added that working from a single template fosters the mandate of the E-Government Act that the federal rules be as uniform as possible.

Professor Capra reported that the goal was to have rules amendments presented by the advisory committees to the Standing Committee at its June 2005 meeting, so that they could be published in August 2005. He explained that the basic decisions reflected in the template had been derived from the extensive work of the Court Administration and Case Management Committee, which had conducted several public hearings and had

determined that the best policy for the Judicial Conference to adopt was a general rule that "public is public," *i.e.,* that all case papers publicly available at the courthouse should also be made available on the Internet. But, he cautioned, certain specific categories of sensitive personal information would have to be redacted.

He noted that the Court Administration and Case Management Committee had spent a great of time discussing which sensitive information should be redacted. The Technology Subcommittee and the advisory committees, he said, had made a few additions to the policy to implement some requirements of the E-Government Act and to meet some concerns of the Department of Justice. He explained that the resulting template is necessarily complex, and it categorizes four different kinds of document filings: (1) documents that must be redacted; (2) documents exempt from the redaction requirement, such as administrative agency records; (3) social security and immigration appeals, for which public access will be restricted to the courthouse; and (4) documents filed under seal. He noted that the template states that a court by order in a case may limit or prohibit remote electronic access to a particular document in order to protect against disclosure of private or sensitive information.

Professor Schiltz reported that the proposal to be considered by the Advisory Committee on Appellate Rules states that documents in the appellate courts should be treated in the same manner that they are treated in the court below.

PROPOSED TRANSNATIONAL PROCEDURES

Dean Kane led a panel discussion of the American Law Institute's transnational procedure project with Professor Hazard and distinguished San Francisco attorneys Elizabeth Cabraser and Melvyn Goldman. Dean Kane noted that Professor Hazard was the only American co-reporter on a project that developed a set of procedural rules drawn from both civil-law and common-law systems for use in handling commercial contests. The results of the project, she said, had been approved recently by the Institute. She asked Professor Hazard first to describe some provisions in the proposed rules, and then she asked Ms. Cabraser and Mr. Goldman to respond.

Professor Hazard noted at the outset that the transnational project had been started about 10 years ago with intense consultation by lawyers from many parts of the world. It was conceived as a procedure for commercial cases involving sophisticated lawyers and clients. But, he said, the rules could also be used in other categories of cases. And, he added, they are generally compatible with the American system and with jury trials. They include provisions dealing with notice, the right of participation, judicial management of proceedings, and full consultation by advocates.

Four of the ideas embraced in the rules, he said, could potentially be adapted for use in the federal court system: (1) more focused discovery; (2) fact pleading; (3) written statements of witnesses in lieu of oral testimony for direct examination; and (4) motions demanding proof.

1. With regard to discovery, Professor Hazard pointed out that the U.S. has the broadest discovery system in the world. In general, a party must — on demand and at its own expense — turn over to a requesting party any evidence it has that may lead to admissible evidence. Elsewhere in the world, on the other hand, discovery requests must be more specific. A producing party's obligation, moreover, extends only to relevant evidence. Other countries, he noted, are mindful of the problem of relevant evidence residing in the hands of an opposing party, but release of that type of evidence is usually governed by substantive law.

   He said that the present federal rule dealing with document discovery had been adopted in contemplation of the exchange of a dozen or so documents, before the use of copying machines and computers. He questioned whether the sheer quantity of documents today makes a difference that calls for a rule change. He added that one interesting consequence of the enormous discrepancy between U.S. and foreign document production rules is that some foreign companies initiate litigation in the United States just to get broad discovery that they can use in a dispute back home.

2. Professor Hazard pointed out that the federal rules authorize notice pleading. But other countries and many U.S. states require a complainant to set forth specific facts at the outset. He suggested that most good plaintiff's lawyers already use fact pleading, even in the federal courts, because they want the court to understand their case from the outset. He explained that the proposed transnational rules require the complaint to set forth facts with sufficient particularity in contemplation of discovery.

3. Professor Hazard explained that the transnational rules provide that in a nonjury trial a written statement by a witness is a necessary predicate to the testimony of that witness. This is contrary to U.S. procedure, where direct testimony is taken orally. Under the transnational rules, the first submission is a written statement prepared by the lawyer setting out what the testimony of a particular witness is going to be. Then an examination of the witness follows — either by the judge in civil law countries, or by the lawyers in common law countries. Thus, the oral testimony of the witness is essentially cross-examination.

4. Fourth, the transnational rules provide for a motion demanding proof, a sort of streamlined version of a summary judgment motion. Typically, he said, a summary judgment motion is made by a defendant arguing that the plaintiff lacks proof as to key elements of the case. The movant has to attach details to show that there is considerable proof that a particular issue is not subject to proof by the opposing party. Instead, he said, why not have a motion demanding proof? That way, the movant does not have the full burden of establishing that there cannot be proof on a particular issue.

Ms. Cabraser said that the federal and state procedural rules work very well in many cases, but they do not work well in others, nor do they always provide protection for litigants against bad practices. Parties, she said, can make litigation unjustifiably expensive and combative.

She suggested that the proposed transnational rules may work very well in commercial disputes, which usually involve litigation among equals. But, she added, much litigation in the American courts is among parties who are not equal. For example, she said, most countries do not have the highly developed tort law of the U.S., nor do they provide the same level of access for ordinary citizens. The courts of the U.S. follow a different national ethos and provide regulation through the litigation process.

With regard to the cost of producing documents, she said, the system should not place most of the cost of production on the plaintiffs. Judges, she pointed out, have authority to assess costs against requesting parties in appropriate cases.

She said that in her own individual cases, the same defendant has produced the same documents several times in past cases. But she must ask for them again in each new case, thereby adding costs to the defendant and running up transactional costs. She suggested that it might helpful if there were a rule or protocol in the complex litigation manual enabling a defendant to identify documents previously discovered and placing the burden on the plaintiff to get them.

With regard to fact pleading, she said that plaintiffs should be required to set forth the facts in a clear manner. It helps both the pleader and the court, and it avoids the need for status conferences to find out what the case is about. She noted that she personally provides the same level of detail in federal complaints that she does in her state court complaints

She suggested that a motion demanding proof could work in both sophisticated and simple cases, especially where there are a limited number of documents. She said that summary judgment had become unmanageable in complex cases, and it leads to

production of a huge volume of documents. She suggested that the concept of a motion demanding proof should be tried.

Mr. Goldman said that discovery, especially electronic discovery, is completely out of hand. He noted that civil cases are rarely tried, yet the parties in the end have to bear the cost of wasteful discovery.

He pointed out that effective case managament is the appropriate reform. He said that a judge should take over a case from the first conference and identify the claims, defenses, issues, and evidence on both sides. The judge, he said, will learn quickly what discovery is needed and will tailor it to the circumstances of the particular case. Staged discovery, for example, would be particularly appropriate.

But, he said, early hands-on case management does not take place in the courts where he practices today, except with a handful of trial judges. Instead, he said, the normal practice is to have pro forma case management conferences with pro form orders. He suggested that if there were effective case management, there would be far less discovery and abuse.

He pointed out that judicial case management is clearly contemplated in the federal rules and in the new transnational rules. But it is not happening for a number of reasons. Not all trial judges, he suggested, are suited by temperament to case management. Judges, moreover, see that the vast majority of their cases settle, and they may conclude that hands-on case management is not a good use of their time. And most court systems lack sufficient flexibility to permit judges who are good at case management to take over cases that need management.

As for fact pleading, he asked whether it is designed to provide information to the other side or to serve as a means for filtering out cases that do not belong in the system. The latter, he said, is a laudable goal, but courts rarely dismiss cases for lack of sufficient facts, except in securities cases. He suggested that fact pleading is a gate-keeping mechanism that might work, and it should be explored. But, he added, even under the current rules, good case management is critical, as a judge can ask the parties to plead with more particularity.

Mr. Goldman said that the proposed motion for proof is a fascinating idea, but he doubted that it will come to pass. He said that appropriate use of summary judgment is a way to elicit the proof that parties have in a case. He noted that trial judges have a great deal of flexibility, and he has seen judges ask parties to file a motion for summary judgment. He noted, too, that Rule 56(f) gives a judge discretion to authorize discovery in connection with summary judgment.

Mr. Goldman said that the use of written statements for expert witnesses is an excellent idea and should be the rule. But he did not believe that it would be appropriate for non-expert witnesses. A trial judge, he said, wants to assess the credibility of the witness on direct examination, as well as on cross examination. Judges have a good ear for listening to evidence in person, and they will interject from time to time when they want clarification. But they may not receive the same education from reading written statements.

Professor Hazard noted that in civil law countries, the judge is in control from the moment a case is filed. The new English rules, too, place heavy emphasis on case management. He noted also that the Judicial Panel on Multi-District Litigation has authority to assign a case to a particular judge, and it regularly assigns cases to particularly competent judges. He said that the notion of randomly assigning cases is deeply embedded in the federal court system, but it needs to be reexamined.

Participants suggested that consideration might be given to developing different subsets of rules to deal with different kinds of cases. But both Ms. Cabraser and Mr. Goldman responded that early, effective case management, rather than different rules, is the appropriate answer. The judge, they said, can determine at the first pretrial conference how much time and effort are required in each case.

Ms. Cabraser added that every case should have an early case management conference, without all the requirements of FED. R. CIV. P. 26. A judge should sit with the parties and shape the rules for each individual case. Over time, she said, protocols would develop as to the appropriate procedures to apply in different types of cases. Cases, she said, could be handled without even referring to Rule 26, and discovery disputes would be averted. The judge should have inquisitory powers and broad discretion to make the parties act appropriately. This approach might mean more work for judges at the outset of a case, but it would save them considerable time in the long run, as there would be fewer discovery problems and disputes.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Wednesday and Thursday, June 15-16, 2005, in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe
Secretary

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

CHAMBERS OF
THE CHIEF JUSTICE

APR 26 2004

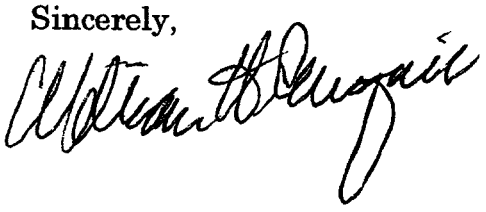
Honorable Dick Cheney
President, United States Senate
Washington, D.C. 20510

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

October 27, 2004

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, 32.1, 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

MEMORANDUM

TO: **Advisory Committee on Criminal Rules**

FROM: **Sara Sun Beale, Consultant**

DATE: **March 15, 2005**

RE: **Proposed Amendments to Federal Rules of Criminal Procedure Published for Comment in August 2004**

Several proposed amendments to the Federal Rules of Criminal Procedure were published for comment in August 2004. The deadline for submitting public comments was February 15, 2004. As of today (March 15), we have received 2 comments, both of which appear in "Appendix A" to this memorandum. Because only the comments raised only one issue, which relates exclusively to Rule 5, they are summarized very briefly below.

A. Public Comments

One of the comments, received from U.S. Magistrate Judge Barry M. Curren, writing on behalf of the **Federal Magistrate Judges Association** (04-CR-002) supports each of the proposed amendments.

The other comment, from **Federal Public Defender Frank W. Dunham** (04-CR-001), addresses only the amendment to Rule 5, and does state one concern. The published amendment Rule 5(c)(3)(D) permits the magistrate judge to accept a warrant by reliable electronic means. Mr. Dunham recommends that "the Rule should make clear that non-certified electronic copies are not the equivalent of 'reliable electronic means.'"

B. Recommendation

The only new issue that has been raised concerns Mr. Dunham's concern about the submission of non certified photocopies under Rule 5. It appears that the Committee chose not to define the term "reliable," preferring instead to leave this to resolution at the local level. If the Committee is convinced that the issue raised by Mr. Dunham has merit, it might be addressed in the Committee Note.

C. Text of the Rules and Committee Notes (beginning on following page)

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 produces

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 a 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.

* * * * *

(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.

Appendix

Public Comments On

Rules Published for Comment

in August 2004

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF VIRGINIA
1650 KING STREET, SUITE 500
ALEXANDRIA, VIRGINIA 22314
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04-CR-001

Frank W. Dunham, Jr.
Federal Public Defender

November 29, 2004

04-EV-004

Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Comments on the Preliminary Draft of Proposed Amendments to Criminal Procedure Rule 5 and Federal Rule of Evidence 408

With regard to proposed changes to Rule 5, Fed.R.Crim.P., Initial Appearance:

The Rule should make clear that non-certified photocopies are not the equivalent of "reliable electronic means."

With regard to proposed changes to Rule 408, Fed.R.Evid., Compromise and Offers of Compromise:

It should be made clear within the context of the Rule itself that statements made by a representative or agent of a party in an attempt to settle a claim are never admissible against the party in any context, civil or criminal.

Very truly yours,

Frank W. Dunham, Jr.
Federal Public Defender

Barry
Kurren/HID/09/USCOURTS
(Mag Judge)
02/03/2005 03:47 PM

To Peter McCabe/DCA/AO/USCOURTS@USCOURTS
cc Aaron Goodstein/WIED/07/USCOURTS@USCOURTS
Subject Comments regarding the Class 2006 proposed Amendments

Dear Mr. McCabe,

On behalf of the Federal Magistrate Judges Association (FMJA), and as Chair of the FMJA Rules Committee, I attach a letter from the FMJA President and the comments of the FMJA Rules Committee regarding the Class of 2006 proposed amendments. These attachments will also be submitted by FedEx. Please feel free to contact me should there be any questions regarding the FMJA comments.

Best Regards,

Barry M. Kurren

Rules Report to Peter Mc.wpd 2004 FMJA Rules Committee Report.wpd

04-CV-127

04-CR-002

04-EV-007

Barry M. Kurren
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FMJA
FEDERAL MAGISTRATE JUDGES ASSOCIATION
43rd Annual Convention - Orlando, Florida
July 6 - July 8, 2005

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DIRECTOR AT LARGE

HON. SHON T. ERWIN
Lawton, OK

February 3, 2005

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments on Proposed Amendments to Federal Rules of Civil and Criminal Procedure and Evidence (Class of 2006)

Dear Mr. McCabe:

The Federal Magistrate Judges Association (FMJA) submits the following comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA chaired by the Honorable Barry M. Kurren (District of Hawaii). The committee members are:

Honorable S. Allan Alexander, Northern District Mississippi
Honorable Hugh W. Brennenman Jr., Western District Michigan
Honorable Joe B. Brown, Middle District Tennessee
Honorable William E. Callahan, Jr., Eastern District Wisconsin
Honorable B. Waugh Crigler, Western District Virginia
Honorable Morton Denlow, Northern District Illinois
Honorable Paul Komives, Eastern District Michigan
Honorable Malachy E. Mannion, Middle District Pennsylvania
Honorable Michael Merz, Southern District Ohio
Honorable Mary Pat Thynge, District of Delaware
Honorable Andrew Wistrich, Central District California

Based on the variety of their respective districts and duties, the committee is representative of magistrate judges as a whole. Many of the committee members consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and, unanimously approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of the membership of the FMJA. We have also encouraged individual magistrate judges to forward comments to you. We are pleased to have this opportunity to present written comments, and we welcome the opportunity to testify.

Sincerely yours,

Aaron Goodstein
President, Federal Magistrate Judges Association

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, AND EVIDENCE (Class of 2006)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

(A) PROPOSED RULES RELATING TO ELECTRONIC DISCOVERY

COMMENT: The FMJA Rules Committee ("FMJA") agrees that amendments to the Federal Rules of Civil Procedure relating to the discovery of electronically stored information are necessary because the present discovery rules do not adequately address issues arising from the increasingly frequent use of discovery of electronic information. The FMJA supports the proposed amendments to Rules 26(f) and 16(b) which would require litigants early in litigation to address issues relating to electronic discovery, including the form of production and preservation of electronically stored information, and to consider an approach to discovery that protects against privilege waiver. The FMJA also supports the proposed changes to Rules 33 and 34 which are designed to adapt the rules to discovery of electronically stored information. The proposed amendments would (1) distinguish between electronically stored information and documents, (2) clarify that an answer to an interrogatory involving records should also include a search of electronically stored information, (3) allow a responding party to substitute access to electronically stored data for an answer only if the burden of deriving an answer is substantially the same for both sides, (4) allow parties seeking discovery to specify the form of production for electronic information and allow those disclosing to object to the form, (5) provide that where there is no request, agreement or court order specifying the form of production, a producing party would be allowed to produce information either in the form it is originally maintained or in an electronically searchable form, and (6) clarify that the obligation to produce for testing and sampling also applies to non-electronic discovery.

The FMJA recommends, however, that further consideration be given to proposed Rules 26(b)(5)(B) and 45(d)(2)(B) which set up a procedure for a party to assert that it has produced privileged information, Rules 26(b)(2) and 45(d)(1)(C) which address the discovery of electronically stored information that is not reasonably accessible, and Rule 37(f) which would create a "safe harbor" against sanctions involving electronically stored information.

DISCUSSION: (1) Amendments Relating to Privilege Waiver

Proposed amended Rule 16(b) addresses the topics to be included in the court's scheduling and case management order. The amendment adds language in subsection (b)(6) that would allow the court to adopt in its scheduling/case management order any agreement reached by the parties during their Rule 26(f) conference which (1) grants protection against inadvertent waiver of privilege and (2) has been conveyed in the parties' Rule 26(f) report to the court.

The FMJA concurs in the proposed amendment. The thorny problem of privilege and waiver is one that the parties themselves are often better suited than the court to address and resolve, and to the extent that the amended language of Rule 16(b)(6) contemplates acceptance of the parties' reasonable proposal, the interest of judicial efficiency will be served. While the proposed amendment does not confer authority upon the court to impose a privilege protection order without agreement by the parties, neither does it prohibit the court from imposing such an order in an appropriate case.

Rules 26 and 45 – which contain virtually identical language – set out the procedures by which the producing party or Rule 45 nonparty may protect itself against inadvertent waiver of privilege when it has produced privileged information to the requesting party without intending to do so. The proposed amendments are not limited to production of electronically stored information, and they presumably are intended to apply in any case where privileged information has been produced in any form. The first sentences of both amended Rule 26(b)(5)(B) and amended Rule 45(d)(2)(B) provide that a party or person who, in responding to discovery requests, "produces information without intending to waive a claim of privilege . . . may, within a reasonable time, notify any party that received the information of its claim of privilege." The following sentences of each rule then require the receiving party to take certain actions to contain or remedy the effects of an inadvertent disclosure pending a ruling by the court if the claim of privilege is disputed.

The FMJA questions the need to codify a generalized "inadvertent production" rule. The commentary to the proposed changes indicate the cost of conducting a privilege review before producing

voluminous amounts of electronically-stored information is a significant concern. That concern is addressed by the proposed addition of Rules 16(b)(5)-(6) and 26(f)(3)-(4), which permit parties to agree and a court to order that production of those materials *without a prior review* will not constitute a waiver of privilege. The inadvertent production rules set forth in proposed Rules 25(b)(5)(B) and 45(d)(2)(B) do not address that concern, but rather deal with an entirely different situation: the production of privileged materials *after – and despite – a prior review*. The commentary correctly notes that "courts have developed principles for determining whether waiver results from inadvertent production of privileged information." The FMJA does not believe there has been adequate explanation as to the need for, or wisdom of, new rules to address what already is being handled satisfactorily under the common law.

That said, in the event that Rules 26(b)(5)(B) and 45(d)(2)(B) are not removed from the draft, the FMJA suggests one change to the proposed language of those rules.

The FMJA is concerned that without further restriction, the amendments allowing a producing party or person "a reasonable time" to notify other parties of an inadvertent disclosure of privileged matter will promote laxity on the part of the respondent in timely screening disclosed information for privileged matter. Moreover, these provisions are necessary only in the exceptional case, but because the rules now apply to all "information" produced, persons or parties may be discouraged from conducting a careful privilege evaluation before producing information in all of the other types of cases which comprise the vast majority of cases in federal court where such provisions are neither necessary nor helpful. Application of the amendment in such cases may undermine the obligation traditionally placed upon the producing party to safeguard its privileged material rather than raise the issue when disclosure becomes inconvenient or prejudicial. It is difficult to "unscramble the egg" in any case, whether the case involves large volumes of information or not. *See Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (an inadvertent disclosure automatically waives the attorney work product privilege, because to do otherwise "would do no more than seal the bag from which the cat has already escaped."). Because litigation of these issues is very expensive and time-consuming, the rule should make clear that a person may not wait to act on a claim of privilege until, for example, the receiving party has relied upon the information in

formulating or refining its claims or defenses or has used the information against the producing party, before invoking a claim of privilege for the first time. *See, e.g., Bowles v. National Ass'n of Home Builders*, 2004 WL 2203831 (D.C. Cir. 2004), where the court held that a failure to act after 15 months where the defendant had actual knowledge that opposing party had possession of privileged documents waived the privilege. The FMJA suggests insertion of a specific time limitation, such as a thirty-day deadline for notification of inadvertent disclosures, with extensions allowed only with court approval upon a showing of good cause.

(2) Discovery of Electronically Stored Information that is Not Reasonably Accessible

The proposed amendment to Rule 26 would add the following language to paragraph (b)(2).

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify the terms and conditions for such discovery.

The proposed amendment to Rule 26 would add similar language to paragraph 45(d)(1)(C), but it substitutes "person" for "party" and omits from the third sentence the phrase "and may specify terms and conditions for such discovery."

Because the proposed amendments are flawed, they should not be adopted at this time.

The proposed change is reminiscent of the 2000 Amendment to Fed. R. Civ. P. 26(b)(1), in which the scope of discovery was narrowed from "relevant to the subject matter involved in the action" to "relevant to the claim or defense of any party," with the broader scope available only on a showing of "good cause." The proposed amendment represents a further narrowing of discovery from all relevant electronically stored information to only that which is "reasonably accessible," with discovery of information that is not "reasonably accessible" available only on a showing of good cause. The following are a few of the more serious concerns about the amendments.

First, the term "reasonably accessible" is not adequately defined, leading to a great potential for confusion. The Advisory Committee Note says that the meaning of the term "may depend on a variety of circumstances" and provides some useful examples of information that "ordinarily" would not be considered reasonably accessible. However, the Note also indicates that if the responding party routinely accesses or uses the electronically stored information, then the information "would ordinarily be considered reasonably accessible," but at the same time states that if the responding party does not routinely access or use the information, that does not necessarily mean that the information is not "reasonably accessible." In the end, the Note suggests that the governing criterion is whether "access requires substantial effort or cost." Regardless, one salient fact trumps these "guidelines": if the information was "actually accessed," then it is "reasonably accessible." These are just a few examples of the ambiguities and confusion the term "reasonably accessible" as used in proposed Rule 26(b)(1) may engender.

Second, the proposed amendment is potentially redundant. Under the proposed amendment, if a court determines that information is *not* "reasonably accessible," the court "may nevertheless order discovery if the requesting party shows good cause." The Note explains that "[t]he good-cause analysis would balance the requesting party's need for the information and the burden on the responding party." This sounds similar to the analysis already conducted under Rule 26(b)(2)(iii), which requires that the court limit discovery of relevant information if it determines that "the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." However, because Rule 26(b)(2)(iii) does not use the term "good cause," it is unclear whether the good-cause analysis is intended to be something different than what courts already are doing under Rule 26(b)(2)(iii).

Third, although the responding party still has the burden of demonstrating that the electronically stored information is not reasonably accessible, there is no longer any presumption of discoverability to overcome. Thus, the requesting party would bear the burden of persuasion on the issue of good cause. This shifting of the burden to the requesting party rather than the producing

party may well lead to more, not fewer, discovery disputes than already arise from the present rule.

Finally, the proposed amendment places too much control in the hands of the responding party in that it may encourage parties who believe that they might be sued to make some electronically stored information inaccessible as rapidly as possible in the normal course of business, such as by using a program that automatically deletes all email after 30 days, or to keep in reasonably accessible form only information which they think will be helpful to them.

Insofar as the proposed amendment to Rule 45(d)(1)(C) is concerned, the same comments apply. In addition, it is not clear why the last phrase of the proposed amendment to Rule 26(b)(2) was omitted from the proposed amendment to Rule 45(d)(1)(C). Although it would be best to omit it in both places, if it is included in one, it should be included in the other as well.

In sum, the proposed amendment is unhelpful. It adds needless complexity, introduces ambiguity and confusion, creates the potential for unfairness, and may reduce the quantity of relevant evidence available in the long run. The proposed amendment also is unnecessary. It accomplishes almost nothing that cannot already be accomplished more simply under the existing versions of Rules 26(b)(2)(iii) and Rule 26(c).

It would be better if the proposed amendment simply said that in making a determination under either Rule 26(b)(2)(iii) or Rule 26(c) about what electronically stored information should be produced, and if so, at whose cost, the court should consider whether the electronically stored information is not reasonably accessible for reasons beyond the reasonable control of the producing party, and if so, to consider whether it should be produced in light of Rule 26(b)(2)(iii). The proposed amendment also could offer a more complete definition of "reasonably accessible." A parallel provision or a cross-reference could be added to Rule 45(d)(1)(c).

(3) Rule 37 Limitation on Sanctions

Proposed Rule 37(f) reads as follows:

> **(f) Electronically stored information.** Unless a party violated an order in the action requiring it to preserve

electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if

(a) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and

(b) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

The FMJA opposes the adoption of a new rule that attempts to create a "safe harbor" against sanctions involving electronically stored information. The FMJA recommends that no special "safe harbor" rule be adopted for electronically stored information because the current Rule 37 procedures are adequate and the proposed rule creates as many questions as it does answers.

The proposed amendment to Rule 37 provides a narrow "safe harbor" to a party that fails to provide electronically stored information where the party "took reasonable steps to preserve the information after it knew or should have known the information is discoverable in the action" and "the failure resulted from loss of the information because of the routine operation of the party's electronic information system." The FMJA does not believe that a special "safe harbor" provision is necessary because if these two elements were met, one would not expect sanctions to be imposed under current Rule 37 procedures.

For example, if a party were to seek sanctions under current Rule 34(d), the respondent could avoid sanctions by demonstrating that the "failure was substantially justified or that other circumstances make an award of expenses unjust." It is not logical to think that under the circumstances presented in the proposed rule that a court would impose sanctions under existing practice. To the extent that the concepts raised by proposed Rule 37(f) are deemed significant, these concepts should be reflected in the final Committee Notes to proposed new provisions to Rules 26(b)(1) and 26(b)(2). Proposed Rule 37(f) refers to steps that are often called a "litigation hold." The reasonableness of a "litigation hold" is related to the proposed new provision in Rule 26(b)(2), which states that electronically stored information not reasonably accessible is discoverable only on court order, for good cause. Therefore, the scenario represented

in proposed Rule 37(f) could be included in the Committee's discussion of what constitutes reasonably accessible information.

Furthermore, the language of Rule 37(f) creates as many questions as answers, and thereby defeats the purpose of a "safe harbor." The terms "reasonable steps to preserve the information," "knew or should have known the information was discoverable," and "routine operation of the party's electronic information system" all invite disputes over their meaning. It makes more sense to see how the case law develops before trying to craft a proposed "safe harbor" provision that is neither "safe" nor a "harbor."

(B) PROPOSED SUPPLEMENTAL RULE G (FORFEITURE ACTIONS IN REM)

COMMENT: The FMJA supports the proposed addition of Supplemental Rule G.

DISCUSSION: The proposed new Supplemental Rule G was proposed by the Advisory Committee on Civil Rules to create a free-standing rule on in rem forfeiture actions brought by the United States. At present, the procedure for such actions is handled under various supplemental rules which were designed for admiralty cases. The proposed new Supplemental Rule G consolidates the forfeiture procedure and takes account of the changes in forfeiture practice occasioned by enactment of the Civil Asset Forfeiture Reform Act of 2000.

(C) PROPOSED AMENDMENT TO RULE 50 (JUDGMENT AS A MATTER OF LAW IN JURY TRIALS: ALTERNATIVE MOTION FOR A NEW TRIAL; CONDITIONAL RULINGS)

COMMENT: The FMJA supports the amendment to Rule 50.

DISCUSSION: The proposed amendment to Rule 50 would allow a party that makes a motion for judgment as a matter of law at some time during trial (classically at the conclusion of the plaintiff's case) to renew that motion within ten days after trial without having first renewed it at the close of all the evidence. The present Rule is a trap for the unwary, requiring a motion for "directed verdict" to be renewed at a time in the trial when counsel are focused on admission of exhibits, jury instructions, and so forth, and may easily forget the formality of renewing the motion. The proposed amendment eliminates what is usually just a formality, but which

can result in a harsh result. Several courts of appeals have been relaxing the current rule to avoid that result, while others have held firm to the text of the present Rule. Since the motion can only be renewed, not added to, there is no unfairness to the party opposing the motion.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

(A) PROPOSED RULE 5 (INITIAL APPEARANCE; PROPOSED AMENDMENT REGARDING USE OF ELECTRONIC MEANS TO TRANSMIT WARRANT)

COMMENT: The FMJA supports the proposed amendment of Rule 5. Under the proposal, there would be stricken from Rule 5(c)(3)(d)(i) the following language: "a facsimile of either" and "other appropriate." Under the proposal, the following language would be substituted for the stricken language: "a reliable electronic."

DISCUSSION: The FMJA is in agreement that the broad term "electronic form" includes facsimiles. More significantly, the amendment reflects the current state of technology in the courts. Indeed, many courts already require that certain documents be filed electronically.

(B) PROPOSED RULE 32.1(a) (INITIAL APPEARANCE; PROPOSED AMENDMENT REGARDING USE OF ELECTRONIC MEANS TO TRANSMIT CERTAIN DOCUMENTS)

COMMENT: The FMJA supports the proposed amendment of Rule 32.1. Under the proposal, the following language would added to Rule 32.1(a)(5)(B)(i): "or copies of those certified documents by reliable electronic means."

DISCUSSION: The FMJA is in agreement that the rule should be amended to permit the magistrate judge to accept a judgment, warrant, and warrant by reliable electronic means. Once again, the amendment reflects the current advanced state of technology in the courts in terms of the acceptance of electronic filings.

(C) PROPOSED RULE 40 (ARREST FOR FAILING TO APPEAR IN ANOTHER DISTRICT)

COMMENT: The FMJA supports the proposed amendment of Rule 40. The proposed amendment would empower a magistrate judge in the

district in which a defendant has been arrested to set conditions of release for a person brought before that magistrate judge, regardless of whether the basis for the arrest was a failure to appear in the district of prosecution or a violation of any other condition of release.

DISCUSSION: The FMJA is in agreement that the rule should be amended in the manner proposed. Currently, the rule specifies that it deals only with persons failing to appear in the district of prosecution as required by the previous order setting conditions of release. The proposed amendment would clearly state that an arrested person must be taken without unnecessary delay before a magistrate judge in the district of arrest in either situation, that is, without regard to whether the arrest warrant issued in the district of prosecution asserts that the defendant failed to appear or that the defendant was believed to have violated some other condition or release. The FMJA is in agreement with the Advisory Committee's note that it makes no sense for a magistrate judge to be empowered to release (or set conditions of release) for a person who failed to appear in the district of prosecution but to be precluded from doing so for a person who violated some less serious condition of release.

(D) PROPOSED RULE 41 (OBTAINING AND ISSUANCE OF A SEARCH WARRANT)

COMMENT: The FMJA supports the proposed amendments of Rule 41. Rule 41(d)(3)(A) currently allows a magistrate judge to issue a search warrant that is based on information communicated by telephone or "other appropriate means, including facsimile transmission." The proposed amendment would strike the words "appropriate means, including facsimile transmission" and substitute the words "reliable electronic means." Furthermore, the proposed amendment to subsection (e)(3) would make clear the process for issuing the warrant that had been applied for by use of reliable electronic means.

DISCUSSION: The FMJA is in agreement that the rule should be amended in the manner proposed. Once again, the proposed amendments reflect the current advanced state of technology when it comes to the reliability of electronic transmission of information. At present, the magistrate judge must enter the contents of a proposed duplicate original which has been read over the telephone into an

original warrant for the magistrate judge's signature. The proposed amendment would allow the applicant to transmit the contents "by reliable electronic means" and would allow that transmission to serve "as the original warrant." The magistrate judge, in the amended version of this rule, would retain the power to modify "the original warrant" but would be required either "to transmit any modified warrant to the applicant by reliable electronic means" or direct the applicant to modify the proposed duplicate original warrant "accordingly." Finally, if the magistrate judge determines to issue the warrant, the magistrate judge, after signing and dating the original warrant, must either "transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant."

(E) PROPOSED CHANGES TO RULES 5 AND 58 TO ELIMINATE A CONFLICT BETWEEN RULES 5.1 AND 58

COMMENT: The FMJA supports the proposed amendments to Rules 5 and 58.

DISCUSSION: At present, Rule 5(c)(3)(C) requires a magistrate judge to conduct a preliminary hearing "if required by Rule 5.1 or Rule 58(b)(2)(G)[.]" The amendment would strike this reference to Rule 58 because the Committee also proposes to amend Rule 58(b)(2), which at present requires a defendant making an initial appearance on either a petty offense or other misdemeanor charge to be advised of a right "to a preliminary hearing under Rule 5.1." By striking the phrase which begins subsection (b)(2)(G), that is, "if the defendant is held in custody and charged with a misdemeanor other than a petty offense" and substituting therefor the word "any," the rule will now require that any defendant, whether or not "held in custody and charged with a misdemeanor other than a petty offense," will simply be advised of "any right to a preliminary hearing under Rule 5.1."

III. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

(A) PROPOSED AMENDMENT TO FED. R. EVID. 404(a)

COMMENT: The FMJA supports the proposed amendment to Rule 404(a).

DISCUSSION: The proposed amendment to Rule 404(a) is to address inconsistencies in the courts regarding the admissibility of

character evidence in a civil case. Unlike criminal cases where the character of the accused may be the only defense available, the admission of character evidence as circumstantial proof of conduct in a civil case is fraught with substantial risks of prejudice, confusion and delay and may lead to a trial on personality rather than on the relevant issues. The proposed rule reinforces the original intent of the Rule to prohibit the circumstantial use of character evidence in civil cases. It also clarifies that Fed. R. Evid. 404(a)(2) is subject to the more stringent limitations of Fed. R. Evid. 412 regarding the use of character evidence of a victim.

(B) PROPOSED AMENDMENT TO FED. R. EVID. 408

COMMENT: The FMJA supports the proposed amendments to Rule 408, with one critical exception. The Committee does not support that proposed amendment which would bar for use only in civil cases the conduct or statements of a party made in compromise negotiations.

DISCUSSION: The proposed amendment to Rule 408(a)(2) would make it clear that Rule 408(a)(2) only applies in civil cases. In other words, under the proposed amendment "conduct or statements made in compromise negotiations" would be admissible against a party in a subsequent criminal proceeding. A majority of commentators and a majority of the courts have opined that current Rule 408 applies to both civil and criminal cases. See: When Two Worlds Collide: Examining the Second Circuit's Reasoning in Admitting Evidence of Civil Settlements in Criminal Trials, 67 Brok. L. Rev. 527 (2001). This Committee believes that the public interest in resolving and settling disputes outweighs the need for such evidence to be admissible in criminal prosecutions.

The justification for the proposed change in the rule is not made clear by the Judicial Conference Rules Committee. The two reasons seem to be that there is some confusion in the circuits over the matter and that "this position is taken in deference to the Justice Department's arguments that such statements can be critical evidence of guilt." Yet, there is nothing in the materials provided that demonstrates this is a serious problem in connection with the Justice Department's efforts to ferret out crime. On the other hand, this Committee fears that such a rule change could, at least in some instances, hamper the efforts of civil litigants' legal counsel and those serving as mediators to successfully resolve civil disputes during the course of settlement conferences. In the end,

absent more persuasive justification for the proposed amendment of Rule 408(a)(2), this Committee opposes the same.

(C) PROPOSED AMENDMENT TO FED. R. EVID. 606(b)

COMMENT: The FMJA supports the proposed amendment to Rule 606(b).

DISCUSSION: The proposed amendment to Rule 606(b) deals with whether statements from jurors can be admitted to prove a disparity between the verdict rendered and the verdict intended by jurors. The proposed rule addresses the incongruity between the Rule and case law and addresses court-drafted exceptions, which run the gamut from being limited to clerical error to permitting proof of juror statements whenever the jury misunderstood or ignored the court's instructions. The proposed amendment limits the exception to clerical error and thereby preserves the sanctity of juror deliberations and the finality of jury verdicts. However, the proposed changes do not prevent the court from polling the jury and taking steps to remedy any obvious errors evident from that poll.

(D) PROPOSED AMENDMENT TO FED. R. EVID. 609

COMMENT: The FMJA supports the proposed amendment to Rule 609.

DISCUSSION: The proposed amendment to Rule 609 addresses how to determine whether a conviction involves dishonesty or false statement within the parameters of Rule 609(a)(2). Presently, Rule 609(a)(1) requires a balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2), while Rule 609(a)(2) allows the automatic impeachment of witnesses with prior convictions that "involved dishonesty to false statement." The proposed changes are substituting "credibility" with "character for truthfulness" and substituting "involved" with "readily can be determined." The intent is to clearly limit the Rule to the admission of convictions that only involve an act of dishonesty or false statement.

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

FROM: **Professor Sara Sun Beale, consultant**

RE: **Rules 11, 32 & 35 (*Booker/FanFan* package of rules)**

DATE: **March 15, 2005**

Judge Bucklew appointed a subcommittee, chaired by Judge Paul Friedman, to prepare recommendations regarding any revisions to the rules necessary to respond to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005).

A memorandum from Judge Friedman and the subcommittee report (with proposed amendments and committee notes) are attached.

This item is on the agenda for the April meeting in Charleston.

MEMORANDUM

TO: Advisory Committee on Criminal Rules

FROM: Judge Paul L. Friedman

DATE: March 15, 2005

RE: Booker Subcommittee

On December 8, 2004, Judge Susan Bucklew appointed a subcommittee of the Criminal Rules Committee, originally called the Blakely Subcommittee and now called the Booker Subcommittee. It consists of myself as Chair, Judge David Trager, Lucien Campbell, Professor Nancy King and Deborah Rhodes, along with the Committee's Reporter, Professor David Schlueter, and the Committee's incoming Reporter, Professor Sara Beale. John Rabiej and Peter McCabe also participated in some of our conference calls. The Subcommittee had three meetings by telephone conference call. Initially, we identified every rule in the Federal Rules of Criminal Procedure that raised possible Booker issues and that might require amendment. We first divided them into three groups, those particularly in need of amendment, those that might deserve consideration but were less pressing, and those we thought probably did not require any change. During our three conference calls, we refined our analysis and Professor

Beale, with the help of Professor King and Professor Schlueter, developed several drafts for the Subcommittee's consideration and discussion. The final work product is attached and consists of a report to the full committee and an appendix containing language which we propose for each of the rules we believe need to be amended and a proposed accompanying committee note. While every member of the Subcommittee contributed greatly to our deliberations, Professor Beale deserves most of the credit for the attached excellent work product.

Attachment

To: Advisory Committee on Criminal Rules

From: The *Booker* Subcommittee

Date: March 15, 2005

Our subcommittee reviewed all of the rules we identified as raising possible *Booker* issues. We divided them into two groups: those for which there is a strong argument that a revision is needed, and those we deemed unobjectionable in their present form. As noted below, we have identified five rules where revision is plainly justified. Accordingly, the first section of this report presents the rules we propose for change, with draft language. The second section describes briefly the other provisions that we screened carefully, and the reasons we concluded that no change is warranted.

An appendix follows the report, containing the language of each of the proposed rules (showing additions and deletions) and accompanying committee notes.

Group 1 -- Strong Cases For Revision:

1. **Rule 11(b)(1)(M)** presently states that the court must advise the defendant of its "obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances."

This clearly contemplates mandatory guidelines with limited departure authority. Since the standards that govern sentencing are a major concern for a defendant who is pleading guilty, the rules should, if possible, clearly inform the defendant of the fact that the Sentencing Guidelines are advisory, rather than mandatory.

A proposed amendment might state that the court must inform the defendant of, and determine that the defendant understands:

> (M) the court's obligation to calculate the sentence under the Sentencing Guidelines and to consider the guideline range, possible departures, and other sentencing factors under 18 U.S.C. § 3553(a);

The use of the term "consider" and the reference to other sentencing factors in § 3553(a) track the language in Justice Breyer's opinion for the majority with respect to the remedy. The draft language does assume that the courts will go through a full guideline calculation before considering other factors. This is in accord with the practice at this time in most courts, and with the procedure recommended by the Sentencing Commission.

2. Rule 32(d) governs the presentence report. We propose an amendment of **Rule 32(d)(2)(F)** to adapt the presentence report to the court's authority under *Booker* to consider the sentencing factors under 18 U.S.C. § 3553(a) as well as the guidelines. Rule 32(d)(1) requires the presentence report to include information relevant to the Sentencing Guidelines, and (d)(2) requires the inclusion of "Additional Information." A review of the existing subsections of (d)(2) indicates that the current rule covers some, but not necessarily all, of the statutory factors under § 3553(a). Accordingly, we propose that the last subsection of (d)(2) be amended to read:

> (F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

In our view, adding this language to subsection (F) has the advantage of limiting it to information requested by the court. Without such a limitation the probation office might have great difficulty in determining what other information might be deemed relevant to the factors under § 3553(a). The phrase "other information" recognizes that much of the information relevant to § 3553(a) is already encompassed under the other subsections of (d)(2). The subcommittee contemplates that a request could be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case. This point is made explicit in the draft Committee Note.

In all other respects, however, we concluded that **Rule 32(d)(1)(A)-(E)** should be retained without change, since the probation office and district court would still need the information provided for under these provisions to calculate the advisory guideline sentence. We debated for some time whether to suggest any change in the caption of (d)(1)(A), which is presently "Applying the Sentencing Guidelines." We concluded that no change is warranted; the function of the presentence report is still to apply the guidelines to the facts, though the guidelines are advisory rather than mandatory.

3. Rule 32(h) This rule is headed "Notice of Possible Departures from Sentencing Guidelines." In order to prevent unfair surprise, it requires notice to the parties when the court is contemplating a departure that has not been identified either in the presentence report or the parties' prehearing submissions. According to the Advisory Committee notes, this provision codifies the Supreme Court's decision in *Burns v. United States,* 501 U.S. 129, 138-39 (1992) (holding that the court must give the parties notice before departing upward on a ground not previously identified in the presentence report as a ground for departure). Although it is still important for the court to give the parties notice when it is considering giving a sentence other than that prescribed by the Guidelines if the issue has not been raised in either the presentence report or the parties' own submissions, the current provision is worded solely in terms of "departures." Under *Booker*, the guidelines are advisory only, and the court can tailor the sentence in accordance with the other factors specified in 18 U.S.C. § 3553(a) even if a "departure" would not have been permitted. Thus this provision should be expanded to include not only "departures" under 5K1.1 and 5K2.0, but also other sentences outside the guideline range.

There are two ways to address this issue.

Alternative 1: One is to add a term such as "variance" (thus requiring the court to give notice of either a departure or variance on a ground that the parties would not otherwise anticipate). If we follow this approach, the text would read:

> **(h) Notice of Possible Departure or Variance from Sentencing Guidelines.** Before the court may depart from the applicable sentencing guideline range or impose a sentence outside the applicable sentencing guideline range pursuant to 18 U.S.C. § 3553(a) on a ground not identified ~~for departure~~ either in the presentence report or a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure or variance. The notice must specify any ground on which the court is contemplating a departure or variance.

Judge Cassell, who coined the term variance, explained it as follows:

> Terminology can get a bit tricky here; to avoid confusion, it seems best to use the term "departure" as reflecting its settled meaning of a difference from an otherwise-specified Guidelines sentence approved by the Guidelines themselves, and a new term--perhaps "variance"--as meaning a difference from the Guidelines system that is not called for by the Guidelines themselves.

United States v. Wilson, 2005 WL 273168 (D. Utah 2005) (footnote omitted). In support of this version, it was noted that emphasizing the distinction between departures and variances in the Rules may be helpful. If courts carefully identify what may be a relatively small number of variances, that may be helpful in reassuring Congress that *Booker* has not led to unrestrained judicial activity. The importance of distinguishing between sentences based on departures and those based on variances is central to the proposed revision of Rule 32(k)(1), discussed below.

Alternative 2: Although the term variance has been used by several courts, it is not universally accepted at this time. (For example, the Second Circuit's influential opinion in *United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005), uses the term "non-Guidelines sentence.") In the absence of agreement on the term variance, we might wish to avoid it. We could achieve that by refocusing the language on "other factors" that the court is considering, which encompasses factors that could give rise to either a departure or a variance. A proposed amendment might read:

> **(h) Notice of Intent to Consider Other Sentencing Factors.** ~~**Possible Departure from Sentencing Guidelines.**~~ Before the court may impose a sentence outside ~~depart from~~ the applicable sentencing guideline range on a ground not identified ~~for departure~~ either in the presentence report or a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a ~~departure~~ sentence. The notice must specify any ground on which the court is contemplating ~~a departure~~ such a sentence.

This version has the advantage of simplicity: it focuses attention on the point that the court is considering a sentence outside the sentencing range on a ground not previously identified, without requiring any designation of such a factor as a departure or variance. Since the focus of

the issue is on preventing unfair surprise, rather than the type of factor the court is considering, it may be less critical here to emphasize the distinction courts will be required to draw under the proposed revision of Rule 32(k)(1) discussed below.

One other possibility was noted in the subcommittee, which was to delete Rule 32(h) entirely. Given the increased ability of district courts to tailor sentences under § 3553(a) on grounds that are not highlighted in the Guidelines, the requirement of notice to avoid unfair surprise has more rather than less salience. Accordingly, it seems preferable to amend the provision rather than delete it, thereby implementing the mandate of *Burns v. United States* in the Rules.

4. Rule 32(k)(1) governs the judgment. The Judicial Conference Criminal Law Committee, after consultation with Judge David Levi, has requested that the Criminal Rules be amended to include a new requirement that the district court use a standard Judgment in a Criminal Case, including the Statement of Reasons form, as designated by the Judicial Conference. The Criminal Law Committee's report states that the proliferation of local variations to the national forms has impeded the Sentencing Commission's ability to collect complete and accurate sentencing data, which in turn impedes Congress and the judiciary in their efforts to understand how the courts are responding to *Booker*. The subcommittee agreed that we should propose an amendment to assist the efforts of the Criminal Law Committee to mandate a procedure that will allow the collection of data and monitoring of the sentencing process post *Booker*.

Lucien Campbell drafted the following amendment to Rule 32(k)(1) to accomplish this goal (bracketed language optional):

> **(1)** ***In General.*** The court must enter judgment, using any form prescribed by the Judicial Conference of the United States. In ~~the~~ a judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence, including the statement of reasons [required by 18 U.S.C. § 3553(c)]. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

5. Rule 35(b)(1)(B) presently states that upon the government's motion made within one year of sentencing, the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commissions's guidelines and policy statements." This is inconsistent with *Booker*'s holding that the Guidelines cannot be mandatory. The simplest solution would be to delete this provision, and to merge subpart (A) into the introductory clause of (1)(B). One member of the subcommittee felt that this change was unnecessary, because there are no guidelines (and thus certainly no mandatory guidelines) at present that govern resentencings in substantial assistance cases. Other committee members felt that the text of the rules should not appear to give guidelines mandatory effect, and noted that future guidelines might govern resentencing.

Group 2 -- No Basis For Change

As noted above, we reviewed many additional provisions that might pose *Booker* issues. We present below a brief description of those provisions and the committee's reasons for concluding that no change is needed at present.

Rule 7(c)(1) This provision requires the indictment to state the "essential facts constituting the offense charged." The question is whether this is sufficient to include all of the facts covered by *Apprendi* and *Cotton*, such as drug type and quantity, which had been held by some courts not to be elements of the offense even though they increased the maximum sentence. Since the rule does not use the term "elements," and there is no term that clearly covers the other *Apprendi*-type facts, there is no pressing need to amend the rule.

Forfeiture-related provisions. **Rules 7(c)(2)** and **32.2(a)** require notice to the defendant that property may be subject to forfeiture or findings, but in general they do not require that the factual basis for forfeiting particular property be stated or found by the jury. Rule **32.2(b)(4)** poses a related issue. In our view there is no need to press ahead at this time with amendments to these rules. A review of the current decisions reveals no case that has held that *Blakely* or *Booker* extend to forfeiture proceedings. In general, the lower federal courts have held that forfeiture does not raise the maximum penalty, and hence does not require trial by jury or proof beyond a reasonable doubt as a constitutional matter. If the committee does decide to address these issues, as noted in the introduction it would be desirable to draw on the expertise of specialists in forfeiture law.

Rule 32.2(e) poses a slightly different issue. It allows the court "at any time" to amend an existing forfeiture order to add substitute property. The only procedural protections under (e)(2) are for third parties. This not only ignores the procedural rights of the defendant, but also smacks of double jeopardy since it allows property to be added after the defendant's sentence has become final. This raises issues that are not directly related to *Booker*, and would entail the need to consult specialists as noted above. There is no urgent need to pursue this issue now.

Rule 11. We reviewed, and found no problems with the following:

Except for 11(b)(1)(M), discussed above, we found no problems with the advice of rights provisions:

11(b)(1)(C)
11(b)(1)(F)
11(b)(1)(H)
11(b)(1)(I)
11(b)(1)(J)
11(b)(1)(K)

Similarly, we found no problem with the provisions regarding plea agreements, **11(c)(1)(B) & (C).** It should still be possible for the parties to bargain about the applicability of particular Guidelines, since they are applicable though only in an advisory sense.

We spent some time discussing **11(b)(1)(G)**, which requires the court to address the defendant to determine whether he understands "the nature of each charge" to which he is pleading. As noted above, one might raise the question whether this should include forfeiture allegations (or restitution related issues). But we concluded, at this point at least, that the language is sufficiently broad and general that revision is not necessary.

Rules 23 and 24. Since *Booker* interpreted the Sixth Amendment, we reviewed the rules governing trial by jury. Nothing in *Booker* addresses the issues covered in these rules (such as waiver of the right to trial by jury, jury size, the examination of trial jurors, and challenges).

Rule 32. We reviewed the following provisions, and found no need for revision:

32(c)(1)(A) & (B) We had some concerns about the implication in (c)(1)(A) that a PSR is not always required, since Justice Breyer's opinion in *Booker* suggests that they are not optional. However, this provision makes exceptions to the requirements of a PSR only when required by statute or when the court explains on the record why it already has sufficient information for sentencing under 18 U.S.C. § 3553 (which Justice Breyer's opinion repeatedly states courts should consult to tailor sentences under the advisory guidelines).

We talked about whether **(c)(1)(B)** was a problem if restitution is covered by *Blakely* et al, but concluded that this provision says only that there must be sufficient information gathered to support a restitution order; it does not address the procedures that would be necessary before restitution could be ordered.

32(f), (g), (i), (j) Obviously the appeal right that the defendant must be informed of under (j) is a right to an appeal of the reasonableness of the sentence, but the language of the provision in (j)(B) is sufficiently general ("any right to appeal the sentence").

Rule 35. 35(b)(2) This provision seems unobjectionable, since this is a reduction after the defendant has been sentenced.

Miscellaneous. We also reviewed and found no problems with **Rules 43(b)(4), 46(i),** and **58(b)(2)(A).**

APPENDIX

DRAFT RULES AND COMMENTARY

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) the court's obligation to ~~apply~~ calculate the sentence under the Sentencing Guidelines~~, and the court's discretion to depart from those guidelines under some circumstances~~ and to consider the guideline range, possible departures, and other sentencing factors under 18 U.S.C. § 3553(a); and

COMMITTEE NOTE

The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." Id. at 756. Rule 11(b)(1)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) Applying the Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

COMMITTEE NOTE

The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." Id. at 756. Amended subsection (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information affecting all cases or a class of cases, or by an individual judge in a particular case.

Rule 32. Sentencing and Judgment

* * * * *

[ALTERNATIVE 1]

(h) Notice of Possible Departure or Variance from Sentencing Guidelines. Before the court may depart from the applicable sentencing guideline range or impose a sentence outside the applicable sentencing guideline range pursuant to 18 U.S.C. § 3553(a) on a ground not identified ~~for departure~~ either in the presentence report or a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure or variance. The notice must specify any ground on which the court is contemplating a departure or variance.

[ALTERNATIVE 2]

(h) Notice of Intent to Consider Other Sentencing Factors. ~~**Possible Departure from Sentencing Guidelines.**~~ Before the court may impose a sentence outside ~~depart from~~ the applicable sentencing guideline range on a ground not identified ~~for departure~~ either in the presentence report or a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a ~~departure~~ sentence. The notice must specify any ground on which the court is contemplating ~~a departure~~ such a sentence.

COMMITTEE NOTE

The amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." Id. at 756. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not

identified in the presentence report or pleadings that could yield a sentence outside the guideline range should identify factors that might lead to either a departure or a sentence based on factors under 18 U.S.C. § 3553(a).

Rule 32. Sentencing and Judgment

* * * * *

(k) Judgment.

(1) ***In General.*** The court must enter judgment, using any form prescribed by the Judicial Conference of the United States. In ~~the~~ a judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence, including the statement of reasons [required by 18 U.S.C. § 3553(c)]. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

COMMITTEE NOTE

The amendment is intended to standardize the collection of data on federal sentences by requiring all courts to enter their judgments, including the statement of reasons, on the forms prescribed by the Judicial Conference of the United States. The collection of standardized data will assist the United States Sentencing Commission and Congress in their evaluation of sentencing patterns following the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." Id. at 756.

Rule 35. Correcting or Reducing a Sentence.

* * * * *

(b) Reducing a Sentence for Substantial Assistance.

* * * * *

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person. ~~:~~

~~(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

COMMITTEE NOTE

The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." Id. at 756. Subsection (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

ADDENDUM TO THE REPORT TO THE JUDICIAL CONFERENCE

COMMITTEE ON CRIMINAL LAW

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Criminal Law met on February 14-15, 2005. All Committee members attended, except Judge Wm. Fremming Nielsen and Chief Judge James B. Loken. Chief Judge Loken participated in part of the meeting by telephone. Also in attendance were Chief Judge David F. Levi (California-Eastern), Chair of the Committee on Rules of Practice and Procedure; Chief Judge Robert L. Hinkle (Florida-Northern), member of the Advisory Committee on Evidence Rules; and Professor Daniel Capra, a reporter from the Advisory Committee on Evidence Rules. Representing the Administrative Office (AO) for all or part of the meeting were Director Leonidas Ralph Mecham; Assistant Director John M. Hughes and Special Assistant Kim M. Whatley, Office of Probation and Pretrial Services; Assistant Director Peter G. McCabe, Office of Judges Programs; Deputy Associate Director Cathy A. McCarthy, Office of Management Planning and Assessment; Assistant General Counsel Joe Gergits, Office of the General Counsel; Counsel Mark Evans, Office of Legislative Affairs; and other AO staff. In attendance for part of the meeting from the Federal Judicial Center (FJC) were FJC Director Barbara Rothstein and Research Division Director James Eaglin. Also in attendance for part of the meeting from the United States Sentencing Commission were Commissioners Richard H. Hinojosa (chair), John Steer (vice-chair), Ruben Castillo (vice-chair),William K. Sessions

The Committee believes that it should continue to work with the Commission to improve the Commission's data collection, analyses, and reporting to ensure that sentencing data meet Commission needs, as well as the needs of Congress and the judiciary. This joint effort would include making some revisions to the Statement of Reasons form in light of *Booker* and exploring the feasibility of using existing judiciary data collection mechanisms to make sentencing data available electronically to the Commission. To effectively enhance data collection, the Committee concluded that procedures must be developed and implemented to ensure that (1) chief district judges are notified when courts fail to submit documents (particularly the Statement of Reasons form) to the Commission, and (2) the "Judgment in a Criminal Case" form (AO 245), including the Statement of Reasons form, used to document sentencing decisions, is standardized and courts are required to use it. The proliferation of local variations to the national forms has impeded the Commission's ability to collect complete and accurate sentencing data. Use of standard forms would improve the ability to capture reliable and useful data about sentencing decisions and to defend existing sentencing practices.

Chief Judge Levi suggested that it may be possible to mandate the use of a standard Judgment in a Criminal Case form and the Statement of Reasons form under the Rules Enabling Act. He suggested that the Committee transmit a recommendation to amend the Federal Rules of Criminal Procedure to require courts to adopt the use of these standard forms. After discussion, the Committee voted unanimously to recommend that the Committee on Rules of Practice and Procedure consider a possible amendment to the criminal rules to require courts to use a standard Judgment in a Criminal Case, including the Statement of Reasons form, to be approved by the Judicial Conference.

The Committee concluded that use of the standard forms would enable the Commission to determine more precisely the number of sentences imposed (1) within the advisory sentencing guideline range; (2) within the advisory sentencing guidelines as adjusted by any departure under the advisory guidelines, including any initiated or supported by the government; and (3) outside of the advisory guideline system based on other factors in 18 U.S.C. § 3553(a) as articulated by the sentencing judge, including those initiated or supported by the government. Use of standard forms would also enable the Commission to capture, analyze, and report explanations for sentencing decisions, including the underlying facts relied upon by the courts, the relationship of such findings to the factors set forth in 18 U.S.C. § 3553(a), and the degree to which the actual sentence differs from the advisory guideline sentence. The Committee believes that such critical data will assist the Commission in its ongoing efforts to study the operation of the guidelines and improve them as necessary.

If the Judicial Conference approves the Committee's recommendations, the Committee could also develop various strategies to promote the Conference's positions on these issues in discussions with the Sentencing Commission, Department of Justice, and Congress. This could include convening additional National Sentencing Policy Institutes and other forums to promote improved data collection, analysis, and reporting procedures on sentencing decisions.

After discussion, the Committee unanimously voted to make several recommendations to the Judicial Conference in view of the *Booker* decision.

Recommendation: That the Judicial Conference—

1. Resolve that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible;

2. Urge Congress to take no immediate legislative action and instead to maintain an advisory sentencing guideline system;

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

FROM: **Professor Sara Sun Beale, consultant**

RE: **Rules 11 & Rule 16; Proposed Amendment Regarding Disclosure of *Brady* Information; Report of Subcommittee**

DATE: **March 15, 2005**

At the Santa Fe meeting, Donald Goldberg reported the subcommittee's consensus in favor of proceeding with a proposed amendment to the rules that would require the prosecution to disclose to the defense, 14 days prior to trial, information that was favorable to the defense, either because it tended to be exculpatory or because it was impeaching evidence. After extensive discussion, a straw poll of the Committee indicated substantial support for further consideration of the matter.

A letter from Mr. Goldberg reporting on the subcommittee's further discussions is attached. Also attached are the opinion in *United States v. Acosta*, 2005 WL 281232 (D. Nev. 2005),* the materials presented at the Santa Fe meeting, including a study by Federal Judicial Center of Brady material in federal and state local rules, orders, and policies, and the local rules and orders summarized in the FJC's study.

This item is on the agenda for the April meeting in Charleston.

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*The case name does not appear in the opinion in Westlaw, and the name "Acosta" does not appear anywhere in the opinion. However, a search for a "*Brady*" opinion in this district in 2005 produced the attached printout, and a West list of cases describes it as *United States v. Acosta*. I have reported the problem to West.

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March 14, 2005

Via E-mail

The 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 Subcommittee

Dear Judge Bucklew:

As instructed at our last meeting in Santa Fe the Brady subcommittee and Rules Committee support staff have continued to consider the need and desirability of an addition to Fed. R. Cr. P . 16 (a) (1) requiring government disclosure of Brady type information without regard to its materiality and fixing a time by which such disclosure should be made.

In the interim the failure of federal prosecutors to properly disclose Brady material continues to appear in reported authorities. See, e.g., Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to Accused, 158 A.L.R. Fed. 401 (2005). Also, Rules Committee support staff has continued to find additional local district court rules and standing orders requiring the production of Brady materials. Together with the material under Tab III-D-i of the Santa Fe agenda book, it appears that at least one-third of the 94 district courts have a relevant local rule, order or procedure governing disclosure of Brady material.

While no formal subcommittee vote was taken during our conference call discussion on March 7, it seemed plain that a majority at least were in favor of an addition to Rule 16 (a) (1) along the lines of that proposed at our last meeting and that Ms. Rhodes was opposed. There did, however, seem to be agreement that:

1. The agenda book for the Charleston meeting should include all of the material under Tab III-D from the Santa Fe agenda book;

2. Staff's memorandum entitled Supplemental Data to FJC Report: Treatment of Brady v. Maryland Materials should be made part of the Charleston agenda book along with staff's memorandum attaching copies of 28 local rules, court orders etc.;

3. Consideration should be given to language which would reconcile the proposal with the Jencks Act;

4. Consideration should be given to whether the proposal would shift the burden of proof or change the standard for securing post-trial relief;

5. Ms. Rhodes will determine whether the Justice Department, as an alternative to the proposed addition to Rule 16, would be willing to change the United States Attorney's Manual so as to make clear to prosecutors that Brady type material should be turned over without regard to materiality;

6. Some form of the proposed addition to Rule 16 (a) (1) should be put to a vote of the entire committee.

As to the Jencks Act issue, the Santa Fe materials (Tab III-D, Appendix C) recognized a disagreement among federal courts as to whether Brady controlled over the Jencks Act, and noted that some districts had avoided the issue by ordering only a synopsis of the exculpatory or impeachment material rather than the prospective witness's actual statement. The recent district court decision in United States v. Acosta, 2005 WL 281232 (D. Nevada 2005) contains a full discussion of the issue. Because the Acosta decision focuses also on the issue underlying the proposal's requirement that favorable evidence be disclosed pre-trial without regard to materiality, I have asked Professor Beale to include that decision in the Charleston agenda book along with the other materials.. . . . . To eliminate any possible Justice Department concern, the proposed addition to Rule 16 (a) (1) could alternatively conclude with the statement: This rule does not authorize the discovery or inspection of statements made by prospective government witnesses except as provided in the Jencks Act, 18 U.S.C. Section 3500.

With regard to whether the proposal would shift either the burden or the standard for securing post-trial relief, my very hurried look at the issue led me to conclude that while the standard for achieving relief under Rule 52 (a) -- which governs nonforfeited error -- is identical to that under Brady, the proposal may result in shifting the burden of persuasion to the government. United States v. Benitez, 124 S. Ct. 2333 (2004); United States v. Olano, 113 S. Ct. 1770 (1993). By copy of this E-mail I urge the rest of the subcommittee to take a closer look at this issue before our Charleston meeting and to consider -- if I am correct -- whether it makes a difference in our position.

I would ask that you forgive the form in which all of this comes to you, but the urgency expressed by Professor Beale required it. I look forward to seeing you in Charleston.

Sincerely,

Donald J. Goldberg

cc: Professor Sarah Beale
Professor Nancy King
Robert B. Fiske, Jr., Esquire
Lucien B. Campbell, Esquire
Deborah J. Rhodes, Esquire
Professor David A. Schlueter
Jonathan Wroblewski, Esquire
John Rabiej, Esquire
Peter McCabe, Esquire
Laura Hooper, Esquire

ORDER OF UNITED STATES MAGISTRATE JUDGE

West Headnotes

[1] Criminal Law 700(2.1)
110k700(2.1)

[1] Criminal Law 700(4)
110k700(4)
"Favorable" evidence required to be disclosed under *Brady* encompasses both exculpatory and impeachment evidence, and must be both favorable and material before disclosure is required. U.S.C.A. Const.Amend. 5.

[2] Criminal Law 700(2.1)
110k700(2.1)
Brady's materiality standard does not define limit of federal prosecutor's duty to disclose before trial evidence favorable to defendant; rather, prosecutor has broad duty to disclose such evidence, and *Brady* determines whether violation of that duty rises to level of constitutional violation after trial has occurred. U.S.C.A. Const.Amend. 5; U.S.Dist.Ct.Rules D.Nev., Rule IA 10-7(a).

[3] Criminal Law 700(5)
110k700(5)
Brady requirement that prosecutor disclose before trial evidence favorable to defendant is not conditioned on determination that pretrial disclosure be necessary to make effective use of information disclosed. U.S.C.A. Const.Amend 5.

[4] Criminal Law 627.7(3)
110k627.7(3)

[4] Criminal Law 700(2.1)
110k700(2.1)

[4] Criminal Law 700(4)
110k700(4)
Possibility of conflict between, on one hand, *Brady*/local rule imposing broad duty upon federal prosecutor to disclose before trial evidence negating guilt or mitigating offenses charged, and, on other hand, Jencks Act/rule of evidence requiring production of witness's statements only after witness has testified on direct examination at trial, did not necessitate invalidation of local rule; rather, any conflict arising when potential witness statement contained exculpatory or impeachment evidence within *Brady*/local rule could be resolved by government's going before magistrate judge to seek protective order. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 3500(a); Fed.Rules Cr.Proc.Rule 26.2, 18 U.S.C.A.; U.S.Dist.Ct.Rules D.Nev., Rule IA 10-7(a).

[5] Criminal Law 627.7(3)
110k627.7(3)
When federal defendant seeks evidence which qualifies as both Jencks Act and *Brady* material, Jencks Act standards control. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 3500(a).
LEEN, Magistrate J.

***1** This matter is before the court on defendant Steven Pearce's Motion for Disclosure of Proffer Information (# 301) and multiple joinders (# 302, # 306, # 312, # 313, # 314, # 316, # 317, # 318, # 320, # 322, # 325, # 328, # 330, # 331, # 332, # 333, # 334, # 335, # 339, # 342, # 346, # 348, # 351, # 365, # 366, # 368, # 373, # 378, # 403). The court has considered the motion, the government's Response (# 403), the arguments of counsel at a hearing conducted July 12, 2004, and defendant Pearce's Additional Authority (# 498) filed in open court at the hearing.

BACKGROUND

The indictment in this case was returned December 2, 2003, (# 1) and charges forty-two defendants with violence in aid of racketeering under 18 U.S.C. § 1959, use of a firearm in commission of a felony, under 18 U.S.C. § 924(c), and aiding and abetting under 18 U.S.C. § 2. The indictment also contains forfeiture allegations. The indictment arises out of events which occurred at the Twentieth Annual Laughlin River Run in Laughlin, Nevada, between April 25 and April 28, 2002. It alleges that the Hell's Angels Motorcycle Club ("HAMC") is an outlaw motorcycle gang engaged in racketeering activity whose members and associates engage in acts of violence and narcotics distribution. The HAMC allegedly accomplishes its objectives through creating a climate of fear by assaulting members of rival motorcycle clubs, particularly the Mongols. It is alleged that there was a long and violent history between the HAMC and the Mongols which included a series of occurrences in 2001 in California and Nevada preceding the April 2002 annual Laughlin River Run. Several "minor events" between the HAMC and the Mongols during the River Run

preceded the April 27, 2002, incident which resulted in a violent confrontation in Rosa's Cantina at Harrah's Laughlin Casino between the two clubs.

The government alleges that in the early morning hours of April 27, 2002, a large group of Mongols were socializing and gambling inside Harrah's Laughlin Casino and that a small group of Hells Angels members and prospects were in the casino, socializing in one of Harrah's bars, Rosa's Cantina. At approximately 2:00 a.m., HAMC members at the Flamingo Laughlin received a telephone call from HAMC members at Rosa's Cantina requesting support for a violent confrontation with the Mongols. As a result, several groups of HAMC members left the Flamingo Laughlin on their motorcycles and headed toward Harrah's. Las Vegas Metropolitan Police Department ("LVMPD") gang detectives followed one large group of HAMC members, and observed HAMC members from other locations in Laughlin converging on Harrah's. A LVMPD sergeant pulled into the Harrah's valet area, concerned about a confrontation between the two groups. His marked police car was surrounded by HAMC members who ignored his police lights, left their motorcycles with the keys in the ignitions, and ran or walked into the hotel to the area of Rosa's Cantina. A group of HAMC members confronted a group of Mongols and after "a short discussion" one of the HAMC members, Raymond Foakes, allegedly kicked one of the Mongols members. Bedlam ensued. Weapons were drawn by both groups. Members of both groups sustained multiple injuries, and three men were killed inside the casino area

***2** Law enforcement closed the casino and detained seventy-eight HAMC members and associates and forty-two Mongols members and their associates. A federal indictment was not returned until December 3, 2003. The indictment charges only members and associates of the HAMC.

Pearce's Proffer Motion

In the current motion, Steven Pearce ("Pearce") seeks disclosure of proffer information provided by informants and cooperating witnesses in this case which includes: initial discussions between the U.S. Attorney's Office and the cooperating individual and the cooperating individual's counsel; the proffer itself; discussions between the U.S. Attorney's Office and case agent regarding their respective opinions as to the completeness and truthfulness of the proffer; discussions regarding the benefits to be offered to the cooperator; and the actual benefits ultimately conferred. Pearce anticipates that some of the forty-two defendants may plead guilty and provide information to the government to obtain a sentence reduction. He also believes the government may have obtained pre-indictment plea agreements from a number of individuals not charged in this case. He argues that if the government intends to use these witnesses, all of the information he seeks is *Brady* material because it impacts the cooperators' ultimate credibility.

The government's response indicates that the government will produce some of the information requested "in a timely fashion." Specifically, the government has agreed to produce the terms of all agreements and inducements with testifying cooperating witnesses or defendants; information that a testifying cooperating witness has provided conflicting or untruthful information, has failed a polygraph or has otherwise breached the terms of his or her plea agreement with the government; the potential range of a "substantial assistance" sentencing guideline departure based on the anticipated cooperation of the testifying witness, if that range was communicated to the cooperating witness and/or the witness's attorney; the criminal record of the testifying cooperating witness material to credibility; monetary payments made by the government to the testifying cooperating witness; and prior statements of the testifying cooperating witnesses. The government opposes production of materials related to initial discussions between the assigned AUSAs and cooperators' counsel; the actual proffer of the cooperator, and statements of counsel; and the initial discussions between the AUSAs and the case agent regarding opinions as to the completeness and truthfulness of the proffer.

DISCUSSION

Pearce describes his understanding of the proffer system, acknowledges that the proffer system *may* be necessary to our system of justice, but argues it can encourage perjury because government counsel and the case agent sometime suggest the cooperator is withholding information and further suggest what information the cooperator could provide if he or she was being completely candid. He seems to suggest that because, at times, the cooperator is told by his own lawyer what the government expects to hear when he is debriefed in a proffer session that the jury should be made aware of this information. He reasons the jury may determine that the cooperator changed

his story during the proffer process to "curry favor with the government and earn more cooperation points." (Motion (# 301), p. 3.) Additionally, he argues that while cooperators are frequently given plea agreements which indicate the government does not commit to a specific amount of downward departure, the "cooperator often has an expectation of the amount the government may recommend." *Id* If the AUSA and cooperator's counsel talked about the possible range for downward departure, Pearce argues the defense and jury should know this because (1) the *amount* of downward departure versus the *fact* of downward departure depends on the quality of the information provided and (2) if the range was discussed with the cooperator's counsel but not mentioned in the plea agreement, it "may affect the cooperator's state of mind." *Id.* at 4. Pearce also asserts that any variance in a statement of an informant or cooperating witness is *Brady* material, and that the content of negotiations regarding the amount of downward departure is also *Brady* material.

***3** Pearce relies heavily on a decision granting a motion for discovery by District Judge Pregerson in *United States v. Sudikoff,* 36 F.Supp.2d 1196 (C.D.Cal.1999). There, Judge Pregerson held that *Brady v Maryland,* 373 U.S. 83 (1963), requires pretrial disclosure of exculpatory information that is either admissible or reasonably likely to lead to admissible evidence. Finding that the normal materiality standard associated with *Brady* should not apply to pretrial discovery of *Brady* material, he ordered the government to disclose:

> all proffers by any witnesses receiving any benefit, whether immunity or leniency, in return for testimony. Included in this category are any proffers made by lawyers for such witnesses. By "proffers" the Court refers to statements that reflect an indication of possible testimony, whether or not it seems likely that the witness would actually so testify. In addition, the government must disclose any notes or documents created by the government that reflect this information. Further, the government must disclose any material that indicates any variations in the witness's proffered testimony.
>
> The government must also disclose to the defendants any information in its possession that reveals the negotiation process by which the immunity agreement was reached. This includes materials authored by a witness, a witness's lawyer, or the government.

36 F.Supp.2d at 1206.

Judge Pregerson's order in *Sudikoff* thoughtfully discussed *Brady* and its progeny. He disagreed with the "materiality" standard usually associated with *Brady* for pretrial discovery purposes, and found it should not be applied to pretrial discovery of exculpatory materials. He pointed out how the prosecutor's *Brady* obligations are usually examined in the context of appellate review where the failure to disclose evidence is considered 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. *Id.* at 1198, *citing, Ortiz v Stewart,* 149 F.3d 923, 935 (9th Cir.1998), *quoting, United States v Bagley,* 473 U.S. 667, 682 (1985). He reasoned that just because a prosecutor's failure to disclose evidence does not violate a defendant's due process rights does not mean that the failure to disclose is proper. *Id* at 1199. On appellate review of a conviction, the *Brady* materiality standard examines whether a defendant was prejudiced from admittedly improper conduct. However, the absence of prejudice to the defendant does not condone the prosecutor's suppression of exculpatory evidence. Judge Pregerson, therefore, determined that the proper test for pretrial disclosure of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense, i.e., whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses. *Id.* He also found that if doubt exists, it should be resolved in favor of the defendant and full disclosure made. *Id* He, therefore, held that the government was obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, even if the evidence is not admissible so long as it is reasonably likely to lead to admissible evidence. *Id* at 1199-1200.

***4** Judge Pregerson found that the proffers of the government witnesses and other materials that would show how the immunity agreement in that case was reached was information that "might reasonably be considered favorable to the defendant's case," and likely to lead to admissible evidence. *Id.* at 1201. He also found "that any variations in an accomplice witness's proposed testimony could be considered favorable to the defense and the existence of such differences should be disclosed under *Brady.*" *Id.* at 1202. He held that witness proffers and other information of this ilk fall within the scope of *Giglio v United States,* 405 U.S. 150 (1972), which

obligates prosecutors "to turn over to the defense in discovery all material information casting a shadow on a government witness's credibility." *Id* at 1203, *quoting, United States v. Bernal-Obeso,* 989 F.2d 331, 334 (9th Cir.1993), *citing, United States v. Shaffer,* 789 F.2d 682, 689 (9th Cir.1986). He recognized that *Giglio* concerned only the suppression of the existence of a leniency agreement, but found that "information that illuminates the process leading up to the agreement may 'cast a shadow' on an accomplice witness's credibility in a manner that disclosure of only the agreement itself would not accomplish." *Id* He concluded that information that reveals the process by which a leniency agreement was reached "is relevant to the witness's credibility because it reveals the witness's motive to testify against the defendant" and is, therefore, "discoverable under *Brady* and *Giglio.*" *Id*

The government argues that the discovery it opposes producing is not *Brady* information because it is not material, i.e., evidence for which "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" citing, *United States v. Bagley,* 473 U.S. 667, 682 (1985). The government points out that the Supreme Court has repeatedly held that *Brady* is not a discovery rule, and that a prosecutor only violates his constitutional duty to disclose if "his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *Bagley,* 473 U.S. at 676, *quoting, United States v Agurs,* 427 U.S. 97, 108 (1976). The government characterizes Judge Pregerson's ruling in *Sudikoff* that the materiality standard should not be applied in the context of pretrial discovery as "flawed." The government argues that it is impossible to reconcile *Sudikoff* with the Supreme Court's decisions holding that *Brady* does not create a constitutional right to additional discovery in criminal cases. The government also argues it is impossible to reconcile *Sudikoff's* pretrial *Brady* standard with the Supreme Court's unambiguous holdings that no constitutional violation occurs unless the prosecutor withholds evidence material to guilt or punishment, and that "materiality" means evidence for which there is a reasonable probability that had it been disclosed, a different verdict would have resulted.

***5** The government also argues that the Supreme Court expressly rejected the "reasonably likely to lead to admissible evidence" standard in *Wood v Bartholomew,* 516 U.S. 1 (1995). In *Wood,* the government failed to disclose the results of a polygraph examination of a key witness. The Ninth Circuit reversed the district court's denial of habeas relief for this failure, finding that the polygraph results may have had an adverse effect on pretrial preparation by the defense. The Supreme Court reversed, finding the Ninth Circuit had misapplied its "*Brady* jurisprudence." The Supreme Court found the Ninth Circuit's conclusion that disclosure of the polygraph results might have lead the defendant's counsel to conduct additional discovery that might lead to admissible evidence was "mere speculation, in violation of the standards we have established." 516 U.S. at 5. Examining the record below, including the testimony of the defendant's trial counsel, the Supreme Court found it was not "reasonably likely" that disclosure of inadmissible polygraph results would have resulted in a different outcome at trial. *Id* at 8.

ANALYSIS

A. The Prosecutor's *Brady* and *Giglio* Duties

The Supreme Court has clearly held that defendants have no constitutional right to discovery in criminal proceedings. *Weatherford v. Bursey,* 429 U.S. 545, 559 (1977). In *Brady,* the Supreme Court held that the government's obligation to disclose favorable evidence is limited to evidence that is material to the defendant's guilt or punishment. 373 U.S. at 87. In *Bagley,* a plurality of the Supreme Court rejected the Ninth Circuit's "automatic reversal" for nondisclosure of impeachment evidence and remanded the case to determine whether the disclosure of witness compensation was reasonably probable to have produced a different result. 473 U.S. at 684. *Bagley* held that evidence is material if there is a reasonable probability the disclosure of the evidence would have changed the outcome of the proceeding. *Id* at 682.

In *Kyles v. Whitley,* the Supreme Court explained that the materiality standard examines whether, in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. 419, 434 (1995). Kyles was charged with capital murder. He filed a lengthy pretrial discovery motion seeking exculpatory and impeachment evidence. The prosecution responded that it had no exculpatory evidence of any nature despite knowing about a number of inconsistent statements made by a key witness, variations in the eye witness accounts and identifications, evidence linking the witness to other

crimes including an unrelated murder, and other documents. At the first trial, which resulted in a hung jury, the State primarily relied on eye witness testimony. Kyles maintained his innocence, called witnesses, supplied an alibi, and defended the case by claiming he had been framed by the witness who planted evidence in his apartment and trash to divert suspicion away from the witness. The Supreme Court found, "Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested." *Id.* at 429. After the mistrial, the key witness again changed important elements of his story, but the prosecutor still failed to turn over his prior inconsistent statements. Kyles was convicted of first degree murder and sentenced to death.

***6** On habeas review, the Supreme Court followed "the established rule that the state's obligation under *Brady v Maryland* ... to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government" and held that "the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." *Id* at 421 (citation omitted).

The *Kyles* decision comprehensively discussed *Bagley,* holding constitutional error occurs for undisclosed evidence only if the evidence was material, and exhaustively explained the four aspects of materiality. First, a reasonable probability of a different result is shown when the government's suppression of evidence undermines confidence in the outcome of the trial. Second, a *Brady* violation is shown when "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. Third, once a reviewing court, applying *Bagley,* has found constitutional error, there is no need for further harmless error review. Fourth and finally, whether suppressed evidence is material is "considered collectively, not item by item." *Id.* at 436. As the court explained:

> We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and 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.

Id. (citations omitted).

Kyles also recognized that the prosecution has the responsibility "to make judgment calls about what would count as favorable evidence" and that "the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." *Id.* at 439. The prosecutor is a representative of the government "whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id., quoting, Berger v. United States,* 295 U.S. 78 (1935) (internal quotations omitted). Therefore, the prudent prosecutor will resolve doubtful questions in favor of disclosure.

Similarly, in *Strickler v. Greene,* the Supreme Court explained:

> 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.

527 U.S. 263, 281-82 (1999).

The Ninth Circuit has considered a series of cases involving the government's failure to turn over potentially exculpatory materials in pretrial discovery. In *United States v. Ciccone,* 219 F.3d 1078 (9th Cir.2000), the Ninth Circuit was troubled by the government's failure to disclose a presentence report of a "co-schemer" who testified at trial. The report revealed the witness had been arrested several times, had a felony conviction for wire fraud, and a history of alcohol use. However, the Ninth Circuit concluded that the failure to disclose "was not sufficiently prejudicial to warrant a new trial both because the evidence against Ciccone was overwhelming and he vigorously cross-examined Miller." 219 F.3d at 1086. The witness admitted on cross-examination that he had been previously convicted of wire fraud, told the jurors about his plea agreement with the government, and admitted he suffered from alcoholism and had an impaired memory. *Id.* In *United States v. Henke,* the Ninth Circuit held that the trial court did not err by failing to conduct an *in camera* review of the government's notes from interviews with a key witness to ensure the notes did not contain exculpatory *Brady* material, finding that the defendants had made no showing that they might discover something exculpatory or impeaching, and had, therefore, not triggered the district court's obligation to review the privileged

notes *in camera.* 222 F.3d 633, 642 (9th Cir.2000).

***7** Payments to witnesses are *Brady* material. *Bagley v Lumpkin,* 798 F.2d 1297, 1302 (9th Cir.1986). Cooperation agreements are *Brady* material. *United States v. Kojayan,* 8 F .3d 1315, 1322 (9th Cir.1993). Government information criticizing the integrity of the confidential informant are *Brady* materials. *United States v. Brumel-Alvarez,* 991 F.2d 1452, 1458 (9th Cir.1992). A prosecutor's interview notes of a government witness constitute *Brady* material to the extent they contain evidence of conflicting statements by the witness. *United States v Service Deli, Inc.,* 151 F.3d 938, 942-43 (9th Cir.1998). Rough interview notes of federal agents ordinarily need not be disclosed pursuant to the Jencks Act, *United States v Alvarez,* 86 F.3d 901, 904 n.2 (9th Cir.1996), but must be preserved, *United States v. Durham,* 941 F.2d 858, 860-61 (9th Cir.1991). However, although rough notes are not ordinarily discoverable under Jencks, they "must be disclosed pursuant to *Brady* if they contain material and exculpatory information." *Alvarez,* 86 F.3d at 904 n.2 .

The Ninth Circuit has also held that generally, disclosure of *Brady* material is to occur before trial, *United States v Nagra,* 147 F.3d 875, 881 (9th Cir.1988), and the disclosure must be made at a time when it would be of value to the accused, *United States v. Aichele,* 941 F.2d 761, 764 (9th Cir.1991). However, it is also clear that the court lacks authority to force the government to produce Jencks Act statements before the witness testifies, *United States v Mills,* 641 F.2d 785, 789-90 (9th Cir.), *cert denied,* 454 U.S. 902 (1981), and that an order requiring early disclosure is unenforceable, *United States v Taylor,* 802 F.2d 1108, 1118 (9th Cir.1986), *cert. denied,* 479 U.S. 1094 (1987).

Brady and its progeny are based on a defendant's due process rights to a fair trial. The Supreme Court has never reversed a conviction for a *Brady* violation unless it has found that the government's failure to disclose evidence denied the defendant a fair trial. Judge Pregerson pointed out in *Sudikoff* that *Brady* emphasized the importance of ensuring that criminal trials are fair and that the proceedings comport with standards of justice:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.

Brady, 373 U.S. at 87-88.

The Supreme Court and Ninth Circuit have held prosecutors must turn over material exculpatory evidence in pretrial discovery, not all exculpatory evidence however insignificant. *Kyles'* articulation of the four prong test for determining materiality persuades the court that the Supreme Court would reject the position taken by Pearce, supported by *Sudikoff,* that all exculpatory evidence and information that might lead to the discovery of admissible evidence is subject to mandatory pretrial disclosure under *Brady* and *Giglio.* Judge Pregerson's decision in *Sudikoff* is a significant departure from the Supreme Court's articulation of the prosecutor's constitutional *Brady* obligations.

***8** The government has agreed to timely produce the terms of all agreements and inducements with testifying cooperating witnesses or defendants; information that a testifying cooperating witness has provided conflicting or untruthful information, has failed a polygraph, or has otherwise breached the terms of his or her plea agreement with the government; the potential range of a "substantial assistance" sentencing guideline departure based on the anticipated cooperation of the testifying witness, if that range was communicated to the cooperating witness and/or the witness's attorney; the criminal record of the testifying cooperating witness material to credibility; monetary payments made by the government to the testifying cooperating witness; and prior statements of the testifying cooperating witness. However, the government opposes producing materials related to initial discussions between the assigned AUSAs and the cooperators' counsel; the actual proffer of the cooperator, and statements of counsel; and the initial discussions between the AUSAs and the case agent regarding opinions as to the completeness and truthfulness of the proffer. The court agrees that *Brady* and its progeny do not create a constitutional duty requiring the prosecutor to disclose these materials in pretrial discovery unless the information is material. Pearce has not shown that the information he seeks in pretrial discovery is exculpatory or impeaching, only that he suspects it may be, or will lead to the discovery of admissible evidence.

Prosecutors are required to make the initial determination of whether the pretrial discovery the defendant requests is material. The prosecutor's responsibility to make judgment calls about what information constitutes *Brady* and *Giglio* material may cause defense counsel some angst. However, the prosecutor's duty to determine whether information in its possession requires pretrial disclosure is no different than the duty imposed on counsel for litigants in both civil and criminal litigation to exercise their professional judgment in making discovery disclosures required by the rules of civil and criminal procedure. The prosecutor who does not err in favor of disclosure runs the risk of reversal.

The government has agreed to turn over a substantial amount of information concerning agreements reached with cooperating witnesses. Government counsel have declined to produce specified categories of information relying on *Brady's* materiality standard for pretrial disclosure purposes. The issue for the court to determine is, therefore, whether the information the government objects to producing is *Brady* material, and what standard the court should employ in determining whether pretrial disclosure is required.

The government objects to producing materials concerning the initial discussions between the cooperator and his or her counsel with the government. Pearce argues these should be recognized as *Brady* materials because the proffer process shapes, influences, and forms the testimony of the cooperator before the first debriefing occurs, and that traditionally all the defense receives is the finished product, or proffer. The court agrees that if the cooperator makes inconsistent statements during the proffer process, those inconsistent statements must be regarded as exculpatory *Brady* material inasmuch as they impeach the credibility of the cooperator. It does not follow, however, that all of the notes, memoranda, and mental impressions of the participants are necessarily *Brady* material. Just as defense counsel may have a paralegal or investigator interview a potential witness and ask only outline questions, prosecutors and federal agents may make preliminary inquiries that do not illicit the details the formal proffer eventually does. Less detailed prior statements by the cooperator or counsel about what information the cooperator can offer are not necessarily, or even usually, prior inconsistent statements. Nor are less detailed general statements necessarily an indication the prosecutors are attempting to shape or influence testimony or encourage perjury. The court will, therefore, not order that all materials related to the initial discussions between the cooperator and cooperator's counsel and the government be disclosed.

***9** Next, the government opposes producing the proffer of the cooperator and any statements of counsel. Government counsel does not articulate a specific objection to producing this material other than a general criticism of Judge Pregerson's analysis in *Sudikoff,* and argument that *Brady* is not a rule of discovery, but a due process requirement which imposes a constitutional duty of disclosure only if the discovery is material, i.e., only if the prosecution's failure to disclose the material creates a "reasonable probability" of a different outcome at trial. On the one hand, the Jencks Act provides that the government, on motion of the defendant, must disclose any statement or report of a government witness in the government's possession after that witness has testified on direct examination at trial. 18 U.S.C. § 3500(a), (b). The Ninth Circuit has held that trial courts lack authority to force the government to produce Jencks Act statements before the witness testifies, *United States v. Mills,* 641 F.2d 785, 789-90 (9th Cir.1981), and that an order requiring earlier disclosure is unenforceable, *United States v. Taylor,* 802 F.2d 1108, 1118 (9th Cir.1986). On the other hand, *Brady* requires *pretrial* disclosure of exculpatory information in time for it to be a value to the accused. *United States v. Nagra,* 147 F.3d 875, 881 (9th Cir.1998); *United States v Aichele,* 941 F.2d 761, 764 (9th Cir.1991). If the government intends to rely on the proffers of cooperators, it can only be because government counsel regard the proffers as inculpatory rather than exculpatory evidence. The responsibility for determining whether the proffers of the cooperators and statements of their counsel are covered by the Jencks Act, and, therefore, not subject to disclosure until after the witness testifies, or, in the alternative, are *Brady* materials is the responsibility of the prosecutor to gauge The prudent prosecutor will err in favor of disclosure. The court will not, however, order the prosecutors to produce the proffers and any statements of counsel in pretrial disclosure, fully expecting the prosecutors will make the judgment call *Brady* requires and err in favor of disclosure.

Finally, the government objects to producing materials related to the initial discussions between the AUSAs prosecuting this case and the case agent

concerning the completeness and truthfulness of the proffer. Again, whether these materials are protected from disclosure under the Jencks Act, or exculpatory materials the prosecutor is obligated to produce pretrial pursuant to *Brady,* is a judgment call the prosecutors are obligated to make.

B. The Defendant's Confrontation Rights

At the hearing, Pearce offered the Ninth Circuit's recent decision in *Murdoch v. Castro,* 365 F.3d 699 (9th Cir.2004), as additional support for his proffer motion. In *Murdoch,* the Ninth Circuit held that the trial court's failure to turn over an attorney-client privileged letter of a prosecution witness to his attorney violated the defendant's Sixth Amendment confrontation rights. The prosecution witness was an accomplice in a murder and robbery case who initially denied any involvement when questioned by police, but later recanted, admitted his own involvement in the robbery, and identified Murdoch as one of his accomplices. He was tried and convicted of first degree murder and sentenced to twenty-five years to life. At his sentencing, the sentencing judge suggested that his sentence might be subsequently reduced if he cooperated and testified against Murdoch. In the words of the Ninth Circuit, he "took the hint and agreed to testify against Murdoch in return for a reduction of his conviction to voluntarily manslaughter with a sentence of twelve years." 365 F.3d at 701 Prior to opening statements, the prosecutor informed the court and defense counsel she had discovered the existence of a letter written by the witness, Dinardo, to his attorney in which he exonerated Murdoch and claimed his own statements to the contrary had been coerced by police The witness' attorney had the letter and asserted the attorney-client privilege. The trial court took possession of the letter without allowing Murdoch's lawyer or the prosecutor to see it, read it, ruled the witness was entitled to the privilege, and returned the letter to his attorney, ordering that it be preserved for appeal. The Ninth Circuit vacated the district court's denial of Murdoch's habeas corpus petition and remanded the case to the district court, instructing it to obtain the letter and determine *in camera* whether, under the totality of the circumstances of the case, the denial of access to the letter resulted in an unconstitutional denial of Murdoch's Sixth Amendment right to confront witnesses.

***10** The court is not persuaded, however, that *Murdoch* mandates pretrial disclosure of the information Pearce seeks. The Sixth Amendment does not guarantee that a defendant have all material he seeks to impeach a witness. It only guarantees "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer,* 474 U.S. 15, 20 (1985) (per curiam). Generally, that right is satisfied when the defendant has a full and fair opportunity to probe any inconsistencies in the witnesses' statements. *Id.* at 22.

C. The Prosecutor's Special Responsibilities

Notwithstanding the constitutional duties imposed on prosecutors by *Brady* and its progeny, the prosecutor has special professional responsibilities. The ABA Standards for Criminal Justice and the Nevada Rules of Professional Conduct outline those special responsibilities. Local Rule IA 10-7 requires that an attorney admitted to practice in this district "shall adhere to the standards of conduct prescribed by the Model Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Nevada, except as may be modified by this court." Local R. IA 10-7(a). The Nevada Supreme Court has adopted the Model Rules of Professional Conduct as adopted by the House of Delegates of the American Bar Association on August 2, 1983, with certain amendments. *See* Nev. Sup.Ct. R. 150. The Nevada Rules of Professional Conduct are set out in Supreme Court Rules ("SCR") 150 through 203 .5. SCR 179 governs the special responsibilities of a prosecutor and provides in part:

> The prosecutor in a criminal case shall:
> 4. Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense, 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 ....

Nev. Sup.Ct. R. 179(4) (1986).

Thus, prosecutors in this district and elsewhere are obligated to timely disclose to the defense evidence or information known to the prosecutor that tends to negate guilt of the accused or mitigate the offense, whether or not these disclosures meet *Brady's* materiality standard. Independent of *Brady* and its progeny, the prosecution has the responsibility to timely disclose to the defense all evidence or

information known to the prosecutor that tends to negate guilt or mitigate the offense. This includes disclosure of items under the control of the government. *Aichele,* 941 F.2d at 764. Moreover, the prosecutor is "deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant." *United States v. Zuno-Arce,* 44 F.3d 1420, 1427 (9th Cir.1995) (internal quotations omitted).

D. Timing of Disclosures

***11** This is a complex case involving voluminous discovery materials in audio, visual, and electronic format Seventy-five thousand pages of documents have been produced in electronic format, and counsel for the parties indicate there may be an additional three hundred thousand pages of documents related to investigation of the Hells Angels and Mongols in other jurisdictions. Approximately thirty-eight video tapes and audio tapes have been produced in discovery, and more than four hundred video tapes from Harrah's security cameras are in the process of being copied, labeled, and indexed. Counsel for the parties have estimated that there are approximately five hundred witnesses to the melee which resulted in injuries and deaths that are cited in the indictment. The parties anticipate relying on a series of expert witnesses.

The government has agreed to produce some of the information Pearce requests "in a timely fashion," but has not specified what it regards as timely. Given the nature of the allegations, the number of defendants, the number of witnesses, and the government's position that all forty-two defendants should be tried together, the court finds these materials should be disclosed no later than 60 days prior to trial. The court fully expects the government counsel will produce *Brady* materials and disclosures required by SCR 179 in an orderly fashion well in advance of this cutoff to the extent practicable.

The court has now reminded the prosecutors of their professional obligations independent of *Brady* and its progeny, and trusts that government counsel will take those obligations seriously. Without suggesting government counsel have not, or will not, meet the special responsibilities imposed upon them by the Rules of Professional Conduct, the court will order pretrial disclosure of all evidence or information known to the prosecutors that tends to negate guilt or mitigate the offenses, whether or not that information is material in the sense that there is a reasonable probability if it is not turned over to the defense the result of the trial may be different, no later than 60 days prior to trial.

CONCLUSION

Under *Brady* and its progeny, the government is only constitutionally obligated to disclose favorable evidence material to the defendant's guilt or punishment. Evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. However, prosecutors have special duties imposed by the Rules of Professional Conduct which are independent of *Brady* and its progeny. The government has agreed to produce broad categories of discovery the defendant seeks, but opposes producing certain information, arguing the requests do not meet *Brady's* materiality standard. While the court agrees with government counsel's analysis that *Brady* and its progeny do not create a constitutional duty to disclose nonmaterial exculpatory evidence in its possession in pretrial discovery, the court will require the prosecutors to meet their obligations under the Rules of Professional Conduct. Given the complexity of this case, and the need for the orderly preparation for and conduct of the trial, the court will require the government to turn over evidence that tends to negate guilt or mitigate the offenses charged no later than 60 days before trial.

***12** Having reviewed and considered the matter,

IT IS ORDERED:

1. Defendant Steven Pearce's Motion for Disclosure of Proffer Information (# 301) is GRANTED to the extent the prosecutor shall timely disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offenses charged, and DENIED in all other respects.
2. For purposes of this ruling, disclosures shall be made no later than January 28, 2005, unless, for good cause shown, the prosecutor obtains a protective order.

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2005 WL 281232 (D.Nev.)

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, consultant

RE: Proposed New Rule 49.1, to Implement E-Government Act

DATE: March 15, 2005

Each of the Rules Committees has been asked to consider on an expedited basis amendments that would authorize electronic filing with appropriate exceptions. In order to aid the committees, a standard template has been developed, which can be adapted to suit the special needs of each type of proceeding.

Professor Daniel Capra, the draftsman charged with the development of the template, attended the Santa Fe meeting at which the Committee discussed a version of the template. Judge Bucklew appointed a subcommittee, chaired by Judge Bartle, to continue work on proposed Criminal Rule 49.1.

Professor Capra has continued to revise the template, based upon the work of the other Rules Committees. The revised template provided by Professor Capra is attached. Because some of the changes made by Professor Capra occurred after distribution to the subcommittee members, and have not yet been discussed by them, I have shown these changes as strikeouts or inserts. The subcommittee expects to supplement this agenda book with additional material before our meeting.

This item is on the agenda for the April meeting in Charleston.

Revised Privacy Template

Date: March 16, 2005.

Rule [ ] Privacy Protection For Filings Made with the Court[1]

(a) ~~Limits on Information Disclosed in a Filing~~ Redacted Filings. Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number,[2] ~~a minor's name~~ a name of a person known to be a minor,[3] a person's birth date, [or] a financial account number [or the home address of a person][4] may include only

> **(1)** the last four digits of the social-security number and tax-identification number;

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[1] The Appellate Rules Committee has tentatively determined that it will seek to draft and approve a "piggy-back" version of the template. The piggy back version will provide that if a filing has been made with the lower court, the rules of the lower court would continue to apply to the filing in a court of appeals. With respect to first-time filings in the court of appeals, the parties will have to comply with the e-privacy rule that would have been applicable had the filing been made in the district court. Accordingly, this template provides the basis for the e-privacy projected e-privacy provision in the Bankruptcy, Civil and Criminal Rules.

[2] The change is made to clarify that corporate tax identification numbers are not subject to the redaction requirement.

[3] This change was suggested by the Committee on Bankruptcy. The Committee noted that there may be situations in which the filing party may not know that a certain person is a minor.

[4] The coverage of home address is for the Criminal Rules Committee only. The other Advisory Committees have decided that it is unnecessary, and perhaps problematic, to delete the full address from court filings. In criminal cases, however, there may be special concerns for protecting victims and witnesses from disclosure of a complete address. The model local rule prepared by CACM imposes a redaction requirement for addresses in criminal cases only.

The Criminal Rules Committee will consider whether the redaction requirement for addresses should be narrowed to cover only the addresses of alleged victims and prospective witnesses. CACM's model rule contains no such narrowing, but it is fair to state that CACM did not consider the possibility of limiting the protection to victims and witnesses.

(2) the minor's initials;

(3) the year of birth; [and]

(4) the last four digits of the financial account number. [and]

[(5) the city and state of the home address.][5]

(b) Exemptions from the Redaction Requirement. The redaction requirement of Rule [ ] (a) does not apply to the following:

(1) in a civil or criminal forfeiture proceeding, a financial-account number that identifies the property alleged to be subject to forfeiture;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to (a) when originally filed;

(5) a filing covered by (c) or (d) of this rule; [6][and]

[(6) a filing made in an action brought under 28 U.S.C. section 2254 or 2255; [7]

(7) a filing made in an action brought under 28 U.S.C. section 2241 that does not

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[5] The redaction requirement for home addresses is to be included, if at all, only in the Criminal rule.

[6] This addition is intended to clarify that social security cases, immigration cases, and sealed filings are exempt from the redaction requirements.

[7] The Criminal Rules Committee has determined, at least preliminarily, that filings in habeas actions should be exempt from the redaction requirement. Civil Rules may wish to consider whether to include a reference to habeas actions in the text of its rule, or otherwise in the Committee Note. Judge Rosenthal would favor including a reference to habeas actions in the text of the rule, as they account for a significant percentage of civil suits.

relate to the petitioner's immigration rights;[8]]

[**(8)** a filing in any court in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case;

(9) an arrest warrant;

(10) a charging document—including an indictment, information, and criminal complaint—and an affidavit filed in support of any charging document; and

(11) a criminal case cover sheet.][9]

[(c) Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases. In an action for benefits under the Social Security Act, and in an action under Title 8, United States Code relating to an order of removal, release from removal, or immigration benefits or detention, access to an electronic file is authorized as follows, unless the court orders otherwise:

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

(2) all other persons may have electronic access to the full record at the courthouse, but 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

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[8] It has been noted that some immigration cases are brought under section 2241. The rule as written would therefore provide that an immigration proceeding brought under section 2241 would not be available to non-parties by remote access.

[9] Bracketed subdivisions 8-11 are to be included, if at all, in the Criminal Rule only. DOJ has agreed to provide more information on the character of, and the necessity for exemption of, criminal case cover sheets.

other part of the case file or the administrative record.][10]

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.[11]

(e) Protective Orders. 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 in a case 1) require redaction of additional information, or 2) limit or prohibit remote access by nonparties to a document filed with the court. [12]

(f) Option for Additional Unredacted Filing Under Seal. A party making a redacted

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[10] This subdivision (c) is intended to be included, if at all, in the Civil Rules only. The Criminal Rules Committee has determined that there is no need for such an exception in the Criminal Rules, and there would appear to be no need for the exception in the Bankruptcy Rules.

The special treatment for immigration cases was added to the template at the request of the Justice Department and tentatively approved by the Civil Rules Committee.

[11] This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

[12] This subdivision has been revised to specify that a judge can take security interests into account in deciding whether to redact information not covered by the general redaction requirement. The proposed reference to widespread disclosure was deleted by the Bankruptcy Committee on the ground that a court may find it necessary to redact information due to the risk that it could be used by certain individuals, even though the risk of "widespread disclosure" would not exist.

This subdivision runs the risk of conflicting with the burgeoning case law that limits sealing orders. A paragraph has been added to the Committee Note to specify that nothing in this subdivision is intended to affect that case law. Nonetheless, there is a concern that this subdivision could be misused as some kind of general authority for protective orders and sealing orders. The Committee may wish to consider whether to delete this subdivision and rely on other law for protections greater than provided in subdivision (a).

filing under (a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains information redacted under (a) 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. Any references in the case to an identifier ~~included~~ in the reference list will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information to the extent that such information is filed not under seal and without redaction ~~by filing that information without redaction~~.[13]

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 regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. 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 in the E-Government Act.

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.

While providing for the public filing of some information, such as the last four

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[13] This change was adopted by the Bankruptcy Committee. The concern expressed was that otherwise a party who filed an unredacted document under seal could be found to have waived the protections of the Rule.

digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e).[14] Moreover, the Rule does not affect the protection available under other rules, such as [Civil Rules 16 and 26(c)], or under other sources of protective authority.[15]

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.

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.

[Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence 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 unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.] [16]

Subdivision (e) provides that the court can order in a particular case require more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to

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[14] This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

[15] This sentence was suggested by the Civil Rules Committee, and obviously must be adapted to protective rules that exist in the other rules if this language is to be included in the Note.

[16] This paragraph of the Note is for the Civil Rules only.

the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (g) of the rule refers to "redacted" information. 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.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and 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.

Trial exhibits are subject to the redaction requirements of Rule [ ] to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons. [17]

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants;
> - pretrial bail or presentence investigation reports;

[17] This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule, because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.

- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)

The privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d). [18]

[18] The underlined material is a new addition to the Committee Note that addresses a CACM commentary concerning certain documents that might be filed but should not be made part of the "criminal case file." The term "criminal case file" is not defined, and it is difficult to mesh with the E-Government Act and the template, both of which presume that if a document is filed with the court it is subject to remote electronic access. The paragraph tries to solve this disconnect by stating that such documents — even though filed and thus subject to remote access — can be sealed by the court.

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

FROM: **Professor Sara Sun Beale, consultant**

RE: **Rules 4 and 5, Proposals of Professor Linda Malone**

DATE: **March 14, 2005**

Professor Linda Malone (Marshall-Wythe Professor and Director of Human Rights and National Security Law at William and Mary School of Law) has written suggesting that Rules 4 and 5 be amended to provide that foreign citizens be advised of their right to contact the consulate of their county when they are served with an arrest warrant or arraigned. Professor Malone submits that these amendments are necessary to implement the Vienna Convention on Consular Relations.

Professor Malone's letter and memorandum are attached.

This item is on the agenda for the April meeting in Charleston.

The College Of
WILLIAM & MARY

School of Law
P.O. Box 8795
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Linda A. Malone
Marshall-Wythe Foundation Professor of Law and
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05-CR-A

March 3, 2005

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and
Procedure of the Judicial Conference of the United States
1 Columbus Circle Northeast
Washington, D.C. 20544

Dear Mr. McCabe:

The attached memo suggests amendments to rules 4 and 5 of the Federal Rules of Criminal Procedure. The suggested amendments are required to ensure U.S. compliance with international treaty obligations.

Article 36 of the Vienna Convention provides consular access rights to foreign nationals arrested or detained abroad. These rights were affirmed by *LaGrand* and *Avena*, two recent International Court of Justice cases. The United States is bound by the Supremacy Clause to comply with the Vienna Convention and to comply with these International Court of Justice decisions to which it is a party. Therefore, the United States is obligated by Constitutional requirements and treaty obligations to provide arrested or detained foreign nationals with the requisite consular access rights. Despite the federal government's significant efforts to ensure compliance with this obligation, foreign nationals arrested or detained in the Unites States are often denied consular access rights.

A recent Supreme Court writ highlights the pressing necessity for this amendment. In December 2004, the Supreme Court granted a writ of certiorari in *Medellin v. Dretke*. In that case, the federal appellate court had denied the appeal of a Mexican national who was sentenced to death in the United States after being denied consular access rights. In *Medellin* the Supreme Court must determine how to implement *Avena*'s holding that failure to provide consular notice mandates judicial review and reconsideration of any conviction and sentence imposed without such notice.

The United States has acknowledged its obligation to comply with Article 36 consular access requirements. These suggested amendments to the Federal Rules of Criminal Procedure are not merely advisable, but mandated by Article 36(2) of the Vienna Convention which requires State-parties to the Convention to see that domestic laws and regulations give "full effect" to the notice requirement.

I hope that this urgent amendment can be placed on the Committee agenda for its next meeting April 4-5. I would be pleased to answer any questions the Committee might have, and plan to attend the meeting to provide whatever assistance I can.

Thank you very much.

Sincerely,

Linda A. Malone

Linda A. Malone
Marshall-Wythe Foundation Professor of Law and
Director of the Human Rights and National Security
Law Program

Attachment

The College Of
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March 3, 2005

TO: Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

FROM: Linda Malone, Marshall-Wythe Foundation Professor of Law, College of William & Mary, Marshall-Wythe School of Law

RE: Suggested amendment to Federal Rules of Criminal Procedure

MEMORANDUM IN SUPPORT OF AN AMENDMENT TO RULES 4 AND 5 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, BASED ON ARTICLE 36 OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

Introduction

In 1969, the United States ratified The Vienna Convention on Consular Relations, a multilateral treaty that codified existing international law on consular relations.[1] Article 36 of the Vienna Convention ("Article 36") provides that foreign nationals arrested or detained abroad have the right to be advised of their rights of consular notification and access "without delay," and that state-parties to the Convention must ensure that domestic laws give "full effect" to the consular notice requirement.[2] Two recent International Court of Justice (ICJ) decisions have reaffirmed these rights.[3] The Supremacy Clause of the U.S. Constitution obligates the U.S. to comply with both Article 36

[1] Roberto Iraola, *Federal Criminal Prosecutions and the Right to Consular Notification Under Article 36 of the Vienna Convention*, 105 W. Va. L. Rev. 179, 180 (2002).
[2] Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 262.
[3] *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Gen. List No. 128, Judgment of 31 March 2004; *LaGrand Case (Germany v. United States of America)*, ICJ Gen. List No. 104, Judgment of 27 June 2001.

requirements,[4] and the UN Charter and the ICJ Statute obligate the U.S. to comply with ICJ decisions to which it is a party.[5]

Recognizing both the importance of consular notification rights and its treaty obligations to fulfill Article 36 requirements, the U.S. has taken some steps to ensure compliance[6] and declared that it will seek and support any available measures necessary to ensure consular notification by law enforcement authorities. The Federal Rules of Criminal Procedure must be amended to require notice of consular access at the necessary stages. The rules must reflect the federal government's obligation to comply with the Article 36 requirements in order to comply with ICJ decisions binding on the United States.

Article 36 Guarantees Consular Access for Foreign Nationals Arrested Within the U.S.

Article 36 provides three separate, but interrelated, rights to nationals arrested in a foreign country: (1) a detainee's right to contact the consul of the detainee's state, (2) a consul's right to contact the detainee, and (3) a detainee's right to be informed without delay by the detaining authorities of the right to contact a consul for assistance.[7] These provisions seek to protect foreign nationals who may be prejudiced by language barriers, lack of understanding of a foreign legal system, and lack of support. The consulate can assist a defendant by providing language translation, providing advice on the American legal process, finding appropriate legal counsel, and gathering mitigating evidence from the home country.[8] Without such assistance, a detained foreign national is likely to fail to take advantage of the rights afforded under U.S. law and to receive far more severe punishment than would otherwise be imposed.

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[4] U.S. Const. art. VI, § 1, Cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[5] United Nations Charter Article 94, Cl. 1: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." *Statute of the International Court of Justice*, Article 60.

[6] Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the LaGrand Case?* 25 Hous. J. Int'l L. 1 (2002); Iraola, at 188.

[7] Iraola, at 184.

[8] Bishop, at 6.

The consular notice requirement serves fundamental interests of the United States as well. Consular notice provides U.S. law enforcement authorities with better access to information on foreign detainees critical to effective law enforcement, immigration regulation, and national security concerns. In addition, full compliance with consular notice obligations increases the likelihood that U.S. citizens abroad will themselves be provided with consular protections as a matter of political comity and reciprocity. Finally, any convictions and sentences for foreign detainees obtained without such notice are vulnerable through appeals and habeas petitions. Indeed, the Supreme Court this term is deciding whether such sentences and convictions must be invalidated if consular notice has not been provided. Failure to satisfy this extremely simple notice requirement, therefore, has extensive, serious consequences for U.S. citizens and foreign nationals.[9]

Recent ICJ Decisions Affirm that Article 36 Creates Individual Rights to Consular Access and Notification

Law enforcement authorities in the U.S. have often failed to comply with consular notification and access requirements. Countries such as Paraguay, Germany and Mexico, whose citizens have been denied Article 36 rights in the United States, have become increasingly outraged by the problem and taken their cases to the ICJ.[10] The ICJ has addressed this problem in two recent decisions and, in doing so, has reaffirmed the U.S.'s obligation to provide consular access and notification to foreign citizens arrested within its borders, or have to provide judicial review and reconsideration of judgments and sentences imposed without such notice.

Germany v. United States of America: the *LaGrand* Case

In 1984, two German nationals, Karl and Walter LaGrand, were sentenced to death for a murder committed during a bank robbery; upon arrest and detention, they had received no notice of

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[9] Linda A. Malone, *From* Breard *to* Atkins *to* Malvo: *Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, ___ William and Mary Bill of Rights Journal ___ (2004).

[10] *Vienna Convention on Consular Relations (Paraguay v. United States of America); Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Gen. List No. 128, Judgment of 31 March 2004; *LaGrand Case (Germany v. United States of America)*, ICJ Gen. List No. 104, Judgment of 27 June 2001; all available at http://www.icj-cij.org/icjwww/idecisions.htm.

their right to seek consular assistance. In fact, not until ten years later did they learn of this right, when fellow prisoners informed them. At that point, it was too late to challenge the failure of consular notification on appeal. When German authorities learned of this violation, they attempted to halt the executions through both diplomatic and legal channels; however, procedural default rules barred the LaGrands from raising the consular notification issue.

On March 2, 1999, Germany filed ICJ proceedings challenging the failure of the United States to inform the LaGrands of their consular rights. At this point, Arizona had already executed Karl LaGrand, and Walter LaGrand was scheduled to be executed the next day. The ICJ issued a Provisional Measures Order requiring that:

> *(a)* The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> *(b)* The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.[11]

Despite this order, Walter LaGrand's execution proceeded as scheduled. Germany, however, pressed its case before the ICJ to conclusion. In its June 27, 2001 judgment, the ICJ held that Article 36(1) creates individual rights to consular access and notification;[12] that the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended," thus violating paragraph 2 of Article 36 as well;[13] and that, in the case of future convictions and sentences without consular notification, "it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." According to the ICJ, this obligation could be carried out in various ways, with the choice of means to be left to the United States

[11] LaGrand Case, 2001 I.C.J. Gen. List No. 104, Provisional Measures Order para. 29.
[12] LaGrand Case, 2001 I.C.J. Gen. List No. 104, Judgment of 27 June 2001, para. 77.
[13] *Id.*, para. 91.

so long as there was review and reconsideration of the failure to comply with Vienna Convention obligations."[14]

Mexico v. United States of America: the *Avena* Case

In 2003, Mexico brought a case, on behalf of itself and 52 Mexican citizens on death row in the U.S., against the U.S. for breaching Article 36 of the Vienna Convention.[15] As to the requirement notice be provided "without delay," the ICJ found that "the duty upon the detaining authorities to give the Article 36, paragraph 1 *(b)*, information to the individual arises once it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."[16] Furthermore, the ICJ elaborated on its *LaGrand* judgment, and held that the required "review and reconsideration" of cases involving breaches of Article 36 must occur within the judicial system, and was not satisfied by the possibility of executive clemency hearings:

> the clemency process, as currently practised within the United States criminal justice system ... is therefore not sufficient in itself to serve as an appropriate means of "review and reconsideration" as envisaged by the Court in the *LaGrand* case.[17]

At least one state has already applied the ICJ's *Avena* decision to one of its death row prisoners in reconsidering and preventing execution of a foreign national.[18] Osbaldo Netzahualcóyotl Torres Aguilera, one of the 52 named Mexicans in the *Avena* proceeding, was sentenced to death in Oklahoma for two murders committed during a burglary. Following the issuance of the ICJ's *Avena* judgment, however, the governor of Oklahoma commuted Torres' sentence to life imprisonment without the possibility of parole, in part due to the ICJ's decision. The same day, the Oklahoma Court of Criminal Appeals issued an order staying Torres' execution and remanding his case for an evidentiary hearing to determine whether Torres had been prejudiced by the Vienna Convention

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[14] *Id.*, para. 125.
[15] *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. Gen. List No. 128, Application Instituting Proceedings, 9 January 2003.
[16] *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. Gen. List No. 128, Judgment of 31 March 2004, para. 63.
[17] Id., para 143.
[18] 98 Am. J. Int'l L. 581 (2004).

violation or by ineffective assistance of counsel. In a concurring opinion, Judge Charles S. Chapel noted that,

> the Vienna Convention ... is binding on all jurisdictions within the United States, individual states, districts and territories.... In order to give full effect to *Avena*, we are bound by its holding to review Torres's conviction and sentence in light of the Vienna Convention violation, without recourse to procedural bar.[19]

The United States Has an Affirmative Duty to Fulfill Article 36 Requirements and To Comply with *Lagrand* and *Avena*

As noted by the ICJ in both the *LaGrand* and *Avena* cases, compliance with Article 36 requirements is obligatory as a matter of treaty law. According to the Supremacy Clause of the U.S. Constitution, U.S. treaties "shall be the supreme law of the land; and the judges in every state shall be bound thereby...."[20] U.S. treaties are superior to state laws, prevail over earlier inconsistent federal legislation, and must be given the same consideration by courts as federal statutes.[21] The Vienna Convention is equivalent to an act of Congress,[22] and by ratifying it in 1969, the United States bound itself as a matter of constitutional law and international law to comply with all Article 36 requirements.

The U.S. is also bound to comply with ICJ decisions in cases to which it is a party as a matter of constitutional law and international law. The ICJ was established by the UN Charter and has jurisdiction to resolve legal disputes between nations.[23] According to Article 94 of the U.N. Charter, the U.S., as a member of the U.N., is bound to "comply with the decisions of the International Court of Justice to which it is a party."[24] Article 94 further states that recourse to the U.N. Security Council is available against a state that fails to comply with an ICJ ruling.[25] Judicial failure to comply with the requirements of the Vienna Convention as interpreted by the ICJ, would, therefore, be violative of the

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[19] *Quoted in* 98 Am. J. Int'l L., at 583.
[20] U.S. Const. art. VI, § 1, Cl. 2.
[21] Iraola, at 189-190.
[22] *Id.*
[23] United Nations Charter, Article 92.
[24] United Nations Charter, Article 94. See also Statute of the International Court of Justice, arts. 36 & 59.
[25] United Nations Charter, Article 94.

international treaty obligations of the U.S. under both the Vienna Convention and the U.N. Charter, in contravention of the Supremacy Clause.

A Pending Supreme Court Case Underscores the Importance of Fulfilling Article 36 Obligations Under *Avena*

In December 2004, the Supreme Court granted a writ of certiorari in *Medellin v. Dretke*, a case considering both the effect of denial of consular access rights and the precedential effect of *Avena*.[26] Mr. Medellin, a Mexican national, was arrested in 1993 in connection with two murders in Houston, Texas.[27] He was not provided consular access rights at the time of his arrest and was later convicted of murder and sentenced to death.[28]

After *Avena* (the aforementioned ICJ case which held that the U.S. violated its Article 36 obligations with respect to Medellin and other Mexican nationals and that U.S. courts were obligated to review and reconsider decisions tainted by such denial),[29] Mr. Medellin applied to the U.S. Court of Appeals for the Fifth Circuit requesting a certificate of appealability of the denial of his habeas corpus petition.[30] The court denied this request and held that U.S. precedent barred it from complying with *Avena*.[31] The Supreme Court granted certiorari to address the following questions:

> (1) In a case brought by a Mexican national whose rights were adjudicated in the *Avena* Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the *Avena* holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to procedural default doctrines?
>
> (2) In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the *LaGrand* and *Avena* judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?[32]

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[26] *See* Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004) *cert. granted* (U.S. Dec. 10, 2004) (No. 04-5928).
[27] *See* Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004), *petition for cert. filed*, 2004 WL 2851246 (U.S. Aug. 18, 2004) (No. 04-5928)
[28] *See id.*
[29] *See supra* notes 15-17 and accompanying text.
[30] *See* Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004), *petition for cert. filed*, 2004 WL 2851246 (U.S. Aug. 18, 2004 (No. 04-5928).
[31] *See id.*
[32] Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004) *cert. granted* (U.S. Dec. 10, 2004) (No. 04-5928).

The Court's decision to grant certiorari speaks to the critical importance of consular notification, and the need for the United States to make every effort to ensure that law enforcement authorities are made aware of the consular notice requirement to avoid jeopardizing convictions and sentencing of foreign nationals.

Despite Significant Federal Government Efforts to Ensure Compliance, Foreign Nationals are Often Denied Consular Access Rights in the United States

Based on its recent statements and efforts to ensure compliance with Article 36 requirements, it is obvious that the federal government recognizes its consular notification obligations. According to the State Department, "Article 36 obligations are of the highest order and should not be dealt with lightly."[33] Indeed, in a publication for federal, state and local law enforcement officials, the State Department states clearly that Article 36 obligations "also pertain to American citizens abroad," and adds, "[i]n general, you should treat a foreign national as you would want an American citizen to be treated in a similar situation in a foreign country."[34] In addition to this publication, the State Department has issued bulletins, a handbook, and periodic notices to local governments covering the Vienna Convention requirements.[35]

The Justice Department has regulations[36] that require an officer who arrests a foreign national to advise the arrestee of his consular rights, and to inform the nearest U.S. Attorney of the arrestee's wishes regarding consular notification. The U.S. Attorney then is obligated to notify the appropriate national consul. These regulations help to ensure compliance with Article 36 notification requirements at the federal level.

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[33] Iraola, at 184.
[34] U.S. Department of State, Pub. No. 10518, Consular Notification and Access: Instructions for Federal, State and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them (1998), available at http://travel.state.gov/law/notification1.html.
[35] Iraola, at 188.
[36] 28 C.F.R. 50.5

Despite the federal government's best efforts to promote compliance, U.S. officials often fail to provide foreign arrestees' their consular access and notification rights; therefore, the U.S. must take this additional step to give full effect to Article 36 rights.

The Federal Rules of Criminal Procedure Must Be Amended to Give Full Effect to the Rights Accorded Under Article 36

The Federal Rules of Criminal Procedure must be amended to comply fully with Article 36 consular notification requirements. Failure to do so would itself be a violation of the requirement in Article 36(2) that the State must ensure that domestic laws provide "full effect" to the consular notice requirement. The following suggested amendments to Rules 4 and 5 will help to ensure that foreign nationals arrested in the U.S. will be notified of their right to access to their nation's consul. The suggested amendments read as follows:

Rule 4. Arrest Warrant or Summons on a Complaint

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(c) Execution or Service, and Return.
(1) By Whom. Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.
(2) Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.
(3) Manner.
(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible. If the defendant is a foreign citizen, the officer must inform the defendant of his right to contact the consulate of his country.

Rule 5. Initial Appearance

***

(d) Procedure in a Felony Case.
(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:
(A) the complaint against the defendant, and any affidavit filed with it;
(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;
(C) the circumstances, if any, under which the defendant may secure pretrial release;
(D) any right to a preliminary hearing, ~~and~~
(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.; and

(F) if the defendant is a foreign citizen, the defendant's right to contact the consulate of his country.

The Federal Rules of Criminal Procedure "govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States."[37] Moreover, the rules "are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[38]

The proposed amendments to Rules 4 and 5 will demonstrate our nation's intent to comply fully with the letter and spirit of the Vienna Convention, as required by that agreement. These amendments will also serve as additional notice to the entire U.S. criminal justice system of the rights conferred on foreign detainees by Article 36. As a result, these amendments will help to guarantee that the right to consular notification and assistance will be honored for all foreign nationals arrested in the United States. Moreover, adding and enforcing this requirement to the Rules will help to reduce the unnecessary expense and delay involved in responding to the appeals of foreigners who challenge their convictions based on a violation of this right. The minimal additional step of guaranteeing notice at the appropriate time will substantially reduce and, in time, may eliminate an entire category of court proceedings in the U.S., thereby conserving precious judicial resources.

Conclusion

A foreign detainee advised of the right to consular notification may receive help in a myriad of ways. The detainee may be provided information about the legal system of the receiving country, be encouraged to follow the advice of an attorney, be provided with another attorney; access a translator; be assisted in providing mitigating information from the home country; or obtain the support of the home country to ensure a fair trial.[39] Therefore, when a foreign detainee is not notified of the right to

[37] F.R. Crim. P. 1.
[38] F.R. Crim. P. 2.
[39] Bishop, at 6.

consular notification, the detainee is effectively denied these forms of assistance, and court proceedings are thereby prejudiced.

When arguing the Tehran Hostages case before the ICJ in 1980, the State Department wrote, "Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others."[40] In that case, the U.S. State Department reasoned that, by taking U.S. consuls hostage, Iran had deprived other U.S. nationals in Iran of access to the consuls, thereby violating those nationals' rights.[41]

Article 36 of the Vienna Convention guarantees individual rights to consular access to all foreign nationals arrested in the United States of America. As a party to the Vienna Convention, and as a party to several ICJ cases regarding the Vienna Convention, the United States has an affirmative duty to notify foreign consuls of the arrest of one of their citizens, in addition to the duty to notify the arrestees themselves of the right to contact their nation's consul. Regardless of how the Supreme Court, in its consideration of *Medellin v. Dretke* finds that *Avena* mandates judicial review and reconsideration of the convictions and sentencing of foreign nationals in which the defendants were denied consular access rights, the United States is clearly obligated under Article 36(2) to comply with its international treaty obligations by amending the Federal Rules to provide detained or arrested foreign nationals with consular access rights.

While the Departments of State and Justice have made significant efforts to improve compliance with this duty, more can and, therefore, must be done. One clear and effective way to improve compliance is to amend the Federal Rules of Criminal Procedure in such a way as to ensure that the consular notification requirement becomes a standard procedure in all criminal proceedings in

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[40] United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. Pleadings 174 (Memorial of the Government of the United States of America), *quoted in* John Quigley, Suppressing the Incriminating Statements of Foreigners, 4 (2004) (unpublished manuscript).

[41] Quigley, at 4.

the United States district courts, and, therefore, never again reaches the United States courts of appeals nor the Supreme Court of the United States. These amendments are required by international law, constitutional requirements, and the needs of law enforcement, immigration regulation, and national security. First and foremost, however, the amendments are necessary to protect the fundamental treaty right of consular notice for U.S. citizens as well as foreign nationals.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, consultant

RE: Rule 6, Grand Jury; Technical Amendment

DATE: March 15, 2005

Section 6501 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760, which is reprinted at the end of this memorandum, amended Rule 6 to –

> (1) facilitate disclosure by an attorney for the government of matters occurring before the grand jury concerning a threat of attack or other grave hostile acts of a foreign power or its agent, or sabotage or terrorism to appropriate federal, state, state subdivision, Indian tribal, or foreign government officials, for the purpose of preventing or responding to such threat or activities;
>
> (2) provide that any use by state, state subdivision, Indian tribal, or foreign government officials must be consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue; and
>
> (3) provide that violations of the guidelines promulgated by the Attorney General and Director of National Intelligence are punishable as contempt.

The Homeland Security legislation adopted in 2002 contained the same substantive provisions, but that legislation did not go into effect because it was based upon an outdated version of Rule 6.

There are several minor respects in which the congressional language is inconsistent with the conventions of the comprehensive revision of the Federal Rules of Criminal Procedure in December 2002. The Rules Support Office's effort to have the bill amended to bring it into conformity with these style conventions before passage was not successful.

If the Committee wishes to conform the new language to the overall style conventions, it could propose technical and conforming amendments. Technical and conforming amendments are not published for public comment, but the other rulemaking steps need to be followed, e.g., Conference and Supreme Court approval and transmission to Congress.

If the Committee decides to pursue this course, the procedure and time line would be as follows: adoption of the amendments at the Charleston meeting, transmittal to the Standing Committee in June, and to the Judicial Conference in September, the Supreme Court in November, and Congress in April 2006, effective date December 1, 2006.

A redlined version of Rule 6 showing the technical amendments, and the text of the legislation amending Rule 6 are attached.

This item is on the agenda for the April meeting in Charleston.

Rule 6. The Grand Jury

(e) Recording and Disclosing the Proceedings.

* * * * *

(2) ***Secrecy.***

* * * * *

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal ~~Federal~~, state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state~~State~~, state~~State~~ subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information ~~only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue information~~ only in a manner consistent with any guidelines issued by the Attorney General and National Intelligence Director.

* * * *

(7) *Contempt.* A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence ~~pursuant to~~ under Rule 6, may be punished as a contempt of court.

Intelligence Reform and Terrorism Prevention Act of 2004,
Pub.L. 108-458, Title VI, § 6501(a), 118 Stat. 3760 (Dec. 17, 2004)

SEC. 6501. GRAND JURY INFORMATION SHARING.

(a) RULE AMENDMENTS.--Rule 6(e) of the Federal Rules of Criminal Procedure is amended--

(1) in paragraph (3)--

(A) in subparagraph (A)(ii), by striking "or state subdivision or of an Indian tribe" and inserting ", state subdivision, Indian tribe, or foreign government";

(B) in subparagraph (D)--

(i) by inserting after the first sentence the following: "An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities."; and

(ii) in clause (i)--

(I) by striking "federal"; and

(II) by adding at the end the following: "Any State, State subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue."; and

(C) in subparagraph (E)--

(i) by redesignating clauses (iii) and (iv) as clauses (iv) and (v), respectively;

(ii) by inserting after clause (ii) the following:

"(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;"; and

(iii) in clause (iv), as redesignated--

(I) by striking "state or Indian tribal" and inserting "State, Indian tribal, or foreign"; and

(II) by striking "or Indian tribal official" and inserting "Indian tribal, or foreign government official"; and

(2) in paragraph (7), by inserting ", or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6," after "Rule 6".

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, consultant

RE: Rule 10, Proposal of Judge McClure

DATE: March 14, 2005

Judge James F. McClure, Jr., of the Middle District of Pennsylvania has written suggesting that Rule 10 be amended to permit waiver or arraignment. This procedure is followed in the Pennsylvania state courts in Union and Synder Counties.

Judge McClure's letter to Judge Bartle is attached.

This item is on the agenda for the April meeting in Charleston.

05-CR-C

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
FEDERAL BUILDING
240 WEST THIRD STREET - SUITE 320
WILLIAMSPORT, PA 17701-6466

JUDGE JAMES F. McCLURE, JR.

(570) 323-9772

December 14, 2004

DEC 16 2004

The Honorable Harvey Bartle, III
United States District Judge
Eastern District of Pennsylvania
United States Courthouse. Room 16614
Independence Mall West
601 Market Street
Philadelphia. PA 19106

Dear Harvey:

You will recall at the meeting at the Four Seasons I suggested that your Advisory Committee on Criminal Rules consider an amendment to the rules which would permit a waiver of arraignment. I indicated that we had been doing that for years in Union and Snyder Counties.

Accordingly, I obtained a copy of the Waiver of Arraignment form being used currently in Union County and the same is attached.

I have had a look at Pennsylvania Rule of Criminal Procedure 571 pertaining to arraignment and in subsection (D), the language fairly well tracks Fed.R.Crim.P. 10(b) in that it indicates a defendant may waive appearance at arraignment if certain requirements are met. It does not speak to waiver of arraignment. I have not taken the trouble to track all the amendments to these rules, but I am certain that when we started utilizing the waiver of arraignment it was permitted under the rules implicitly if not explicitly.

No doubt, Union County has simply continued to use the same form it has used since I was there, without paying a whole lot of attention to the nicety of the current rule.

I understand Jack Bissell's concerns with regard to matters usually reviewed with counsel at arraignment such as a deadline for pretrial motions, a date for jury selection, discovery and the like. I regularly handle all of that in a standard pre-trial practice order. However, my suggestion would only be that a waiver of arraignment be allowed if the judge agreed, as is now the case under Fed.R.Crim.P. 10(b)(3).

We have had a frequent practice recently in the Middle District of the government's filing of superseding indictments, particularly in multi-defendant criminal cases such as those charging conspiracy to distribute cocaine. Currently, I have one seven-defendant case and another ten-defendant case. In the ten-defendant case, a second superseding indictment was filed for the sole purpose of adding the last three defendants. Nevertheless, it necessitated a third arraignment for the first seven defendants. Moreover, the first superseding indictment added a forfeiture count which only applied to two of the initial seven defendants. Therefore, attorneys for all of the first seven defendants were required to appear at three separate arraignments to go through the exercise of entering not guilty pleas, although some of the defendants had waived their own appearances. It has been my experience that all defendants enter not guilty pleas at arraignment unless there has been an early agreement to plead to an information.

It is this kind of wastefulness of our resources to which my recommendation is addressed. We are not only imposing upon the valuable time of the prosecutors, public defenders and the CJA attorneys, as well as the court staff and the probation office, but are adding to the CJA payments for both attorney's fees and expenses in most of these cases. I suspect that there could be a considerable savings of costs nationwide if individual judges were permitted to approve not only waiver of attendance at arraignments but a waiver of attendance by counsel.

This recommendation would, of course, not affect the basic requirement that a defendant make an initial personal appearance under Fed.R.Crim.P. 5.

I am aware that the following paragraph appears in the Advisory Committee Notes for the 2002 Amendments to Fed.R.Crim.P. 10:

> It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

It would be necessary, of course, to do a careful cross-check to see if the arraignment date carries further significance, as indicated, and make such revisions as may be required. It should not affect the Speedy Trial Act, as the 70-day period runs from the filing date of the information or indictment or the defendant's initial appearance, whichever is later. 18 U.S.C. § 3161(c)(1).

Kindest personal regards and best wishes for the holidays!

Sincerely yours.

James F. McClure, Jr.
United States District Judge

JFM:llw
Enclosure
cc w/ enclosure:
The Honorable Anthony J. Scirica, Chief Judge
The Honorable Thomas I. Vanaskie, Chief Judge

IN THE COURT OF COMMON PLEAS, 17th JUDICIAL DISTRICT
UNION COUNTY BRANCH - CRIMINAL

No.

COMMONWEALTH OF PENNSYLVANIA
VS.

WAIVER OF ARRAIGNMENT

_____
Defendant

I, I, _____, hereby acknowledge that I have received a "NOTICE TO APPEAR" for Arraignment and copies of the Information stating the charges filed against me by the District Attorney.

2 I am aware that I have a right to have the charges against me, as contained in the information read to me, word for word, in open court after which I will be asked to state whether I plead "guilty" or "not guilty".

3 I am further aware that by my own choice, I may bypass the arraignment procedures, by waiving it, that is, giving up my right to be formally arraigned. In the event I choose to do so, a plea of "not guilty" will automatically be entered on my behalf.

4 I have been advised in accordance with the Rules of Court as to my rights as follows.

(a) I have a right to be represented by a lawyer of my own choice, or I may represent myself. I am further aware that if I believe that I cannot afford a lawyer to represent me, I may immediately make application for representation by the Union County Public Defender.

(b) I have a right to file a "Request for a Bill of Particulars" within seven (7) days following that date of my arraignment and ordinarily not later than that.

(c) I have a right to file a "Motion for Pre-Trial Discovery and Inspection" within fourteen (14) days following the date of my arraignment and ordinarily not later than that.

(d) I have a right to file various other motions, and any such other motions I may wish to file must ordinarily be filed within thirty (30) days following the date of my arraignment and are to be filed in one document titled "Omnibus Pre-Trial Motion"

5. I further understand that if I do not file these motions in accordance with the Rules of Criminal Procedure as outlined above, I may jeopardize my right to file them at a later date.

6. I acknowledge that I have read and I do understand the foregoing, I now request that the Court take the following action on my behalf:

____ **I desire to waive a formal arraignment and wish the Court to enter a plea of "not guilty" on my behalf.**
____ **I desire to be formally arraigned by the Court.**
____ **I desire to enter a plea of "guilty" to the charges filed against me at this time.**

_____ _____
Date Signature of Defendant

The foregoing document has been executed by the Defendant after conferring with me in my capacity as defense attorney.

_____ _____
Date Attorney for Defendant

ORDER

____ **The waiver of arraignment and entry of a plea of "not guilty" is hereby accepted.**
____ **At the request of the Defendant, a formal arraignment on charges filed by the District Attorney was held this date.**
____ **The guilty plea is accepted.**

BY THE COURT

_____ _____
Date J.

White: Court File
Canary: District Attorney
Pink: Defense Counsel

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

FROM: **Professor Sara Sun Beale, consultant**

RE: **Rules 16 and 32, Proposals of James Felman**

DATE: **March 14, 2005**

Attorney James Felman, former co-chair of the United States Sentencing Commission's Practitioner Advisory Group and current co-chair of ABA Criminal Justice Section Corrections and Sentencing Committee, has proposed that Rules 16 and 32 be amended to provide disclosure related to sentencing proceedings.

Mr. Felman proposes that (1) Rule 32 be amended to require that a party providing information to the Court regarding a sentencing proceeding must generally provide that information to the other party, and (2) Rule 16 be amended to require the government to produce to the defendant, upon request, all documents and tangible objects material it intends to use at sentencing. Such a request by the defendant would trigger a reciprocal obligation.

Mr. Felman's letter to Judge Bucklew and his supporting memorandum are attached.

This item is on the agenda for the April meeting in Charleston.

05-CR-B

KYNES, MARKMAN & FELMAN, P.A.

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JAMES H. KYNES
(1953-1993)

JAMES E. FELMAN
STUART C. MARKMAN*
KATHERINE EARLE YANES

ROBERT W. RITSCH*
OF COUNSEL

*ALSO ADMITTED IN
NORTH CAROLINA

February 1, 2005

The Honorable Susan Bucklew
Judge, Middle District
United States District Court
801 North Florida Avenue
Tampa, Florida 33602

Dear Judge Bucklew:

Please find enclosed a memo I have written regarding two amendments to the Federal Rules of Criminal Procedure that I believe should be made. I am really not sure how the Federal Rules of Criminal Procedure Advisory Committee works, but I suppose I would like this to serve as the initiation of whatever process I can cause to be initiated. I would welcome any opportunity to discuss these issues with you further or to appear before your committee to discuss these proposals should the time allow. Either way, I would welcome your thoughts, even if provided informally. You may feel free to email me with any thoughts if that is a more convenient format. My email address is jfelman@kmf-law.com.

Thank you for your consideration of my proposal. I look forward to hearing from you at your convenience as to what my next step, if any, may be on this issue.

Sincerely,

James E. Felman

JEF/lh
Enclosure

THE NEED FOR PROCEDURAL REFORM IN FEDERAL CRIMINAL CASES

James E. Felman

The bulk of the written rules governing federal criminal cases apply only to the three percent or so of the cases involving trials.[1] Even in the few cases that proceed to trial, the vast majority of the rules apply only to the guilt phase of the case. I believe the Federal Rules of Criminal Procedure applicable to sentencing proceedings – which 97% of the time is all that happens – are in need of at least two specific reforms:

1. Rule 32 of the Federal Rules of Criminal Procedure should be amended to require that any party wishing to provide information to the Court regarding a sentencing proceeding, whether directly or indirectly through the Probation Office, must, absent good cause shown, provide that information to the other party.

2. Rule 16 of the Federal Rules of Criminal Procedure should be amended to require the government to produce to the defendant, upon request, all documents and tangible objects material to or which it intends to use regarding the application of the sentencing guidelines or other factors enumerated under 18 U.S.C. § 3553(a). Such a request by the defendant would trigger a reciprocal obligation.

Both of these proposals seem fairly simple and straightforward to me. I do not think they would be difficult to draft, to understand, or to follow. Indeed, they seem to me to be so fundamentally fair and reasonable that I find it difficult to imagine any reasonable argument against them.

I would like to state the case for these two proposals by considering how I would attempt to describe to a civil practitioner the current procedures which do not include these simple rules. Imagine the following conversation between a federal criminal defense attorney (Criminal Attorney) and a civil attorney (Civil Attorney):

Criminal Attorney: We resolve most of our cases by settlement. The plaintiff's attorney will generally try to convince the defendant that he should admit liability without a trial because if he does not the plaintiff will seek a greater penalty later.

---

[1]United States Sentencing Commission 2002 Sourcebook of Federal Sentencing Statistics, p.20 (Figure C). The rate of guilty pleas has been steadily increasing:

1997 – 93.2%
1998 – 93.6%
1999 – 94.6%
2000 – 95.5%
2001 – 96.6%
2002 – 97.1%

Data from 2003 to the present is not yet available.

Civil Attorney: That happens in civil cases too. Does the plaintiff specify what the penalty will be if the defendant admits liability at the beginning of the case?

Criminal Attorney: Sometimes the plaintiff will agree to make a recommendation regarding the penalty, but they do not have to. Most Courts will not accept a settlement agreement which includes a firm agreement on the penalty. Instead, the penalty is determined by the Court at a special hearing that only takes place after the defendant has admitted liability.

Civil Attorney: So if the defendant refuses to admit liability right away, I take it the damages or penalties issues get fleshed out through depositions, interrogatories, and requests for admissions?

Criminal Attorney: No. We don't bother with any of those things.

Civil Attorney: Wow. So does the plaintiff have to provide the defendant with the documentary or other evidence it will present at the penalty hearing before the defendant decides whether or not to admit liability?

Criminal Attorney: No.

Civil Attorney: If the defendant refuses to admit liability and insists on a trial, does the plaintiff have to provide the defendant with the documents it will use to prove damages before the trial?

Criminal Attorney: No. In fact, there is no trial on the penalty. We bifurcate the proceedings and the trial is only on the issue of liability. Then we have a separate penalty hearing before the judge. The only right a defendant has to documents before trial are those which go to the issue of liability.

Civil Attorney: So if the defendant either agrees to admit liability or gets found liable at the trial, does the plaintiff at *that* point have to provide the defendant with the evidence it will present at the penalty hearing?

Criminal Attorney: No.

Civil Attorney: Does the defendant have to provide the plaintiff with the evidence it will present at the penalty hearing?

Criminal Attorney: No.

Civil Attorney: So what happens next?

Criminal Attorney: After the defendant either admits liability or is found liable at a trial, the Court appoints a special investigator – called a probation officer – to

determine the facts relating to penalties as well as additional theories of liability that were not necessarily at issue in the trial or even that were rejected by the jury at trial.

Civil Attorney: So how does the Court's Investigator learn what the facts relating to the penalty are?

Criminal Attorney: The Investigator starts by meeting *ex parte* with the plaintiff and reviews the plaintiffs' penalty evidence *in camera*.

Civil Attorney: Is that how the Court learns the facts on which to base its penalty decision?

Criminal Attorney: Usually.

Civil Attorney: Does the defendant get to look at the evidence provided by the plaintiff to the Judicial Investigator?

Criminal Attorney: No.

Civil Attorney: Then what happens?

Criminal Attorney: Then the Investigator will sometimes meet *ex parte* with the defendant. And no, the plaintiff does not get to look at the evidence provided by the defendant to the Court's Investigator. All submissions to the Judicial Investigator are generally made on an *ex parte* basis.

Civil Attorney: That seems like a strange way to have an adversarial process. Then what happens?

Criminal Attorney: After the Investigator is done meeting separately with the parties, the Investigator prepares draft findings of fact and conclusions of law and circulates them to the parties to see if there are any objections.

Civil Attorney: Are the proposed findings of fact accompanied by citations to the materials on which they are based?

Criminal Attorney: No.

Civil Attorney: So how does the defendant know what is objectionable?

Criminal Attorney: Sometimes they don't. Oh, by the way, if the defendant objects to things without a sufficient basis, the Court can penalize the defendant for doing so by increasing the penalty.

Civil Attorney: So assuming the defendant goes forward and objects anyway, then what

happens?

Criminal Attorney: At that point the defendant might get to meet with the Court's Investigator and the plaintiff, but such meetings are not required if the plaintiff does not agree to come. In any event, there are no rules governing such meetings and the plaintiff is still not required to disclose anything there.

Civil Attorney: So then how does the dispute get resolved?

Criminal Attorney: At the penalty hearing before the Court.

Civil Attorney: How does the Court go about doing that?

Criminal Attorney: Well, the Rules of Evidence do not apply so, for example, hearsay is admissible. The Court decides what the facts are by a preponderance of the evidence.

Civil Attorney: Does the plaintiff in advance of the penalty hearing have to provide the defendant with the evidence it has previously submitted *ex parte* to the Court's Investigator?

Criminal Attorney: No.

Civil Attorney: What about during the penalty hearing itself?

Criminal Attorney: No.

Civil Attorney: I understand there is now some controversy about Courts making the penalty findings by a preponderance of the evidence rather than juries making the findings on a standard of beyond a reasonable doubt?

Criminal Attorney: That's the big issue of the day. Personally I don't think Courts are any less reliable than juries. I also think both Courts and juries try to do whatever they think is right, and the different standard of proof likely doesn't change much very often. If the defendant were entitled to discovery of the plaintiff's evidence, either before or after the plaintiff submits it to the Court's Investigator, *that* might really make a difference. And, of course, most of us think the Rules of Evidence are generally pretty sensible, so going ahead and using them might be helpful as well.

Civil Attorney: Well I sure am glad we don't use your system to figure out disputes over money.

Criminal Attorney: Me too.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Dave Schlueter, Reporter

RE: Proposed Amendments to Rule 29

DATE: March 8, 2005

At its meeting in Oregon in Fall 2003, the Committee considered proposed amendments to Rule 29 from the Department of Justice concerning the ability of the government to appeal an adverse ruling on a Rule 29 motion. During that meeting, members of the Committee expressed general support for an amendment but raised questions on the best way to draft an amendment that would deal with the question of multiple counts or charges, multiple defendants, and the problem of hung juries. The Department agreed to draft another amendment that could address those concerns.

The Department prepared drafts in response to the discussion but did not prepare a draft amendment that would address the problem of granting a partial judgment of acquittal in multi-count or multiple defendant cases.

Before the Spring meeting in Monterey, California in Spring 2004, Judge David Levi, Chair of the Standing Committee, proposed in an e-mail that perhaps one avenue for addressing the problem of deadlocked juries and the multi-count cases would be to include waiver provisions.

In response to his suggestion, I prepared yet another version of possible amendments to Rule 29. That draft, which included "waiver" language, was intended to address concerns raised by both members of the Committee and the Department. The waiver language draws on similar language in Rule 11.

In preparing that draft I considered a very thorough and helpful memo prepared by Ms. Brooke Coleman, a law clerk for Judge Levi, who graciously agreed to do some research (on very short notice).

At the Monterey meeting in Spring 2004 there was additional discussion on whether any amendment was needed at all and the Committee ultimately decided not to pursue any amendments to Rule 29. The draft amendments were not considered or discussed.

The Department indicated to the Committee, at its Fall 2004, meeting in Santa Fe, New Mexico, that it intended to express its high interest in the amendments to the Standing Committee. At its January 2005 meeting, the Standing Committee heard an oral presentation from the Department and also considered extensive written data provided by the Department on the need for an amendment to Rule 29. Following discussion, the

Standing Committee agreed that it was appropriate to ask the Department to present the new written information to this Committee. The Standing Committee also asked that this Committee again consider any appropriate amendments to Rule 29, which would address the Department's concerns, and present those amendments to the Standing Committee at its June 2005 meeting, along with a recommendation to either publish or not publish those amendments.

I am including a revised version of the amendment originally prepared for the Spring 2004 meeting. It includes provision for a defendant waiving his or her double jeopardy protections and includes a draft Committee Note, which draws heavily from Ms. Coleman's memo and from a memo prepared by the Department.

This item is on the agenda for Committee's April 2005 meeting.

RULE 29: VERSION NO. 4
(March 8, 2005)

Rule 29. Motion for a Judgment of Acquittal

(a) Motions Made Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense. ~~the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction.~~ If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision.

(1) In general. Except as provided in Rule 29(b)(2) and (c)(2), the court must proceed with the trial, submit the case to the jury, and reserve its decision until after the jury returns a verdict of guilty. ~~The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.~~ If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside the verdict and enter an acquittal if the evidence is insufficient to sustain the guilty verdict.

(2) Ruling on Motion Before Verdict with Consent of Defendant. The court may rule on the motion with regard to some or all of the charges—or with regard to some or all of the defendants—before the jury returns a verdict, if:

(A). the court places the defendant under oath, and informs the defendant personally in open court that a pre-verdict ruling that grants the motion, would normally deprive the government of the right to appeal that ruling on Double Jeopardy grounds, but that the defendant may nonetheless waive that constitutional protection; and

(B) after being so apprised, the defendant consents on the record and in writing to a pre-verdict ruling.

(c) Motions Made After Jury Verdict or Discharge.

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

(2) Ruling on the Motion.

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

court may enter an acquittal if the evidence is insufficient to sustain a conviction and:

(A). the court places the defendant under oath, informs the defendant personally in open court that a ruling that grants the motion after the jury has been unable to reach a verdict could subject the defendant to another trial and normally deprive the government of the right to appeal that ruling on Double Jeopardy grounds, but that the defendant may nonetheless waive that constitutional protection; and

(B) after being so apprised, the defendant consents on the record and in writing to a ruling granting the motion.

~~If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

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

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

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

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

(3) Appeal.

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

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

COMMITTEE NOTE

Rule 29 provides that a court may acquit a criminal defendant on its own or on defendant's motion either before the jury returns a verdict, after a hung jury, or after the jury returns a guilty verdict. Although the government may appeal a Rule 29 acquittal in the latter case, it cannot appeal from a Rule 29 acquittal in the first two situations. *United States v. Ball*, 163 U.S. 662, 672 (1896); *Fong Foo v. United States*, 369 U.S. 141 (1962); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). The Double Jeopardy Clause prohibits such appeals because, unlike the case where a jury has returned a verdict and an acquittal is then granted by the court, a pre-verdict acquittal does not provide a readily available verdict to reinstate if the acquittal is overturned on appeal. Without this verdict, a defendant would have to stand trial once again. *See* Richard Sauber and Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewable Ability of Directed Judgments of Acquittal,* 44 AM.U.L.REV. 433, 451 (1994); 18 U.S.C. § 3731.

As originally drafted, Rule 29 permitted an anomaly: it permitted orders disposing of entire prosecutions or counts without any possibility of appellate review. *See* Sauber & Waldman, *supra.* This anomaly arose because Rule 29 was originally drafted in 1944, when the Government under the 1907 Criminal Appeals Act could not appeal a judgment of acquittal whether rendered before or after a guilty verdict. *See United States v. Sisson*, 399 U.S. 267 (1970). In 1971, however, Congress enacted a new Criminal Appeals Act permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; *see United States v. Martin Linen Supply Co., supra.* 430 U.S. at 568. In enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson,* 420 U.S. 332, 337-38 (1978). Although "Congress was determined to avoid

creating non-constitutional bars to the Government's right to appeal," id., Rule 29 acted as a non-constitutional bar to the Government's right to appeal, by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal.

This anomaly was partially remedied by the1994 amendment to Rule 29, which permitted the court to reserve until after the guilty verdict its decision on a motion for judgment of acquittal, thus rendering its decision appealable. Some appellate courts have suggested that deferral of ruling is the better practice, but it is still only permissive under the current rule. Sauber and Waldman, *supra*, at 460. Despite the amendment and the suggestions of those courts, some district courts did not always follow that best practice, but instead issued pre-verdict judgments of acquittal which were unappealable no matter how erroneous. The current amendment completes the process begun by the 1994 amendment and makes the best practice the required practice.

Proponents of a rule allowing for appeal of Rule 29 acquittals claim that the current system engenders a lack of judicial accountability, resulting in diminished trust and a perception of inaccuracy in the system. *See* Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?*, 27 ARIZ.ST.L.J. 953, 954-55 (1995); Sauber and Waldman, *supra,* at 452-56; Forrest G. Alogna, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction,* 86 CORNELL L.REV. 1131, 1133, 1140-41 (2001). In addition, they argue that an inability to appeal defeats the public's interest in fully prosecuting defendants, results in the possible release of dangerous defendants, and squanders already scarce government resources. Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND.L.REV. 353, 370-71 (1998).

Rule 29(b). Originally, the Committee considered an amendment to Rule 29 that would have required the trial court, in all cases, to reserve ruling on the motion until after the verdict, in order to provide the government with the ability to appeal in all cases. That proposal, however, presented competing concerns. Granting a pre-verdict acquittal would permit the court to relieve the defendant of unnecessary adjudication, including the burden and possible self-incrimination from presenting a defense, and yet provide a check on the government's power to bring unwarranted charges against a defendant. *See generally* Sauber and Waldman, *supra* at 458-60.

That proposal, however, failed to address two key issues: (1) the appropriate procedure where there is a hung jury and the court determines an acquittal is proper and (2) the appropriate procedure where there are multiple defendants and/or counts and the court determines that certain of those defendants and/or counts should be eliminated.

Rule 29(b). The Committee ultimately proposed the present amendment, which attempts to resolve those issues using a "waiver" model. Proposed Rule 29(b) addresses the general rule, that unless the defendant waives double jeopardy protections, the court must proceed with the trial, submit the case to the jury, and reserve its decision until after

the verdict is returned. The proposed amendment permits the court to rule on the motion before a verdict is returned, if the defendant, after being advised of the options, waives double jeopardy protections, as spelled out in Rule 29(b)(2) and Rule 29(c)(2).

Rule 29(b)(2). Specifically, under proposed Rule 29(b)(2), the court may rule on the motion before the verdict with regard to some or all of the charges, or with regard to some or all of the defendants, if the defendant is first placed under oath and after being apprised in open of the protections of the Double Jeopardy Clause, waives on the record and it writing, those protections.

Rule 29(c)(2). Similarly, under proposed Rule 29(c)(2), if after a jury has returned a verdict of guilty, the court must enter a judgment of acquittal if the evidence is insufficient to support the verdict. If, however, the jury has not been able to reach a verdict, the court may enter a judgment of acquittal if the defendant is first placed under oath, and after being apprised in open court of the protections of the Double Jeopardy, waives on the record and it writing those protections.

Although there are few cases on the question of expressly waiving double jeopardy protections, one case is instructive. *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986); *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988). In *Kington I and II*, the defendants made a motion to suppress, but the court did not consider the motion until after the jury had been empaneled and sworn. *Kington II,* 835 F.2d at 107. The court granted the motion, but only after the defendants agreed to waive double jeopardy so that the government would be allowed to appeal. *Kington I,* 801 F.2d at 735-36. The government appealed the decision, and the Fifth Circuit found jurisdiction to review the appeal under § 3731 because defendants had waived their double jeopardy objections. Id. The court further stated that the hearing regarding the motion to suppress had been conducted without the jury in attendance and that the judge, not the government, had proposed that defendants waive their rights. Id. The Fifth Circuit reversed the district court judge's determination on the motion to suppress, and the defendants challenged the sufficiency of their waiver of double jeopardy rights in a second case. *Kington II,* 835 F.2d at 107. The court reviewed the trial transcript where the defendants had agreed to waive their rights and found the waiver to be effective. Id.

Constitutional rights, including double jeopardy objections, can be waived by an accused *United States v. Bascaro,* 742 F.2d 1335, 1365 (11th Cir. 1984) (absence of objection is waiver of double jeopardy defense), *cert. denied sub nom. Hobson v. United States,* 472 U.S. 1017 (1985). Courts have allowed the defense of double jeopardy to be waived, but as with any constitutional right, that waiver must be knowing, intelligent, and voluntary. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences."). Therefore, while there are cases holding that defendant's action or inaction can waive double jeopardy, the Committee believed that it was appropriate to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (where consent order did not specifically state waiver of double jeopardy rights, no such waiver existed); *Morgan*, 51

F.3d at 1110 (civil settlement with the government not waiver of claim of double jeopardy defense where settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation of his actions).

Given the nature of waiving the Constitutional protection of double jeopardy, the Committee believed that placing the defendant under oath and conducting a colloquy in open court, and reducing the defendant's consent to writing would help insure that first, the defendant appreciated the importance of reflecting on a decision to waive those rights, and second, provide assurance for any appellate court reviewing the issue, to have the defendant's decision not only registered in the record of proceedings, but also in writing. Rule 11 and Rule 23(a) serve as models for addressing the issue of waiver. Before entering a plea of guilty, the court is required to conduct, in open court, a plea colloquy that insures that the defendant is knowing, voluntarily, and intelligently waiving a number of constitutional rights. And under Rule 23, in waiving a jury trial, the defendant is required to waive the right on the record and the government and court are required to consent. 2 CHARLES ALAN WRIGHT, NANCY KING, & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE, § 372 (3d ed. 2004). Further, the waiver must be "express and positive" and "in writing." Id. Often the waiver is done in open court, which is favored, but not required. Id. ("It is clearly the better practice for the court to interrogate the defendant personally, before accepting a waiver of jury trial, to be sure that the defendant understands his right to trial by jury and the consequences of a waiver.").

As noted, *supra*, when the Fifth Circuit reviewed the waiver by defendants of their double jeopardy objections in *Kington II,* the court relied on the transcript of the trial proceedings. *Kington II,* 835 F.2d at 107. In those proceedings, the judge questioned the defendants regarding their understanding of what they were waiving. Id. The district court judge separately addressed the defendants, and each counsel subsequently agreed to waive their double jeopardy rights. In reviewing the sufficiency of the waiver, the court noted that one of the attorneys stated "we waive the issue of double jeopardy as a result of the second trial to the extent that any jeopardy may have already attached from the impaneling of this jury, and this waiver is made knowingly, intelligently, and freely." Id. The other attorney agreed to this stipulation. Id. at 109. Therefore, the court found that the waivers were effective. Id.

DEPARTMENT OF JUSTICE REPORT TO STANDING COMMITTEE RE PROPOSED AMENDMENT TO CRIMINAL RULE 29

DECEMBER 16, 2004

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

December 16, 2004

MEMORANDUM

TO: Judge David F. Levi
Chairman, Committee on Rules of Practice and Procedure

FROM: James B. Comey
Deputy Attorney General

Robert McCallum
Associate Attorney General

Christopher Wray
Assistant Attorney General
Criminal Division

SUBJECT: Proposed Amendment to Criminal Rule 29

I. Introduction

Several years ago, at the strong urging of career prosecutors from across the country, the Department of Justice asked the Advisory Committee on Criminal Rules to consider amending Rule 29 of the Federal Rules of Criminal Procedure to preserve the Government's right to appeal a trial court's decision to grant a motion for judgment of acquittal. We worked closely with the Committee over a number of meetings on the issue. We collected and presented data, responded to questions and concerns raised by members of the Committee, developed a number of draft amendments, and strongly advocated on behalf of publishing for public comment a proposed amendment to the Rule.

At its May 2004 meeting, the Committee voted 9-3 not to publish any proposed amendment to the Rule and not to take any further action on the Department's request. Based upon the discussion prior to the vote, the basis for this action appeared to be: (1) the perception that unappealable, pre-verdict judgments under the Rule were extremely rare and, thus, did not

undermine the public's confidence in the criminal justice system or create public harm to the extent necessary to warrant an amendment; and (2) the usefulness of the Rule as a procedural device enabling judges to manage appropriately and effectively the trial of criminal cases, especially ones involving multiple defendants, multiple counts and hung juries.

At the meeting of the Standing Committee that followed a few weeks later in June 2004, Associate Attorney General Robert McCallum requested the opportunity for the Department to make a presentation on Rule 29 at the January 2005 meeting of the Standing Committee. We were pleased that the request was met favorably. This memorandum sets forth the reasons for our continuing efforts to amend Rule 29. We hope the Standing Committee will take appropriate steps so that this issue can be addressed through the procedures of the Rules Enabling Act. Specifically, we ask the Standing Committee: (1) to find, based upon the documentation herein, that pre-verdict judgments of acquittal cause significant public harm and that Rule 29 is inadequate to address this harm; and (2) to refer the issue to the Advisory Committee with the instruction to address this issue by publishing one or more proposals to amend the Rule and, thereafter, to amend the Rule appropriately or to explain why it does not require amendment.

This memorandum incorporates the materials previously presented to the Advisory Committee and includes an expanded discussion and documentation of selected Rule 29 cases. First, it discusses Rule 29 in its current form and why we believe it should be amended. We set out, here, the history and some of the case law relating to Rule 29. Second, we review the available data on Rule 29 cases and explain why we believe this data satisfies the threshold for publishing a proposed amendment to the Rule. We also summarize several selected Rule 29 cases to demonstrate how the current Rule impacts a wide variety of cases and causes significant harm to the community. Finally, the memorandum discusses two proposals for amending the Rule and recommends that one or both of them, or a variation thereof, be published for comment.

We very much appreciate the Standing Committee's consideration of this issue, and we look forward to a full discussion at the upcoming meeting of the Committee.

II. Rule 29 In Its Current Form, It's History, And Why It Should Be Amended

Currently, Rule 29(a) permits a defendant to make a motion for judgment of acquittal "after the government closes its evidence or after the close of all the evidence," and authorizes the district court, in response to such a motion or on its own, to grant a judgment of acquittal if it believes the evidence is insufficient to support a conviction. Rule 29(b) permits, but does not require, the court to reserve decision on an acquittal motion until the jury has reached a verdict. Rule 29(b) also authorizes a court to grant a judgment of acquittal if the jury is discharged without a verdict. Such rulings, when made before the jury enters a verdict, can not be appealed – no matter how erroneous – because of the impact of the Double Jeopardy Clause. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

Rule 29 currently permits an anomaly: orders disposing of entire prosecutions or counts without any possibility of appellate review. This anomaly was partially addressed, first by judicial decisions, and then by a 1994 amendment to Rule 29, which permitted and, in fact, encouraged district judges to reserve decision on a motion for judgment of acquittal until after the guilty verdict. Because our experience shows that the majority of Rule 29 judgments of acquittal are granted *pre-verdict*, and are therefore unappealable, we believe trial courts should now be required to do what the 1994 amendment encouraged them to do – reserve decision until after a guilty verdict. An amendment is necessary, we believe, to correct the legal anomaly, to ensure the Government its full statutory right to appeal, and to permit the correction of erroneous rulings dismissing whole prosecutions and counts.

Rule 29 is unique. As commentators have recognized:

> In all of federal jurisprudence there is only one district court ruling that is both absolutely dispositive and entirely unappealable. Federal Rule of Criminal Procedure 29 enables the trial judge upon her own initiative or motion of the defense to direct a judgment of acquittal in a criminal trial at any time prior to the submission of the case to the jury. Once the judgment of acquittal is entered, the government's right of appeal is effectively blocked by the Double Jeopardy Clause of the U.S. Constitution, as the only remedy available to the Court of Appeals would be to order a retrial. No matter how irrational or capricious, the district judge's ruling terminating the prosecution cannot be appealed.

Richard Sauber & Michael Waldman, Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal, 44 Am. U. L. Rev. 433, 433-34 (1994) (footnote omitted) (hereafter "Unlimited Power"). As these commentators note: "[t]hough there is only one such rule in federal jurisprudence, it is one too many." Id. (footnote omitted).

This anomaly arises from a relatively recent historical accident. Rule 29 first authorized the granting of judgments of acquittal in 1944.[1] At that time, the Government had extremely limited rights of appeal under the 1907 Criminal Appeals Act, and could not appeal a judgment of acquittal whether rendered before or after the guilty verdict. See United States v. Sisson, 399 U.S. 267 (1970). It was thus of no moment that Rule 29 allowed the court to grant a motion for judgment of acquittal at the close of the government's case, or at the close of all the evidence, or after the jury verdict. See Fed. R. Crim. P. 29 (1944).[2]

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[1] "The preverdict acquittal of Rule 29 has no impressive historical lineage." Unlimited Power, at 434. Prior to 1944, some courts directed verdicts of acquittal, but "the power to direct an acquittal developed as a corollary to the [appealable] directed verdict in civil cases, with little thought or reasoning." Id. (note omitted).

[2] The authorization of rulings at these different times was not intended to create differences in appealability. Indeed, Rule 29 was patterned after Civil Rule 50, which allowed a

In 1971, however, Congress enacted the Criminal Appeals Act, permitting the Government to appeal from any judgment dismissing an indictment or any count thereof, including a judgment of acquittal under Rule 29, unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731; see United States v. Scott, 437 U.S. 82, 91 & n.7 (1978); United States v. Wilson, 420 U.S. 332, 337, 352-53 (1978); United States v. Genova, 333 F.3d 750, 756 & n.1 (7th Cir. 2003) (citing cases). In enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit. . . . Congress was determined to avoid creating non-constitutional bars to the Government's right to appeal." Wilson, 420 U.S. at 337-38.

"When Congress removed all statutory barriers to government appeals in 1971, the unappealable preverdict acquittal of Rule 29(a) emerged as an historic anachronism, a procedural appendix left over from an era in which appeals of any kind were unavailable." Unlimited Power, at 434. Nonetheless, for many years, Rule 29 was not amended to reflect the expansion of the Government's right of appeal. As a result, this non-constitutional rule of procedure inadvertently created a bar to the Government's right to appeal, by permitting district courts to enter judgments of acquittal at times (at the close of the Government's case, at the close of all the evidence, after the jury is discharged without returning a verdict) when the Double Jeopardy Clause prohibited appeal. The result was a flurry of litigation, in the Supreme Court and lower courts, over whether a ruling was an unappealable pre-verdict judgment of acquittal under Rule 29 or was an appealable pre-verdict dismissal. See, e.g., United States v. Scott, 437 U.S. 82, 85, 95 (1978), overruling United States v. Jenkins, 420 U.S. 358 (1975); United States v. Martin Linen Supply Co., 430 U.S. 564, 570-72 (1977); United States v. Torkington, 874 F.2d 1441, 1444 (11th Cir. 1989); United States v. Giampa, 758 F.2d 928, 932-36 (3d Cir. 1985); United States v. Ember, 726 F.2d 522, 524-26 (9th Cir. 1984); United States v. Gonzales, 617 F.2d 1358, 1361-62 (9th Cir. 1980).

In Martin Linen, 430 U.S. at 570-72, both the majority and the dissent decried the idea of having the appealability and "the constitutional significance of a Rule 29 judgment of acquittal [turn] on a matter of timing." 430 U.S. at 574-75 (majority) ("Rule 29 contemplated no such artificial distinctions"), 583 (dissent) ("hinging the outcome of this case on the timing ... elevat[es] form over substance"). That, however, was the consequence of failing to amend the Rule. See Scott, 437 U.S. at 91 n.7; United States v. DiFrancesco, 449 U.S. 117, 130 (1980) ("the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of the defendant after a guilty verdict has been entered by the trier of fact," citing post-verdict Rule 29 cases).

In 1994, a partial correction was made. Based on a proposal of the Advisory Committee on the Criminal Rules, subsequently approved by the Standing Committee, the Supreme Court amended

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district court to direct a verdict at the close of the opponent's case, at the close of all the evidence, or after the jury's verdict. See Fed. R. Civ. P. 50 (1937); Fed. R. Crim. P. 29, 1944 Advisory Committee Notes. Civil Rule 50, like Criminal Rule 29, was not drawing any distinctions concerning appealablility – these civil judgments would be appealable regardless of their timing. See Unlimited Power, at 456-57 & nn.168-70.

Rule 29 to permit and encourage district judges to preserve the right to appeal. The 1994 amendment allowed district courts that received motions for judgment of acquittal at the close of the Government's case to "reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion . . . after it returns a verdict of guilty. . . ." Fed. R. Crim. P. 29(b) (1994).

Reservation of decision was not a new idea. Beginning with its 1944 enactment, Rule 29 has always permitted a judge to reserve decision on a motion for judgment of acquittal made at the close of all the evidence, and to decide it after the jury's verdict. Fed. R. Crim. P. 29(b) & Advisory Committee Note (1944). After the 1971 enactment of the Criminal Appeals Act, appellate courts encouraged judges to reserve decision on motions made at the close of the evidence. See United States v. Singleton, 702 F.2d 1159, 1163 n.12 (D.C. Cir. 1983) ("where all the evidence has been presented, trial courts should reserve judgment on motions for acquittal until after the return of the jury verdict"). Even before the 1994 amendment, many courts began to reserve decision on motions made at the close of the Government's case, and the Supreme Court commended the practice. See 1994 Advisory Committee Notes below. The 1994 amendment explicitly authorized such reservation of decision on motions made at the close of the Government's case, and encouraged district judges to do so:

> The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S. Ct. 125 (1989); United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the Rule as presently written by reserving its ruling on the motion.
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> The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a Rule 29 motion is only preserved where the ruling is reserved until after the verdict.
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> In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 268 (1978), we described similar action with approval: 'The District Court had sensibly made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt.' Id. at 271.
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> United States v. Scott, 437 U.S. 82, 100 n.13 (1978). By analogy, reserving a ruling on a motion for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Fed. R. Crim. P. 29 Advisory Committee Note (1994).

To ensure that reservation did not prejudice the defendant, the 1994 amendment also altered what evidence could be considered by the court considering the motion. Under governing law at the time, if a defendant makes a motion for judgment of acquittal at the close of the government's case, and then decides to put on evidence, he "waives his objections to the denial of his motion to acquit," United States v. Calderon, 348 U.S. 160, 164 & n.1 (1954), and takes "the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty," McGautha v. California, 402 U.S. 183, 215 (1971), vacated in part on other grounds, Crampton v. Ohio, 408 U.S. 941, 942 (1972). See, e.g., United States v. Vallo, 238 F.3d 1242, 1247-48 (10th Cir. 2001); United States v. Brown, 53 F.3d 312, 314 (11th Cir. 1995). The 1994 amendment provided: "[i]f the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b) (1994) & Advisory Committee Note. The 1994 amendment thus ensured that a defendant received the same ruling on the sufficiency of the Government's case as he would have had the decision not been reserved, while it preserved the ability for the Government to appeal and for errors thus to be corrected.

Courts and commentators have spoken favorably of the 1994 amendments and have continued to encourage reservation as best practice. For example, Justice Stevens noted in Carlisle v. United States, 517 U.S. 416, 444-45 (1996), that Rule 29(b) "accommodates the defendant's right to a move for a directed acquittal with the Government's right to seek appellate review. Indeed, the subdivision was amended in 1994 for the very purpose of striking a more proper balance between those two interests." (Stevens joined by Kennedy, JJ., dissenting). The "value" of reserving a decision on a directed verdict of acquittal was also noted in Wright & Miller, Federal Practice and Procedure, 2A Fed. Prac. & Proc. Crim 3d §464. See also, e.g., United States v. Renick, 273 F.3d

1009, 1013 (11th Cir. 2001); United States v. Byrne, 203 F.3d 671, 675 (9th Cir. 2001); 5 W. LaFave, J. Israel & N. King, Criminal Procedure, §24.6(b) p.545 (1999).

Unfortunately, as set forth below, district courts have not always followed that best practice, instead issuing erroneous judgments of acquittal before verdict which are unappealable. Indeed, in some instances, district judges have intentionally timed their entry of the judgment of acquittal to prevent its review. To end such dispositions, and to conform federal practice to best practice, we propose to finish the reform the Committee began in 1994.

III. Scope Of The Problem And Representative Examples Of Pre-Verdict Rule 29 Cases

An amendment to Rule 29 is not solely a matter of legal reform or theory, however. It is necessary because pre-verdict judgments of acquittal are not infrequent, are often wrong, cause significant harm to the public, and undermine the public's confidence in the criminal justice system.

A. Various Data Sources

While the precise numbers are not tracked in any data base,[3] it is clear that district courts grant substantial numbers of judgments of acquittal each year, many of which are granted before the jury reaches a verdict. The Administrative Office of the Courts ("AOC") reports that in the year ending on September 30, 2002, 336 defendants were totally acquitted by judges – almost as many defendants as were acquitted by juries (400) or convicted by judges (423). See Exhibit A, AOC, Judicial Business of the United States Courts 2002, Table D-4.[4] Given that during this period only 2,671 defendants had their cases disposed of by jury verdict, and 759 by judicial verdict, these 336 judicial acquittals represent a substantial proportion – 13% of all jury verdicts and almost 10% of the verdicts issued at trial. Id., Table D-6. These judicial acquittals occurred for all types of crimes, including crimes that pose a significant risk to the public (homicide, assault, robbery, extortion, theft, fraud, sex offenses, drug crimes, firearms crimes, and drunk driving). Id., Table D-4. While the AOC data is imprecise and subsequent inquiries by the AOC and the Department indicate a smaller number of pre-verdict Rule 29 rulings,[5] it does indicate that a significant number and percentage of defendants may be receiving pre-verdict judgments of acquittal.

Data collected by the Department shows more directly a significant number of pre-verdict Rule 29 cases. During 2002 and again in mid-2003, the Department conducted a survey of all United States Attorney's Offices asking for empirical data regarding the instances of judges granting

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[3] No data base specifically tracks pre-verdict Rule 29 judgments of acquittal. Thus, the numbers must be estimated from other data or based upon surveys of the field.

[4] These AOC Tables were obtained from www.uscourts.gov/judbus2002/contents.html.

[5] The AOC data does not differentiate between pre- and post-trial judgments of acquittals and "not guilty" verdicts in bench trials.

judgments of acquittal, both before and after the jury's verdict, since October 1, 1999. We received responses from 83 out of 94 districts. See Exhibit B, Summary Table. The results of the survey are, therefore, under-representative – not only because districts did not report, but also because it is unlikely that the responding districts reported every Rule 29 case. The responding districts reported that, during this approximately three and one-half year period, judges had granted judgments of acquittal in a total of 256 cases. In 184 of these cases (72%), judgments of acquittal were granted before the jury verdict. In other words, in only 72 cases (28%) did judges follow the intent of the 1994 amendment and reserve the Rule 29 rulings until after the verdict. Further, in 134 of the 184 cases (73%) in which judgments of acquittal were entered before the jury verdict, the judgments of acquittal ended the entire prosecution and freed all of the defendants; in 9 more cases, the judgments of acquittal freed some of the defendants. Thus, this survey shows that pre-verdict Rule 29 cases were granted, on average, 73 times per year.

We also researched published appellate opinions of post-verdict Rule 29 dismissals. These opinions indicate that district judges often err in granting judgments of acquittal. There are at least 18 published appellate opinions in the 18 months ending June 30, 2003, which reverse judgments of acquittal entered after the verdict. See e.g., United States v. Jackson, 335 F.3d 170 (2d Cir. 2003); United States v. Velte, 331 F.3d 673 (9th Cir. 2003); United States v. Lenertz, 63 Fed.Appx. 704, 2003 WL 21129842 (4th Cir. 2003); United States v. Hernandez, 327 F.3d 1110 (10th Cir. 2003); United States v. Bologna, 58 Fed.Appx. 865, 2003 WL 282461 (2d Cir. 2003); United States v. Brown, 52 Fed.Appx. 612, 2002 WL 31771265 (4th Cir. 2002); United States v. Donaldson, 52 Fed.Appx. 700, 2002 WL 31770311 (6th Cir. 2002); United States v. Brown, 50 Fed.Appx. 970, 2002 WL 31529016 (10th Cir. 2002); United States v. Moran, 312 F.3d 480 (1st Cir. 2002); United States v. Zheng, 306 F.3d 1080 (11th Cir. 2002); United States v. Reyes, 302 F.3d 48 (2d Cir. 2002); United States v. Smith, 294 F.3d 473 (3d Cir. 2002); United States v. Johnson, 39 Fed.Appx. 114, 2002 WL 818229 (6th Cir. 2002); United States v. Thompson, 285 F.3d 731 (8th Cir. 2002); United States v. Oberhauser, 284 F.3d 827 (8th Cir. 2002); United States v. Canine, 30 Fed.Appx. 678, 2002 WL 417271 (8th Cir. 2002); United States v. Timmons, 283 F.3d 1246, 1250 (11th Cir. 2002); United States v. Deville, 278 F.3d 500 (5th Cir. 2002). This data is also under-inclusive, as it does not include unpublished reversals.

The frequency of reversible error is confirmed by data from the Criminal Appellate Section at Main Justice, which handles reports of adverse decisions and requests for Government appeals. See Exhibit C, Summary Table and Facts. During 2000 and 2001, Criminal Appellate handled a total of 34 reports of *post-verdict* judgments of acquittals. Id. The Solicitor General, who is selective in authorizing appeals, authorized appeal in 25 cases; the appellate court reversed in 17 of those cases, and reversed in part in an 18th case. Id. Thus, the appellate court found reversible error in almost 72% of the cases appealed, and over 50% of the cases reported. During 2002 alone, Criminal Appellate handled 22 reports of post-verdict judgments of acquittal, and the Solicitor

General authorized appeal in 15 of them; rulings have been received in at least 10 of those cases, 8 of them reversals.[6]

Given the substantial rate of reversible error in judgments of acquittal entered after the verdict, there is no reason to believe that district judges err any less frequently when they grant motions for judgment of acquittal before verdict.[7] Indeed, the rate of error may be even higher, since such pre-verdict rulings are made when the jury, witnesses and counsel are waiting in the courtroom, a situation "in which the court would feel pressured into making an immediate, and possibly erroneous, decision." Fed. R. Crim. P. 29, 1994 Advisory Committee Notes.

B. The Threshold For Rules Changes

The precise number of pre-verdict Rule 29 judgments granted each year is not clear. But what is clear from the above data is the following: notwithstanding the 1994 amendment, the majority of courts granting judgments of acquittal do so pre-verdict; this results, every year, in scores of cases being disposed of without the possibility of review; and over half of these decisions would be reversed on appeal. In rejecting the Department's request to publish for comment an amendment to Rule 29, the Advisory Committee noted that the Government had not made an adequate showing of a significant problem – that the concerns raised by the Department had not met the threshold for further consideration of an amendment to the Rule. We think otherwise.

We believe that in circumstances such as we have here – where there has been rigorous documentation of a significant number of cases; where those cases recur every year and, therefore, have a cumulative effect; where the Rule results in substantive (not merely procedural) harm to the community, including a loss of confidence in the criminal justice system; and where there is no remedy – the proposed amendment demands further consideration, publication for public comment, and an appropriate solution. While the raw number of pre-verdict Rule 29 dismissals alone is not extraordinary, the consequences and potential harm of such dismissals are. As the cases described below document, Rule 29 acquittals directly affect the integrity and security of the community and damage the public's confidence that the criminal justice system provides equal justice to all, including the leaders of the community. Most importantly, the harm has no remedy. As the Advisory Committee stated with regard to the 1994 amendment to Rule 29, even if the proposed

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[6] The following additional cases have been reversed since the 2002 Table in Exhibit C was prepared: United States v. Baker, 367 F.3d 790 (8th Cir. 2004); United States v. 363 F.3d 1169 (11th Cir. 2004); United States v. Alvarez, 351 F.3d 126 (4th Cir. 2003).

[7] The Supreme Court cases finding such decisions unappealable certainly confirm the occurrence of such errors, some of them glaring. See, e.g., Sanabria v. United States, 437 U.S. 54, 68 & n.22, 77-78 (1978) ("The trial court's ruling here led to an erroneous resolution in the defendant's favor ..."); Fong Foo v. United States, 369 U.S. 141, 142-43 (1969) (acquittal was improperly entered well before the Government completed its case, and was "based upon an egregiously erroneous foundation").

amendment would "not affect a large number of cases," it is still a worthwhile and necessary amendment. Fed. R. Crim. P. 29, 1994 Advisory Committee Notes.[8]

C. Representative Case Summaries[9]

Career Department prosecutors have observed repeated instances in which courts enter pre-verdict judgments of acquittal which are erroneous and have serious consequences. The cases discussed below are representative examples which illustrate the larger problem. Rule 29 cases include every type of offense. See Exhibit A. The cases below involve tons of cocaine, bank robberies, a civil rights beating, and money laundering. None could be appealed.

The following cases also illustrate the variety of problems caused by pre-verdict acquittals: irreparable prejudice caused by applying erroneous legal standards and analysis; the political difficulty *and yet necessity* of enforcing the criminal laws equally, even when that requires the prosecution of law enforcement officials and lawyers; the risk posed to the public when dangerous criminals are released; and the danger that the public will lose respect and confidence in the criminal justice system. In short, the rule of law, equal justice, public safety, and public respect and confidence are fundamental to our criminal justice system. When these principles are undermined, so is justice. These cases demonstrate a problem. They demand the *modest but essential* remedy of appellate review.

1. Standard of Review

The central tenet of Rule 29 is that the trial court must review the evidence in the light most favorable to the government, must not inject *its* view of the evidence, and must allow the jury to

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[8] To whatever extent the amendment is considered unnecessary because it effects only a small number of cases, it is likewise true that an equally small number of cases would be affected by the inability to dispose of multiple counts or defendants, or by an increase in Government appeals. Since the number of cases affected is the same, we believe the analysis should focus on comparing the relative harms and benefits to amending the Rule.

[9] The discussion of these cases is necessarily brief, so that a number of cases could be discussed within a memorandum of reasonable length. Summaries of each case, together with supporting excerpts of record, are attached as Exhibits D-H. Additional excerpts of record have been obtained – and are available upon request – but were not practical to attach as exhibits. It is worth noting that the compilation of these records was extremely time- and labor-intensive. In many cases, it required lengthy case files to be retrieved, reviewed, summarized and transcripts ordered – often by an attorney unfamiliar with the case because the trial attorney had left the office. That the field undertook this task – amidst the additional and simultaneous burdens imposed by Blakely issues – speaks to the level of commitment to this issue by United States Attorney's Offices around the country.

decide the case if "any rational trier of fact" could find the defendant guilty. Jackson v. Virginia, 443 U.S. 307, 318-319 (1979) (emphasis in original). This principle is well known.

There are, however, too many cases where this principle is not applied. When it is not, the Government does not receive a fair trial and the public is not served. In all of the Rule 29 cases discussed herein, the court substituted *its* view of the evidence for that of the appropriate fact-finder – the jury.

2. Additional Legal Error

In addition, most of these cases also involve additional legal error. The two following cases illustrate a misunderstanding of identity case law. They show that cases including identity evidence as strong as photographs and fingerprints – which some might have thought Rule 29-proof – cannot prevent erroneous acquittals when the court makes legal error. In these cases, pre-verdict acquittals were granted notwithstanding defendants' photographs taken at the location of the crime, and defendant's fingerprints on two separate demand notes from two separate bank robberies.

A. Eight Defendants and Two and One-Half Tons of Cocaine

In United States v. Joya-Joya, a case in the Southern District of California, eight defendants were charged with conspiracy to distribute two and one-half tons (2,365 kilograms) of cocaine. See Exhibit D. In September 2003, the eight defendants were in the middle of the Eastern Pacific Ocean on two "go-fast" boats – notoriously used to smuggle drugs on the high seas. A Navy helicopter spotted and video-taped the two boats operating together. Once spotted, the men aboard the blue/green "go-fast" jumped into the white "go-fast" and took off. The Navy helicopter chased the white "go-fast" for over an hour, while the white-"go-fast" refused to yield. The "go-fast" did not stop until another helicopter fired warning shots. The eight men aboard the white "go-fast" surrendered and were taken aboard a Navy ship, the USS Shoup. Once on board the Navy ship, the Coast Guard took individual color photographs of the eight defendants. The Coast Guard also seized 2,365 kilograms of cocaine from the abandoned blue/green "go-fast." The cocaine was 90% pure and had a wholesale value in Mexico of $17,042,000.[10]

At trial, the defendants' photographs were introduced into evidence by Coast Guard Officer Hoke, the boarding officer, who testified that the photographs fairly and accurately depicted the eight people transferred by the Coast Guard in the middle of the ocean from the white "go-fast" to the Navy ship. Officer Hoke did not make a court-room identification.[11] In addition to the photographs,

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[10] Its wholesale value in the United States would be much higher, and its retail value higher still.

[11] The court excluded other identity testimony that one of the eight men – with extremely large feet – had a white substance on his foot. In fact, a pair of size 15 shoes were seized from the blue/green boat with the tons of cocaine. Ironically, the court excluded this testimony stating

each of the defendants signed his name to written stipulations which were admitted at trial. Further, during the trial, defense counsel referred to their clients by name, the Government referred to the eight defendants as the same eight men on the white "go-fast," and defense counsel never objected that the defendants had been brought to the wrong courtroom to be tried on the wrong case.

The court granted a pre-verdict Rule 29 motion stating, repeatedly and in various ways, that the evidence was insufficient because no witness identified the defendants in the court-room.[12] As to the defendants' photographs and authenticating testimony, the court made the astounding statement that "[t]he only evidence in the record even *indirectly relating to defendants* are photos of eight individuals taken on the Shoup, and, according to the testimony of Officer Hoke, consists of individual photographs of the individuals who were removed from the white boat." (emphasis added). The court then discounted these photos because they were not "particularly clear." The court also denied the Government's motion to re-open its case-in-chief.

In fact, the photographs are quite clear.[13] So is the law. It is also uniform. Courts have long held that in-court identification by a witness is not required. See e.g., United States v. Doherty, 867 F.2d 47, 67 (1st 1989 Cir.); United States v. Morrow, 925 F.2d 779, 781 (4th Cir. 1991); Delegal v. United States, 329 F.2d 494, 494 (5th Cir. 1964); United States v. Capozzi, 883 F.2d 608, 617 (8th Cir. 1989); United States v. Cooper, 733 F.2d 91, 92 (11th Cir. 1984). "A witness need not physically point out a defendant so long as the evidence is sufficient to permit the inference that the person on trial was the person who committed the crime." United States v. Darrell, 629 F.2d 1089, 1091 (5th Cir. 1980). Identification can be inferred from all of the facts and circumstances in evidence, United States v. Weed, 689 F.2d 752, 754 (7th Cir. 1982), including, as here: when the defendants entered and signed various stipulations, United States v. Green, 757 F.2d 116 (7th Cir. 1985); when defense counsel identifies his client at trial, United States v. Alexander, 48 F.3d 1477, 1490 (9th Cir. 1995), and when no one points out that the wrong person has been brought to trial. Id. at 1490. In this case, the photographs and the authenticating testimony alone were sufficient evidence of identity for a rational fact-finder to convict the defendants. In addition, there were the stipulations entered into

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it was a "connect the dot" type of argument, but later found that the identity dots were not connected.

[12] In lamenting that Officer Hoke, who "impressed the court with his honesty and credibility," had not made a court-room identification, the court did not fault the officer. To the contrary, the court noted that Officer Hoke was "rushed" by "circumstances beyond his control"; there were "limited resources," "they cover a big ocean," and "the weather, the elements, were certainly part of it as well"; in addition he had a "limited amount of sleep," was "multi-tasking, running back and forth taking care of contraband, making sure that these eight individuals had proper clothing, were cleaned up, had their medical exams, were fed, received cots," and had to complete his paperwork before all of the defendants, contraband and exhibits were transferred to another ship. Exhbit D.

[13] The photographs will be made available.

and signed by each of the defendants, defense counsel's identification of the defendants and the absence of any contrary identity evidence.

The harm is also clear. Eight men smuggling over two tons of cocaine were released. Though obvious, it merits saying that the public has a strong interest in successfully prosecuting those responsible for bringing to our communities tons of cocaine and the myriad of crimes that accompany cocaine trafficking and use. Also obvious, but worth saying, is that those entrusted with an illegal and valuable cargo worth over $17 million wholesale in Mexico, have a significant role/contacts with a drug cartel. Undaunted by the magnitude of this offense, the court made an irrevocable determination that we believe is both legally and factually erroneous. The consequences of this error could have been corrected had the ruling been deferred.

B. Two Bank Robberies

Similarly, in United States v. Cooley, a case from Massachusetts, the court exonerated a defendant charged with two bank robberies whose fingerprints were on the two separate demand notes. See Exhibit E. In addition to the fingerprints, the evidence included two video-tapes of the bank robber, carrying a demand note, and matching the same physical description of the defendant. The two bank tellers also gave a description of the defendant. The court precluded them from identifying the defendant in the court room.[14]

In granting an acquittal, the judge relied on a Fourth Circuit case, United States v. Corso, 439 F.2d 956 (4th Cir. 1971), where the only evidence linking the defendant to the robbery was his fingerprint on a matchbox that had been folded up and used to prevent the automatic door from catching properly, stating "[t]he probative value of an accused's fingerprints upon a readily movable object is highly questionable, unless it can be shown that the prints could have been impressed only during the commission of the crime." Corso, 439 F.2d at 957. Here, unlike Corso, the prints could have been impressed only during the commission of the crime. The fingerprints were on two different demand notes presented to two tellers in two different robberies. The court not only failed to consider how unlikely it was that the defendant's prints would be found on both notes if he had merely touched the paper at some unrelated to the robberies, it also failed to consider the other identity evidence presented – such as the videotape of the robberies, which confirmed the robber's possession of the demand notes, and allowed the jury to compare the person in the videotape to the defendant, as well as to compare the similarity of the tellers' descriptions of the robber to the defendant.

The evidence in this case was not simply a fingerprint that could have been placed at any time. Yet the judge's misinterpretation of the law, and his refusal to consider all of the evidence in the light most favorable to the government could not be challenged through the appellate process, because the judge's ruling was made pre-verdict. As a result, a bank robber was released back into the community, posing a risk of further harm.

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[14] The court found that too much time had passed since the robbery

3. Cases Against Law Enforcement Officials and Lawyers

Criminal prosecutions against public officials, law enforcement officers and lawyers are especially challenging for well-known reasons. These people are leaders in the community. They have political and institutional connections. They are often powerful. They are often wealthy. Courts sometimes treat these defendants with greater respect and deference. Witnesses are often reluctant to testify. There may be serious personal and financial repercussions for those witnesses courageous enough to do so. These cases have an additional burden, particularly in civil rights cases. The witnesses are often criminals, who may make poor witnesses. The following three cases illustrate the difficulty in getting the case to the jury, much less obtaining a conviction. Each of these defendants – prison supervisors, and lawyers – were acquitted by the court and returned to the community without punishment, and without the community having any say. In one case, a juror voiced criticism. See Exhibit H.

A. Civil Rights Beating

In United States v. Collins, a recent civil rights case, out of the Western District of North Carolina, the court acquitted two supervisory correctional officers who beat and kicked an inmate in the head and torso. See Exhibit F. The inmate, Paul Midgett, got into a verbal altercation with another corrections officer and refused an order to return to his cell. A female officer came to assist and they quickly subdued Midgett, who stands 5'5" and weighs 110 pounds. After Midgett was subdued and on the ground, two supervisory officers, each standing over six feet tall and weighing over 200 pounds, punched and kicked Midgett multiple times in the head and torso, causing serious bruising and a broken rib. There was blood on the floor and wall. Afterward the supervisory officers made comments including, "We whipped the wheels off of him." The two corrections officers and another inmate witnessed the beating and testified to it.[15] The prison doctor, who examined Midgett, testified that he had never seen an inmate in that condition after an incident with guards. A photograph of the defendant's badly bruised face and chest was also admitted.[16]

In granting a pre-verdict acquittal, the court made several errors. First, the court misunderstood civil rights law stating, "I believe that I am compelled at this time to determine that the evidence fails to establish any motive to punish by ordeal rather than by trial," an incorrect legal standard which defense counsel had argued. The law is clear that the Government is required to prove only that the defendants purposely engaged in conduct that constituted excessive force amounting to punishment. Bell v. Wolfish, 441 U.S. 520, 535-39 (1979). There is no requirement that the government prove that the defendants intended to punish the victim; only, that the lack of

[15] During the trial, the court took an unusual tone with one of the testifying officers. The court told her to listen and answer the question before he became "real irritated," that he would strike her testimony if she didn't raise her voice, and that he would "incarcerat[e]" her if she spoke to anyone about her testimony.

[16] This photograph will be made available.

legitimate justification for the defendants' actions rendered them "malicious and sadistic for the purpose of causing harm." Hudson v. McMillian, 503 U.S. 1, 5 (1992). Second, the court incorrectly imposed a requirement that the victim testify, stating "the failure to call Mr. Midgett, indeed, creates a fatal vacuum . . . ." Third, the court inserted its view of the evidence and of the witnesses' credibility by stating, "the relatively minor injuries he sustained are completely inconsistent with government testimony."

The court's ruling dealt a considerable blow to the Department's efforts to enforce the civil rights laws in Mecklenburg County jail in western North Carolina. After the acquittal, the Sheriff of Mecklenburg declared victory by telling the press that the case was frivolous and a "witch hunt." The community could take that view, or it could take the view that the criminal justice system is unable to hold law enforcement officers accountable. Either serves to undermine the public's trust and confidence in the criminal justice system. While the defendants were released, the two subordinate officers who testified against them were suspended and will most likely be fired.

B. Money Laundering by Attorneys

In United States v. Foster, a case from Massachusetts, the Government presented evidence of a lawyer who laundered hundreds of thousands of dollars of his client's drug money. See Exhibit G. The evidence showed that the lawyer received bags of cash containing hundreds of thousands of dollars, that there were fourteen payments in two years, that the money was from clients who sold ecstasy, that the lawyer ran at least $370,000 in cash through his client trust account, and that the lawyer used the money to invest in a nightclub with his clients, while other money was used to buy boats and cars. The evidence included a wiretap and the testimony of multiple coconspirators testifying to events showing defendant's knowledge of the drug money. For example, after spotting law enforcement surveillance, one dealer picked up the lawyer, told him about it, and together they removed ecstasy pills and money from the dealer's apartment, with the lawyer saying he was happy to do it.

The court granted a pre-verdict acquittal because it viewed the evidence in the light most favorable to the defendant – instead of the Government. In finding insufficient evidence that defendant knew the cash was drug money, the court noted it is "not a crime" to deposit $370,000 in cash. The court repeatedly commented on the defendant's lack of "subterfuge," stating: "the fact that he is so out front, isn't that consistent *also* with the fact that he didn't know?" (emphasis added.) The court also applied an incorrect legal standard for proving knowledge, stating: "It has to be either he was told . . . 'I'm a drug dealer and this is where I got the money.' Or he acts in a way that shows his state of mind as being someone who is aware of the fact that he is dealing with criminals and he acts that way." Unlike the court, the jury may have found the lawyer's blatancy demonstrated his guilt, rather than his innocence. The jury may have chosen to believe the testimony of multiple witnesses and may have concluded that a lawyer accepting bags containing hundreds of thousands of dollars of cash from drug clients, and entering into business partnerships with them, knows that it is drug money. Instead of reviewing the evidence in the light most favorable to the Government, the court focused on one possible, and unlikely, interpretation of the evidence. By precluding the

jury from considering the facts, the court created a "blatancy" defense that does not exist and applied it to this case as a matter of law. Following the acquittal, one juror said that she found the evidence of knowledge very persuasive and expressed frustration by asking, "What is the point of the jury being there?"

The disconcerting problem with Rule 29 is less that judges err; it is the inability to seek further review of what we believe to be erroneous legal decisions through the appellate process. At times, it appears that courts may intentionally rule pre-verdict in order to shield rulings from appeal.

For example, in United States v. Levine, a money laundering/lawyer case from New Jersey, the government presented evidence that a lawyer and another defendant laundered $400,000 through a shell corporation in the Cayman Islands and various other accounts. See Exhibit H. Ultimately the money, proceeds from a fraud scheme, returned to the defendants. Despite ample evidence of these transfers, which were not contested, the court repeatedly expressed the view that there could be no money laundering, because the funds, after circuitous routing, were returned to the original source: the defendants. In granting the pre-verdict acquittal, the court said:

> There is not sufficient proof to show any of the elements of money laundering. This circuitous route of the money going around the circle and ultimately going back home to roost to him – while it makes no sense, this does not constitute money laundering, so far as this Court is concerned, and I'll dismiss all the money laundering counts.

In fact, the money laundering statute requires proof only that the defendant moved the proceeds of a crime in and out of the United States with the intent to conceal or disguise the nature, location, source, ownership or control of the proceeds. This fundamental misunderstanding of the elements of the offense was, unreviewable, as the court was aware. The next court day, when the AUSA asked the court to reconsider its order, the court responded:

> It is done. Finished. Judgment of acquittal. It is gone. *I know what I'm doing. I recognized what I was doing. I recognized what I was doing. . . .* Jeopardy has attached. Once I enter judgment of acquittal at the end of the government's case or the end of the whole case, that is the end of the jeopardy that the person is put in. You can't reargue that. You can't appeal. You can't do anything with it. I'm aware of that. (Emphasis added.)

The court further opined that it could not reconsider a Rule 29 motion and asked the AUSA if there was any case authority allowing reconsideration.[17] When the AUSA noted that there is and began to summarize it, the court said "I'm not going to reconsider it."

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[17] This issue is currently pending before the United States Supreme Court in Smith v. Massachusetts, No. 03-8661 (Whether the double jeopardy clause's prohibition against successive prosecutions is violated when the judge rules that the defendant is not guilty because the government's evidence is insufficient, but later reverses that finding).

In this case, the court ruled pre-verdict knowing that the acquittal permanently relieved defendants of criminal liability and returned a lawyer to practice. In the process, the court declared a certain form of money laundering legal, and shielded (apparently intentionally) that decision from appellate review and, likely, reversal.

These few cases are illustrative. Many other examples have been and could be provided if time and space allowed. Despite the 1994 amendment encouraging reservation of the decision, district judges do not follow the best practice, thus, precluding appellate review of erroneous decisions. Allowing these decisions, which dispose of entire cases, counts or defendants, to escape the appellate review which protects against error in all other like rulings, is anomalous, it shields error, it invites abuse, it releases dangerous individuals; it prevents the jury and the justice system from performing their most basic function – adjudicating guilt correctly, and it undermines the public's confidence in the criminal justice system.

IV. Proposals To Amend Rule 29

The Department's objective before the Standing Committee is less to discuss the specifics of a particular proposal and more to ensure that this important issue is thoroughly and completely addressed through the Rules Enabling Act process. Nevertheless, the following briefly discusses the Department's original proposal and another proposal which was discussed before the Advisory Committee.

A. The Department's Original Proposal

The Department's original proposal is straightforward and is not intended to alter the basic purpose of the Rule. See Exhibit I. It would require the district court to reserve decision on whether to grant a judgment of acquittal until after the jury returns a verdict. The amended Rule would thus preclude the entry of a judgment of acquittal before the jury returns a verdict, or if the jury is discharged without having returned a verdict. It would preserve the government's appellate rights and ensure that erroneous rulings will be corrected by the Courts of Appeals. Meritless or erroneous dismissals can be reversed and verdicts of guilt reinstated without offending the Double Jeopardy Clause. See United States v. Scott, 437 U.S. 82 (1978).

The proposed amendment would simply complete the work of the 1994 amendment and make the best practice the standard practice. The proposed amendment would bring substantial benefits. It "reconcile[s] the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution," as the Supreme Court suggested. See Fed. R. Crim. P. 29 Advisory Committee Note (1994) (quoting Scott, 437 U.S. at 100 n.13). By requiring reservation until after the jury verdict of guilty, the Government's right to appeal is preserved. The resulting appellate review protects the public's interests in correcting erroneous rulings, convicting defendants against whom sufficient evidence has been presented, and confining dangerous defendants who would otherwise be erroneously freed to prey again on the public.

At the same time, the proposed amendment safeguards the defendant's constitutionally-protected interest in avoiding a second trial, by allowing reinstatement of a guilty verdict following reversal of a post-verdict Rule 29 acquittal on appeal. See Carlisle v. United States, 517 U.S. 416, 445 (1996) (Stevens joined by Kennedy, JJ., dissenting) ("The defendant's interests are obviously fully protected by an acquittal, while the Government's right to appeal is protected because the jury has already returned its verdict of guilty.").

Our proposal, like the 1994 amendment, further protects defendants' rights by requiring that the reserved decision on a motion at the close of the Government's case be made "on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b). Thus, a defendant still can require that the Government set forth sufficient evidence in its case in chief by making his Rule 29 motion at the close of the Government's case. That defendant will receive precisely the same ruling he would have received had the decision not been reserved.

The proposal would preserve the power of the district court to enter a judgment of acquittal on the defendant's motion, but simply shift the timing. We would also preserve the court's power to grant a judgment of acquittal *sua sponte*, again merely moving the timing of such a motion from before submission of the case to the jury to within seven days after the verdict. The proposed amendment thus preserves the longstanding ability of district courts to dismiss criminal counts as insufficiently supported by the evidence, but simply requires that decision, like virtually all others, be subject to judicial review. The amendment also permits the appellate courts to provide the same checks and balances against judicial error they do in virtually every other context. See Unlimited Power, at 452-56 (detailing the virtues of ensuring appellate review of Rule 29 decisions).

The proposed amendment achieves other goals as well. The amendment removes the pressure on the district court for a quick decision on a dispositive issue. As the 1994 Advisory Committee noted, reservation allows the district judge to rule after the verdict, rather than in the midst of trial while the jury, counsel and witnesses are waiting, and thus "remove[s] the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision." Id.[18]

Further, the proposed amendment, when considered in the context of the entire prosecution, will result in less wasted time and effort. When an erroneous judgment of acquittal is granted, all of the time and effort invested by the prosecutors, by the judge, and by the jury – in investigation, grand jury presentations, pre-trial motion practice, trial preparation, jury selection, and the bulk of the trial – are totally and irretrievably wasted. By contrast, in most cases, reserving the ruling until after the verdict involves relatively little delay. Where the motion is made at the close of the evidence, all that remains of trial is closing arguments, jury instructions, and deliberations. If the motion is made at the close of the Government's case, the only additional portion of trial remaining

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[18] The proposed amendment thus "afford[s] a trial judge the maximum opportunity to consider with care a pending acquittal motion," which has been termed the purpose of Rule 29's "differentiations in timing," *see* Martin Linen, 430 U.S. at 574.

is the defense case, if any, and any rebuttal case. In most cases, these portions of the trial are brief. The AOC reports that, in 2003, 50% of criminal trials were 1 day; 79% were 3 days or less; and 96% were 9 days or less. See Exhibit A, Table C-8.

In almost all cases, particularly more substantial prosecutions, these portions of the trial are relatively short compared to the length of the completed portions of the trial, and are dwarfed by the length of the prosecution as a whole. The AOC reports that, in 2003, the median time interval from filing to jury trial was 12.3 months. See Exhibit A, Table D-10. Thus, the relatively short time "saved" by granting a motion for judgment of acquittal pre-verdict is outweighed by the time and effort lost when a judgment of acquittal is erroneously granted, thus wrongly discarding the already completed portions of the trial and prosecution, and the time and effort already invested by the judge, jury, and prosecution. Overall, the proposed amendment saves time and effort.

Finally, the proposed amendment respects the role of the jurors. Reserving a Rule 29 motion allows the jury to complete the task which is its *raison d'etre*, and for which the jurors were called to serve.

In sum, the proposed amendment requires judges to do what the 1994 amendment encourages them to do – reserve decision until after a guilty verdict. In so doing, the proposed amendment (1) conforms Rule 29 to § 3731, securing the Government's full scope of its right to appeal under that statute and the Constitution, (2) provides district judges with additional time to consider and correctly rule on Rule 29 motions, (3) ensures that erroneous grants of judgments of acquittal can be corrected, (4) protects the public from dangerous defendants who would otherwise be erroneously freed, and (5) prevents the waste of the judicial, juror and prosecutorial time and effort already invested in the prosecution and trial. At the same time, the proposed amendment preserves the defendant's ability to obtain a judgment of acquittal; the defendant's ability to move for a judgment of acquittal at the close of the government's case in chief, and to require that the evidence be sufficient at that point; and the district court's ability on its own motion to move for a judgment of acquittal. The proposed amendment will thus be, we believe, a marked improvement to Rule 29.

Some members of the Advisory Committee expressed general support for the Department's proposal but were concerned that in multi-defendant and/or multi-count cases, a procedure should be authorized to streamline the case in order to eliminate weak counts. One means of addressing this concern is by encouraging judicial suasion and voluntary dismissal in the Rule or the Committee Note. Moreover, dismissing some but not all of the defendants or counts is often favorable to all parties, including the Government, because it simplifies the case for the jury while terminating only portions of the case that are unnecessary for the Government. We are open to further consideration of this issue and how it might be addressed.

B. Other Proposals

Other mechanisms have been suggested to accomplish the same goals. One proposal, suggested by Judge Levi, would require a defendant to waive any double jeopardy claims before a

Rule 29 motion could be granted prior to verdict. See Exhibit J. This proposal, which the Department views very favorably, was first discussed at the Advisory Committee meeting in May 2004. As the Department noted then, this proposal addresses both the Department's interest in an appellate right and the court's interest in retaining discretion to dispose of weak counts, particularly in the case of multiple defendants and/or counts and retrials after hung juries. While this proposal presents the issue of whether double jeopardy can be waived and, if so, what procedures the rule should require, preliminary research indicates that a waiver requirement might be constitutionally imposed before a trial court were permitted to grant a pre-verdict Rule 29 dismissal. While the waiver proposal does not necessarily achieve all of the efficiencies of the Department's original proposal (it would require a second trial following a successful appeal), we favor it and think it merits further consideration by the Advisory Committee.

In short, the Department is open to any proposal which will accomplish the policy objectives discussed here. Publishing for public comment one or more proposed amendments will continue the dialogue necessary to amend Rule 29 and to fulfill the promise of the Rules Enabling Act process.

V. Conclusion

The Department of Justice has considered this issue at great length and does not lightly urge substantive amendments to the Criminal Rules. Nonetheless we believe that Rule 29 as currently constituted represents an anomaly within the Rules and indeed within the judicial system. Throughout the legal system, nearly every ruling made by the judge or decisionmaker can at some point be substantively appealed. For the Rules to permit a single judge to enter an unreviewable acquittal ending a federal prosecution in a criminal case, perhaps the most fundamental and grave proceeding in any system of laws, "runs directly counter to the principles of fairness and uniformity inherent in the process of appellate review." Unlimited Power, at 434, 452, 463 (urging that "a revision of Rule 29 that eliminates the power of trial judges to order pre-verdict judgments of acquittal would best serve the interests of justice and fairness").

To an extent rarely equaled in our history, citizens look to the federal criminal justice system to play a leading role in ensuring the national security, policing financial markets and corporate suites, and ensuring the consistent enforcement of a host of important laws. The societal costs suffered when even a small number of meritorious criminal cases are irretrievably and erroneously abrogated far outweigh the burdens placed on the court, the parties and the jurors to await the deliberation of the defendant's peers. The Rules should ensure a just result for crime victims and for the public as well as for the criminal defendant. The proposed amendment to Rule 29 would help "provide for the just determination of every criminal proceeding," the very purpose of the Rules of Criminal Procedure. Fed. R. Crim. P. 2. It also allows the Department of Justice to do a better job vindicating the interests of both the United States and the victims of crime. We thank the Committee for seriously considering our views. We urge the Committee to recognize that there is a problem and to take appropriate steps so that an appropriate solution can be found through the procedures of the Rules Enabling Act.

cc: Judge Susan C. Bucklew
Chair, Advisory Committee on Criminal Rules

Judge Edward E. Carnes
Former Chair, Advisory Committee on Criminal Rules

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, consultant

RE: Status of Proposed Amendment to Rule 41 re Tracking-Device Warrants

DATE: March 15, 2005

In June 2003 the Committee presented to the Standing Committee its recommendation that an amendment to Rule 41 authorizing the issuance of warrants for tracking devices be published for public comment. The history of this amendment is described briefly in Professor Schlueter's memo of October 5, 2004.

The Standing Committee originally voted to approve and forward the amendment. However, after the Standing Committee meeting the Deputy Attorney General (who had abstained from the vote) asked the Committee to defer forwarding the proposal to the Judicial Conference in order to permit the Department of Justice to consider and present its concerns to the Standing Committee.

Professor Schlueter's October 5, 2004 memo to the Committee and the text of the proposed amendment and committee note are attached.

No further report from the Department of Justice has been received, but Ms. Rhodes has indicated that the Department will provide further information that will be included in the agenda book, or, if necessary, provided as a supplement.

This item is on the agenda for the April meeting in Charleston.

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.

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 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

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, consultant

RE: Rule 45. Computing and Extending Time: Proposed Amendment

DATE: March 11, 2005

Under Rule 45(c), additional time for service is provided if service is made by mail, leaving with the clerk of court, or electronic means, under Civil Rule 5(b)(2(B),(C), or (D), respectively. The Civil Rules Committee has proposed an amendment to 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.

A proposed draft amendment of Rule 45(c) and accompanying Committee Note are attached. They are modeled on the proposed amendment to Civil Rule 6.

The Civil Rule 6 amendment and Committee Note are also attached.

This item is on the agenda for the April meeting in Charleston.

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. ~~When these rules permit or require~~ Whenever a party must or may ~~to~~ act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D), 3 days are added after ~~to~~ the period would otherwise expire under subdivision (a) ~~if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D)~~.

COMMITTEE NOTE

Rule 45(c) 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. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. 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 that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(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 45(a) the period expires on Tuesday. Three days are then added – Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends 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 45(c) 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 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper

was mailed. The three added Rule 45(c) 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.

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 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 a party must or may act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.

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.

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

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **December 17, 2004**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Santa Fe, New Mexico, on October 28 and 29, 2004.

* * * * *

Part I of this report presents action items. Part I A recommends transmission for approval of new Civil Rule 5.1 and conforming amendments to Civil Rule 24(c). These proposals were published for comment in August 2003. They were discussed and revised at the April and October 2004 meetings. The Committee believes that the revisions do not require republication.

* * * * *

I Action Items

A. Rules for Adoption: New Civil Rule 5.1 — Notice of Constitutional Question; Conforming Rule 24 Changes

The Advisory Committee recommends approval for adoption of new Civil Rule 5.1, and a conforming amendment of Civil Rule 24(c), as follow on the next pages:

or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

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.

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 expires. All the other time-counting rules apply unchanged.

One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a legal holiday, ordinarily Monday.

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

FROM: **Professor Sara Sun Beale, consultant**

RE: **Rules Affected by the Crime Victims Rights Act, Judge Cassell's Proposals**

DATE: **March 14, 2005**

On October 30, 2004, President Bush signed into law P.L. 108-405, the Justice for All Act 2004. Title I of the act, the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA), contains provisions on victim allocution and other rights. The relevant provisions are codified as 18 U.S.C. § 3771.

Judge Paul G. Cassell, of the District of Utah, has provided the Committee with an memorandum analyzing the CVRA and proposing 25 changes throughout the rules (including two new rules) to implement the legislation and carry forward its goals. As noted in his memorandum, Judge Cassell has written extensively on victim's rights. He also served as counsel to the victims of the Oklahoma City bombings before his nomination to the bench.

Judge Cassell's memorandum (including appendices incorporating the text of the act and legislative history) are attached.

This item is on the agenda for the April meeting in Charleston.

05-CR-D

Proposed Amendments to the Federal Rules of Criminal Procedure in Light of the Crime Victims Rights Act

By Paul G. Cassell
United States District Court Judge
for the District of Utah

and Professor of Law for
the S.J. Quinney College of Law
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March 2, 2005

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE IN LIGHT OF THE CRIME VICTIMS' RIGHTS ACT

Proposed Amendments to the Federal Rules of Criminal Procedure in Light of the Crime Victims' Rights Act

By Paul G. Cassell*

Last October, Congress passed and the President signed into law the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA).[1] The CVRA will reshape the federal criminal justice system, forcing significant changes to the Federal Rules of Criminal Procedure. The CVRA transforms crime victims into participants in the criminal justice process by guaranteeing them notice of court hearings, the right to attend those hearings, and the opportunity to be heard at appropriate points in the process. In this memorandum, I try to provide comprehensive suggestions about the changes to the criminal rules the CVRA requires both as a matter of law and of sound public policy.

This memorandum is divided into two parts. In Part I, I briefly sketch the background leading to the CVRA's enactment. For the last ten years, Congress has been considering amending the U.S. Constitution to protect crime victims' rights. Unable to garner the necessary super-majority needed to pass a constitutional amendment, the principle sponsors (Senator Jon Kyl of Arizona and Senator Dianne Feinstein of California) decided instead to pass a broad federal statute protecting victims' rights throughout the federal system. They intended that the statute significantly improve how federal courts treat crime victims. To that end, the CVRA confers rights on victims throughout the criminal process.

In Part II, I provide a rule-by-rule analysis of the multiple changes needed in the Federal Rules of Criminal Procedure to implement the CVRA. Of particular importance is new language protecting crime victims' rights to be notified of, be present at, and be heard at public criminal proceedings. The right to notice is implemented in a new Rule 10.1, which mandates that prosecutors keep victims apprised of criminal proceedings. The right to attend court proceedings is implemented in a new Rule 43.1, which generally gives victims the right to remain in the courtroom even when they are witnesses. The right to be heard at bail, plea, and sentencing hearings is reflected in changes to Rule 46(k), Rule 11, and Rule 32 respectively.

I also propose other significant changes to conform the Rules to the CVRA. Rule 1 would provide a definition of "victim" consistent with the CVRA. Rule 17 would give victims notice before confidential personal information can be subpoenaed. Rules 20 and 22 would allow victims to be heard before judges transfer cases to remote districts. Rule 32 would provide victims access to the relevant parts of presentence reports so that they can make an effective sentencing recommendation. Rule 44.1 would recognize a court's discretionary power to appoint volunteer attorneys to represent victims. Rule 50 would protect a victim's right to proceedings free from

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* U.S. District Judge for the District of Utah and Professor of Law, S.J. Quinney College of Law, Univ. of Utah.

[1] Crime Victims' Rights Act, Pub. L. No. 108-405, 118 Stat. 2261 (codified as 18 U.S.C. § 3771).

unreasonable delay. And Rule 53 would allow closed circuit transmission of court proceedings in cases involving multiple victims.

This memorandum also contains several appendices. Because the CVRA is not yet widely available in the standard West Publishing rule book, Appendix A contains a full copy of the legislation. Shortly after the passage of the CVRA, chief sponsor Senator Jon Kyl took to the Senate floor to provide a section-by-section explanation. Appendix B is a copy of his helpful analysis. Finally, while I discuss my proposed changes rule-by-rule in the body of this memorandum, it might be helpful for the Committee to see a clean draft of the proposed rule changes interlineated into the text of the current rules. Appendix C contains a clean copy.

I have considerable background on victims issues, which is why I have written this (perhaps too lengthy) analysis of the issues. Along with co-authors Douglas Beloof and Stephen Twist, I have a new law school casebook coming out shortly on the subject of crime victims' rights – VICTIMS IN CRIMINAL PROCEDURE.[2] I teach a course on Crime Victims' Rights annually at the University of Utah College of Law. I have also published several articles on crime victims' rights[3] and have testified before Congress on the subject.[4] I hope that my background will allow me to provide some assistance to the members of the Committee as it attempts to integrate victims into the federal criminal system.

I. GENERAL BACKGROUND TO THE CRIME VICTIMS' RIGHTS ACT

The Crime Victims' Rights Movement developed in the 1970s because of an imbalance in the criminal justice system. Victims' advocates argued that the criminal justice system had become

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[2] North Carolina Academic Press (forthcoming 2d ed. 2005).

[3] Paul G. Cassell, *Barbarians at the Gates: A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479 (1999); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victims Rights Amendment*, 1994 UTAH L. REV. 1373 (1994); Laurence H. Tribe & Paul G. Cassell, *Embed the Rights of Victims in the Constitution*, L.A. TIMES, July 6, 1998, at B7.

[4] *See, e.g.*, "The Right of Crime Victims To Be Heard Throughout the Criminal Justice Process," Testimony before the Subcomm. on the Constitution of the Senate Judiciary Comm, May 1, 1999 (St. Louis, Missouri); "A Response to the Critics of the Victims' Rights Amendment," Testimony before the Senate Judiciary Comm., Mar. 24, 1999 (Washington, D.C.); "The Victims' Rights Amendment," Testimony before the Senate Judiciary Comm., Apr. 28, 1998 (Washington, D.C.); "A Constitutional Amendment Protecting the Rights of Crime Victims," Testimony before the Senate Judiciary Comm., Apr. 16, 1997 (Washington, D.C.).

preoccupied with defendants' rights to the exclusion of considering the legitimate interests of crime victims.[5] These advocates urged reforms to give more attention to victims' concerns.

The movement received considerable impetus with the publication in 1982 of the Report of the President's Task Force on Victims of Crime. The Task Force concluded that the criminal justice system "has lost an essential balance . . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection. . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them. This oppression must be addressed."[6] The Task Force recommended multiple reforms, including a federal constitutional amendment to protect crime victims.

In the wake of that recommendation, crime victims advocates considered how best to pursue a federal amendment. Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go to the states first to enact state victims amendments. They have had considerable success with this states-first strategy.[7] To date, about thirty states have adopted victims' rights amendments to their own state constitutions.[8]

With the passage of these state amendments in hand, in 1995 victims advocates decided the time was right to press for a federal constitutional amendment. Lead most prominently by the National Victims Constitutional Amendment Network,[9] the advocates approached the President and Congress about a federal amendment. In 1996, Senators Kyl and Feinstein introduced a federal

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[5] *See generally* BELOOF, CASSELL & TWIST, *supra*, chapter 1; Cassell, *Balancing the Scales of Justice*, *supra*, 1994 UTAH L. REV. 1380-82.

[6] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 114 (1982).

[7] *See* S. REP. 108-191, 108 Cong., 1st Sess. 3 (2004).

[8] See ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, §§ 12, 28; COLO. CONST. art. II, § 16a ; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16(b); IDAHO CONST. Art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. 1, § 25; MD. DECL. OF RIGHTS art. 47; MICH. CONST. art. I, § 24; MISS. CONST. art. 3, § 26A; MO. CONST. art. I,§ 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; NEW MEX. CONST. art. 2, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST.; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. 1, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. 2, § 33; WIS. CONST. art. I, § 9m. These amendments passed with overwhelming popular support.

[9] *See* www.nvcan.org.

victims' rights amendment.[10] In the following years, however, despite the backing of many members of Congress of both political parties and of both President Clinton and later President Bush, the Amendment could never gain the required two-thirds vote for approval.

In April 2004, victims advocates met with Senators Kyl and Feinstein to decide whether to push again for a federal constitutional amendment. Concluding that the amendment had only majority support in Congress rather than the required super-majority, the advocates decided to press for a far-reaching federal statute protecting victims' rights in the federal criminal justice system. In exchange for backing off from the federal amendment, victims' advocates received near universal congressional support for a "broad and encompassing" statutory victims' bill of rights.[11] This "new and bolder" approach not only created a string of victims' rights, but also provided funding for victims' legal services and created remedies when victims' rights were violated.[12]

The legislation that ultimately passed – the Crime Victims' Rights Act – gives victims "the right to participate in the system."[13] Specifically, the Act grants victims:

> (1) The right to be reasonably protected from the accused;
>
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole 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, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
>
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, 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;

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[10] S.J. Res. 52, 104th Cong., 2nd Sess (Apr. 22, 1996).

[11] 150 CONG. REC. S4261(daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[12] *Id.* at S4262 (statement of Sen. Feinstein).

[13] *Id.* at S4263 (statement of Sen. Feinstein). For a description of victim participation, see Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

(7) The right to proceedings free from unreasonable delay; and

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.[14]

The congressional sponsors described these as "broad rights"[15] whose "significance [should not] be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."[16]

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE TO IMPLEMENT THE CVRA

In light of the CVRA, the Committee needs to significantly change the Federal Rules of Criminal Procedure. As should be obvious from the description of the CVRA's goals, the Act is not an invitation to business as usual for federal courts. Rather, Congress intended to make crime victims participants in the criminal process. Congress will be watching to see whether the Judiciary (and the Executive) will fully and fairly implement the new Act. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress."[17]

Broadly construing the CVRA also required because the Act is remedial legislation. As the Supreme Court has instructed, "When Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals."[18] The Committee is, of course, aware of the need to effectuate the goals of the CVRA, having previously withdrawn the Committee's proposed amendment to Rule 32 regarding sentencing allocution by all victims in light of the new Act.

With the goal of effectively implementing the Act in mind, I propose the following Rules changes for consideration by the Committee. In the sections that follow, I first recite a specific proposed change followed by the rationale for that change as both a matter of law and of policy. Appendix C provides a clean copy of all the rules with the proposed revisions interlineated.

Rule 1 - Definition of "Victim"

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[14] 18 U.S.C. § 3771(a).

[15] 150 CONG. REC. S4269 (statement of Sen. Kyl).

[16] *Id.* (statement of Sen. Feinstein).

[17] *Id.* at S4271 (statement of Sen. Leahy).

[18] *California v. American Stores Co.*, 495 U.S. 271, 279 n.4 (1990).

The Proposal:

Rule 1 should be amended to include the following definition of a victim:

(11) "Victim" means a person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative.

The Rationale:

The CVRA itself directly defines "victim" with this language,[19] which ought to be folded into the rules for convenience. The rules currently define such terms as "attorney for the government," "federal judge," and "petty offense;" "victim" likewise should be defined.

A definition is required for a second reason: Rule 32 currently contains a differing definition of "victim" as "an individual against whom the defendant committed an offense for which the court will impose sentence."[20] Because that definition varies from that mandated by the CVRA, it will have to be changed.

The term "victim" used in the CVRA has an interpretative history.[21] The CVRA's definition of "victim" is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (MVRA).[22] In turn, the MVRA drew on the 1982 Victim Witness Protection Act (VWPA).[23] As a result, the CVRA uses a definition of "victim" that is twenty-two years-old and has not produced major

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[19] 18 U.S.C. § 3771(e).

[20] Fed. R. CRIM. P. 32(a)(2).

[21] *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 2 (reviewing different definitions of "victim" for purposes of crime victims legislation).

[22] *See* 18 U.S.C. § 3663A(a)(2).

[23] *See* 18 U.S.C. § 3663(a)(2).

administrative or definitional problems. Courts will be able to use that case law to determine who qualifies as a "victim."[24]

Rule 1 also appears to be the best place to include the CVRA's language about a "representative" of a victim. This language, too, draws on the restitution statutes.[25]

Rule 2 – Fairness to Victims in Construction

The Proposal:

Rule 2 should be amended to require fairness to victims in construing the rules as follows:

> These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay.

The Rationale:

The CVRA broadly mandates that victims have the right to "be treated with fairness and with respect for the victim's dignity and privacy." This right to fairness appears to create a substantive

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[24] *See, e.g., Hughey v. United States*, 495 U.S. 411 (1990) (holding that VWPA limited "victim" to victims of the actual offense of conviction so that district court could not order restitution on basis of charges that were dropped as part of plea agreement); *United States v. Follet*, 269 F.3d 996 (9th Cir. 2001) (holding that a free clinic was not a "victim" of the defendant's rape of his niece); *Moore v. United States*, 178 F.3d 994 (8th Cir. 1999) (bank customer was "victim" of attempted bank robbery under MVRA where defendant pointed a sawed-off shotgun at the customer and the teller, who were standing only two feet apart, while demanding money); *United States v. Sanga*, 967 F.2d 1332 (9th Cir. 1992) (holding that foreign national who conspired to be brought into United States illegally was still a "victim" of the conspiracy where her smuggler threatened her life and forced her to work as live-in maid once she had arrived); *United States v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah 2003) (holding that "victim" in manslaughter case under MVRA was murdered person himself and not the estate). *See generally* John F. Wagner, Jr., Annotation, *Who is a "Victim," So as to Be Entitled to Restitution Under Victim and Witness Protection Act*, 108 A.L.R. FED. 828 (2005).

A few new issues will need to be litigated. For example, the *Hughey* case noted above conflicts with the views of Senator Jon Kyl, co-sponsor of the CVRA, who explained that the definition of "victim" in the CVRA is an intentionally broad definition because "all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." *See* 150 CONG. REC. S10910-01 (Oct. 9, 2004) (statement of Sen. Kyl).

[25] *See, e.g.*, 18 U.S.C. § 3663A(a) (same definition of victim "represenative").

right to fairness, as is found in some state victims' rights amendments – including the amendment found in Senator Kyl's home state of Arizona.[26] This broad reading was explained by Senator Kyl:

> The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process.[27]

In light of victims' new substantive right to fairness, Rule 2 should be amended to make clear that all of the rules must be construed to be fair to victims no less than to the government and defendants.

(New) Rule 10.1 - Notice of Proceedings for Victims

The Proposal:

A new Rule 10.1 should be added to guarantee victims their right to notice of proceedings as follows:

> **Rule 10.1 Notice to Victims.**
> **(a) Identification of Victim.** During the prosecution of a case, the attorney for the government shall, at the earliest reasonable opportunity, identify the victims of the crime.
> **(b) Notice of Case Events.** During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:
> (1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;
> (2) The release or detention status of a defendant or suspected offender;
> (3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;
> (4) The right to make a statement about pretrial release of the defendant;
> (5) The victim's right to make a statement about acceptance of a plea of guilty or *nolo contendere*;
> (6) The victim's right to attend public proceedings;
> (7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and

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[26] *See, e.g.,* ARIZ. CONST., art. 2, § 2(A)(1) (victim's right to be "treated with fairness, respect, and dignity"); UTAH CONST., art. I, § 28(1)(a) (same). *See generally* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1387-88 (noting that Utah's provision is drawn from Arizona's and that it creates substantive rights).

[27] 150 CONG. REC. 4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

(8) After the defendant is sentenced, the sentence imposed and the availability of the Bureau of Prisons notification program, which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances.

The Rationale:

This proposed change stems from the CVRA's command that victims have the "right to reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime . . . ."[28] Under this provision, victims have the right to notice of the arraignment as well as subsequent proceedings. Congress believes that victims should know about court proceedings, as Senator Feinstein urged:

> Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong.[29]

There can be no dispute, then, that victims are entitled to notice of court proceedings. The tricky issue is how to provide that notice to victims. This responsibility must fall on prosecutors and their investigative agents for several reasons. First, prosecutors and their agents are the only ones who know the identity of the victims in the first instance. In a bank robbery, for example, it is the FBI agents who will respond and interview the tellers. Second, prosecutors and their agents continue working with victims throughout the course of a prosecution. They work with victims in investigating the crime, identifying potential defendants, preparing the indictment, and presenting evidence to the grand jury and at any preliminary hearing, bail hearing, or trial. Because of that working relationship, in many cases prosecutors are best situated to provide notice. Third, most crime victims will lack legal counsel and will be unfamiliar with the nature of federal criminal proceedings. They may require assistance from someone familiar with the process in understanding what kinds of hearings are contemplated. United States Attorney's Offices, including the Victim-

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[28] 18 U.S.C. § 3771(a)(2).

[29] 150 CONG. REC. S2468 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein); *see also id.* at S4267 (statement of Sen. Kyl) ("It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted.").

Witness Components in those offices, are well-situated to provide that assistance. For all these reasons, notice is appropriately provided by prosecutors. Most states follow this approach as well.[30]

It appears that the Justice Department agrees with this assessment. In the *Attorney General Guidelines for Victim and Witness Assistance*, the Department already requires prosecutors and their agents to provide notice to crime victims. In particular, the *Guidelines* currently obligate prosecutors to provide "the earliest possible notice" of:

> (a) The release or detention status of an offender or suspected offender. . . .
>
> (b) The filing of charges against a suspected offender, or the proposed dismissal of all charges. . . .

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[30] *See, e.g.,* ALA. STAT. § 15-23-62 (requiring law enforcement officers to give victims initial description of their rights "[t]he name and telephone number of the office of the prosecuting attorney to contact for further information); ARIZ. REV. STAT. § 13-4409 (requiring prosecutor to provide notice to victim of criminal proceedings; CONN. GEN. STAT. ANN. § 51-286e (requiring prosecutor to notify victim of any judicial proceedings related to the case); DEL. CODE ANN. tit. 11 § 9411 (requiring Attorney General to provide information to victim including "[n]otice of the scheduling of court proceedings and changes including trial date, case review and sentencing hearings"); GA. CODE ANN. § 17-17-8(b) (requiring prosecutor where possible to give victim "prompt advance notification of any scheduled court proceedings"); KY. REV. STAT. ANN. § 421.500.5 (requiring prosecutor to provide victim "prompt notification, if possible, of judicial proceedings relating to the case"); ME. REV. STAT. ANN. tit. 15 § 6101 (requiring prosecutor to provide victims of certain crimes notice of any plea agreement and of trial date); MASS. GEN. LAWS ANN. ch. 258B § 3 (requiring prosecutor to give victims notice of various rights); MICH. COMP. LAWS ANN. §780.755 (requiring prosecutor to give victims notice of court proceedings); MINN. STAT. ANN. § 611A.03 (requiring prosecutor to give victim notice of plea agreement and sentencing hearing); N.M. STAT. ANN. § 31-26-9(B) (requiring prosecutor to provide victim with notice of scheduled court proceedings); N.Y. LAW. § 646a (requiring prosecutor to provide notice of court proceedings); S.D. CODIFIED LAWS. § 23A-28C-1 (requiring prosecutor to notify victim of certain hearings); TENN. CODE ANN. § 40-38-103 (requiring prosecutor to notify victim of "times, dates, and locations of all pertinent stages in the proceedings); TEX. C.C.P. CODE ANN. art 56.08(b) (requiring prosecutor to give victim notice of court proceedings); UTAH CODE. ANN. § 77-38-3 (requiring prosecutor to give victim notice of "important criminal justice hearings");WIS. STAT. § 972.14(2m) ("Before pronouncing sentence, the court shall inquire of the district attorney whether he or she has complied with § 971.095(2) and with sub. (3)(b), whether any of the victims of a crime considered at sentencing requested notice of the date, time and place of the sentencing hearing and, if so, whether the district attorney provided to the victim notice of the date, time and place of the sentencing hearing."); WYO. STAT. ANN 1-40-204(b)(i) (requiring prosecutor to inform victim about all hearings). *But see* OHIO REV. CODE ANN. § 2930.06(C) (requiring court to give notice to victim of court proceedings)..

> (c) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim or witness is either required to attend or entitled to attend. . . .
>
> (d) The acceptance of a plea of guilty or *nolo contendere* or the rendering of a verdict after trial. . . .
> (e) If the offender is convicted, the date set for sentencing, the sentence imposed . . . .[31]

To avoid breaking any new ground, the proposed new rule 10.1 is lifted essentially verbatim from the *Attorney General Guidelines for Victim and Witness Assistance*. As a result, this new rule does not create significant new responsibilities for prosecutors and their agents.

The drafters of the CVRA also appear to believe that the notification obligations will fall primarily on prosecutors' offices. The CVRA authorizes $22,000,000 over the next five fiscal years to the Office for Victims of Crime of the Department of Justice for enhancement of victim notification systems.[32] Presumably, those enhanced new notification systems can be used to keep victims apprised of court proceedings. Moreover, the CVRA directs that the Department of Justice and its investigative agencies "shall make their best efforts to see that crime victims are *notified of*, and accorded, the rights described in subsection (a)."[33]

Proposed new Rule 10.1 adds only two additional obligations beyond those found in the *Attorney General Guidelines*: notice to victims of (1) their right to make a statement regarding any proposed plea and (2) their right to attend public proceedings. With respect to the first point, given that the *Attorney General Guidelines* already requires prosecutors to confer with victims about pleas, it should not be burdensome for prosecutors to also inform victims about their rights in connection with a public plea proceeding. With respect to the second point, the *Attorney General Guidelines* already require prosecutors to inform victims of their right to attend trial. The proposed change

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[31] ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE, at 31 (2000); *see also* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 82 (1997) ("Prosecutors' offices should notify victims in a timely manner" of all significant hearings).

[32] *See* 118 Stat. 2260, 2264; *see also* 150 CONG. REC. SS4267 (statement of Sen. Kyl) (April 22, 2004) ("we authorized an appropriation of to assure . . . that moneys would be made available to enhance the victim notification system, *managed by the Department of Justice's Office for Victims of Crime*, and the resources additionally to develop state-of-the-art systems for notifying crime victims of important statements of development); *but cf. id.* (discussing court notification of attorneys of record and concluding "it is a relatively simple matter to add another name and telephone number or address to that list").

[33] 18 U.S.C. § 3771(c)(1) (emphasis added).

merely requires prosecutors to inform victims of their right to attend all public proceedings as guaranteed in the CVRA. These modest changes should not require prosecutors to devote any significant new resources to victim notification.

Rule 11(a)(3) - Victims' Views on *Nolo Contendere* Pleas

The Proposal:

Rule 11's procedures on pleas should be revised to allow victims to express their views on any plea arrangement (including any plea of *nolo contendere*) before the court decides whether to accept it, as follows:

> (a)(3) *Nolo Contendere Plea.* Before accepting a plea of *nolo contendere*, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.

The Rationale:

As discussed at greater length in the sections immediately below, the CVRA gives victims the right to be heard regarding any "plea." It would seem to be a natural corollary that the court should consider the victim's views before accepting any plea of *nolo contendere*. Moreover, the court is already required to consider the "public interest" in determining whether to accept such a plea. The victims' views would seem to be part of the larger public interest the court should consider.

Rule 11(b)(4) - Victims' Right To Be Heard on Pleas

The Proposal:

The court should be required to address any victim present in court when a plea is taken to determine whether the victim wishes to make a statement and to consider the victim's view before accepting a plea, as follows:

> **(4) Victims' Views.** Before the court accepts a plea of guilty or *nolo contendere* or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.

The Rationale:

The CVRA guarantees victims the right to "to be reasonably heard at any public proceeding in the district court involving . . . [a] plea . . . ."[34] Many states have similar rights.[35] The rationale for a victim's right to be heard at this stage is to give the judge as much information as possible from which to decide whether to accept a plea. It is clear that the court is under no obligation to accept a plea proposed by the parties.[36]

The proposed rule change requires the court to directly address any victim who is present in court. This is consistent with the legislative history of the CVRA which explains that "[t]his provision is intended to allow crime victims to directly address the court in person."[37] Moreover, courts are required to directly address defendants during plea proceedings,[38] so victims should be treated even-handedly. Addressing victims personally may also be important because many victims will lack the assistance of counsel. Untrained in legal proceedings, victims may be uncertain about what exact point in the process they should present their views. Having the court address the victim will eliminate that uncertainty and ensure that the victim's right to be heard is protected.

Rule 11(c)(1) - Prosecution To Consider Victims' Views on Pleas.

The Proposal:

The prosecution should be required to consider the victims' views in developing any proposed plea arrangement as follows:

> (1) ***In General.*** An attorney for the government and the defendant's attorney, or the defendant when proceeding *pro se*, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or *nolo contendere* to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will . . . .

The Rationale:

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[34] 18 U.S.C § 3771(a)(4).

[35] *See generally* BELOOF, CASSELL & TWIST, *supra* (chapt. 7.B).

[36] *See, e.g., United States v. Bean*, 564 F.2d 700 (5th Cir. 1977).

[37] 150 CONG. REC. S 4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl)(reprinted in Appendix B).

[38] *See* FED. R. CRIM. P. 11(b)(1) ("Before the court accept a plea of guilty . . . the court must address the defendant personally in open court.").

The proposed change requires prosecutors to make reasonable efforts to notify victims about pleas and to consider the victims' views regarding pleas. This requirement is taken verbatim from the *Attorney General Guidelines for Victim and Witness Assistance*, which already directs prosecutors to "make reasonable efforts to notify identified victims of, and consider victims views about, any proposed or contemplated plea negotiations."[39] About 29 states already require prosecutors to "consult with" or "obtain the views of" victims at the plea agreement stage.[40]

The proposed rule helps to implement not only a victim's right to be heard at plea proceedings but also the right to "confer with the attorney for the government"[41] and to be "treated with fairness . . . ."[42] Given that victims have the right to confer, the conferring should take place at the most salient points in the process. As Senator Feinstein explained, "This right [to confer] is intended to be expansive. For example, the victim has the right to confer with the Government concerning any critical stage or disposition of the case."[43] Given that the overwhelming majority of federal criminal cases are resolved by a plea, the victim should be able to confer with the prosecutor regarding the plea.

Rule 11(c)(2) - Court to be Advised of Victim Objections to Plea

The Proposal:

Prosecutors (and victims attorneys) should be required to advise the court whenever they are aware that the victim objects to a proposed plea agreement as follows:

> **2) *Disclosing a Plea Agreement.*** The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or the attorney for any victim shall advise the court when

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[39] ATTORNEY GENERAL GUIDELINES, *supra*, at 33 (defining what can be considered in determining whether notice is reasonable in a particular case); *see also* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 87 (1997) ("Prosecutors should make every effort . . . to consult with the victim on the terms of any negotiated plea . . . .").

[40] U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 31ST CENTURY 75 (1997)

[41] 18 U.S.C. § 3771(a)(5).

[42] 18 U.S.C. § 3771 (a)(8).

[43] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

the attorney is aware that the victim has any objection to the proposed plea agreement.

The Rationale:

In circumstances where an attorney (either for the government or for the victim) is aware of a victim's objection to a plea, that information should be relayed to the court. The victim's attorney will, no doubt, do this on her own initiative. The rule is intended to clarify that the prosecutor is under an equal obligation to communicate this information to the court.

The CVRA appears to obligates prosecutors to communicate a victim's objection to the court. The CVRA commands that prosecutors use their "best efforts" to enforce victims' rights.[44] A victim, often untrained in the law and unexpectedly thrust into criminal proceedings, may well believe that prosecutors automatically relay any objection to the plea to the court. The proposed rule avoids any confusion by requiring the prosecutor to notify the court of a victim's concern. The rule is limited to situations where the prosecutor is "aware" of an objection.

This approach is consistent with the leading case of *State v. Casey*,[45] which considered whether a victim's request to be heard regarding a plea made to the prosecutor was sufficient to trigger the victim's constitutional right to be heard.[46] In *Casey*, the victim had told the prosecutor that she wished to be heard in opposition to a plea. The prosecutor refused to convey that information to the court. After the plea was accepted, the victim appealed to the Utah Supreme Court, urging that her right under the Utah Victims' Rights Amendment to be heard regarding a plea had been violated. The state responded that the victim was required to petition the court directly to be heard. In rejecting that argument, the Court explained that prosecutors no less than other components of the criminal justice system were required to assist victims throughout the process under the Utah statutory scheme.[47] More important for present purposes, the Court also concluded that prosecutors had ethical obligations as officers of the court to convey that information to the judge:

> Prosecutors must convey such requests [to be heard] because they are obligated to alert the court when they know that the court lacks relevant information. This duty, which is incumbent upon all attorneys, is magnified for prosecutors because, as our case law has repeatedly noted, prosecutors have unique responsibilities. . . . The prosecutor is the representative not of an ordinary party to a controversy, but of a

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[44] 18 U.S.C. 3771(c).

[45] 44 P.3d 756 (Utah 2002).

[46] *See generally*, *Recent Developments in Utah Law*, 2003 UTAH L. REV. 716 (2003).

[47] *Casey*, 44 P.3d at 763.

> sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest in a criminal prosecution is not that it shall win but that justice shall be done.[48]

Applying the reasoning of *Casey* to analogous rights under the CVRA, a prosecutor must convey a victim's request to be heard regarding a plea to the court. But it also seems that the prosecutor should convey a victim's objection regarding a plea to the court. In determining whether to accept a plea, the court is making a public interest determination.[49] As the Tenth Circuit has explained, "'Rule 11 also contemplates the rejection of a negotiated plea when the district court believes that bargain is too lenient, or otherwise *not in the public interest*.'[50]" When the prosecutor is aware that a keenly interested member of the public – the victim – has an objection, the court should be apprised of that concern.

An alternative way of drafting the rule is to require courts to inquire of prosecutors whether the victim has been advised of the proposed plea and whether the victim wishes to make a statement concerning it.[51] For example, Oregon requires the court to ask the prosecutor whether the victim has been consulted about a plea and, if so, what the victim's view is:

> (b) Before the judge accepts a plea of guilty or no contest, the judge shall ask the district attorney if the victim requested to be notified and consulted regarding plea discussions. If the victim has made such a request, the judge shall ask the district attorney if the victim agrees or disagrees with the plea discussions and agreement and the victim's reasons for agreement or disagreement.[52]

South Dakota law contains a similar requirement that prosecutors disclose "any comments" by the victim about the plea:

> If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court, or on a showing of good cause,

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[48] *Id.* at 764 (internal quotations and citations omitted).

[49] *See, e.g. United States v. Bean*, 564 F.2d 700 (5th Cir. 1977).

[50] *United States v. Carrigan*, 778 F.2d 1454, 1462 (10th Cir. 1985) (emphasis added) (*quoting United States v. Miller*, 722 F.2d 562, 563 (9th Cir.1983)).

[51] *See* U.S. DEPT. OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 108 (1997) ("Judges should facilitate the input of crime victims into plea agreements . . . and they should request that prosecuting attorneys demonstrate that reasonable efforts were made to confer with the victim.").

[52] OREGON REV. STAT. § 135.406.

> in chambers, at the time the plea is offered. The prosecuting attorney shall disclose on the record any comments on the plea agreement made by the victim, or his designee, of the defendant's crime to the prosecuting attorney. Thereupon the court may accept or reject the agreement . . . .[53]

Texas law requires the court to ask the prosecutor whether a victim impact statement has been submitted. If so, the court must review the statement:

> Before accepting a plea of guilty or a plea of *nolo contendere*, the court shall inquire as to whether a victim impact statement has been returned to the attorney representing the state and ask for a copy of the statement if one has been returned.[54]

The rule proposed here is narrower than all these state formulations; it only requires a prosecutor to confer with the victim about the plea and inform the courts if the victim *objects*. For many significant categories of federal cases (e.g., a typical drug trafficking offense, a status offense such as felon in possession of a firearm, etc.), there will be no victim. To require in every case some sort of victim inquiry by the court or victim certification by the prosecutor would unnecessarily waste time. The proposed rule requires only that the prosecutor report a victim objection – in which case the court will presumably want to pay the most careful attention to whether to accept a plea.

Rule 12.1 – Victim Addresses and Phone Numbers Not Disclosed for Alibi Purposes

The Proposal:

The rule regarding disclosure of witnesses the government will use to disprove an alibi should be revised to eliminate the requirement that the victim's address and telephone number be disclosed to the defendant as follows:

> **(b) Disclosing Government Witnesses.**
>
> **(1)** ***Disclosure.*** If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:
>
> (A) the name~~, address, and telephone number~~ of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and
>
> (B) each government rebuttal witness to the defendant's alibi defense.
>
> **(2)** ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the

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[53] S.D. CODIFIED LAWS § 23A-7-9.

[54] TEXAS. CODE CRIM. PRO. 26.13

defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose. Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address, and telephone number of each additional witness (other than a victim) if:

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

In addition, a similar change should be made to Rule 12.3 regarding the address and telephone number of victims who will be used to disprove a public-authority defense.

The Rationale:

This proposed change implements the victim's right to be "reasonably protected from the accused."[55] Victims cannot be reasonably protected if the defendant, without good reason, receives the victim's address and telephone. The proposed rule would eliminate the requirement that the information be *automatically* provided to the defense even without any showing of need. At the same time, however, nothing in the rule would preclude the defense from seeking access to that information through an appropriate motion. The court could then determine whether any such motion had merit.[56]

Rule 15 - Victims' Right to Attend Pre-Trial Depositions

The Proposal:

Rule 15 should be amended to allow victims to attend any deposition in a case, as follows:

(i) Victims Can Attend. Victims can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.

The Rationale:

Victims have the right "not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would

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[55] 18 U.S.C. § 3771(a)(1).

[56] *Cf. United States v. Wills*, 88 F.3d 704, 710 (9th Cir. 1996) (delayed disclosure of alibi witness allowed because witness feared for safety and defendant had violent history; *ex parte* hearing allowed because of need to keep identity of witness from the defendant).

be materially altered if the victim heard other testimony at that proceeding."[57] Depositions authorized by Rule 15 are for the purpose of preserving evidence at trial,[58] and thus appear to be an extension of the trial. Victims accordingly have the right to attend such proceedings (if they are public) under the same conditions governing their attendance at trial. To avoid any confusion over this issue, the proposed rule change simply clarifies that victims' right to attend proceedings extends to depositions.

Just as victims can be excluded from trial in certain unusual situations where their testimony would be materially affected, they can likewise be excluded from a deposition in those situations. The proposed rule change simply carries forward the limitations on attending trial to the deposition setting by providing that the "same conditions" apply to the victim's attendance.

Rule 17 - Victims' Right to Notice of Subpoena of Confidential Information

The Proposal:

Rule 17 regarding subpoenas should be modified to give victims notice before personal or confidential information is subpoenaed and to allow victims to file a motion to quash such a subpoena as follows:

> (2) After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without notice to the victim, given through the attorney for the government or for the victim. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Rationale:

The existing Rules governing subpoenas are flawed because they allow the parties to subpoena personal or confidential information about a victim from third parties without the knowledge of the victim. This issue was highlighted recently in the notorious Utah state criminal proceedings involving the kidnapping of Elizabeth Smart.[59] Attorneys for Elizabeth's alleged kidnapper subpoenaed class records from her high school (class and teacher lists, report cards, and disciplinary and attendance records) and medical records from her hospital.[60] The school turned over

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[57] 18 U.S.C. § 3771(a)(3).

[58] *See, e.g., United States v. Edwards*, 69 F.3d 419, 437 (10th Cir. 1994).

[59] *See generally* ED SMART & LOIS SMART, BRINGING ELIZABETH HOME: A JOURNEY OF FAITH AND HOPE (2003).

[60] Stephen Hunt, *Defense Blasted for Obtaining Smart's School Records*, The Salt Lake Trib., Jan. 14, 2005, at B2.

the requested records without notice to the Smart family, while the hospital refused to turn over the requested records. Elizabeth's father learned about the subpoena only after her school records had already been turned over to defense counsel. The Smart family attorney then filed a motion to have the records returned to the school. Prosecutors in the case have objected to the fact that they were not given an opportunity to file a motion to quash.[61] The matter is apparently still under review in the state courts.

The problem that occurred in the Smart case under the Utah state rules could occur under the federal rules. The federal rules currently allow the *witness* to whom the subpoena for documents or records is issued to object,[62] but there is no provision for notifying the *victim* if personal or confidential information about the victim has been requested. Allowing such subpoenas to be delivered without notice to the victim violates the provisions of the CVRA guaranteeing victims the rights to be treated "with respect for the victim's dignity and privacy" as well as "with fairness."[63] With respect to the protection for dignity and privacy, allowing subpoenas to go directly to third party custodians of records could provide no protection if the custodian was either disinterested or disinclined to protect the victim's privacy. This is no far-fetched situation, as third parties who are subpoenaed will often have no interest in incurring legal fees in fighting to protect the rights of a victim. Even if they are interested, third parties may not fully understand the sensitive nature of certain victims' information. Victims may also have important statutory rights to protect. In the Elizabeth Smart case, for example, the school may have violated the Family Educational Rights and Privacy Act by turning over private information about Elizabeth.[64]

The new proposed rule remedies this problem by simply giving victims notice before their personal or confidential information is subpoenaed from a third party. The proposed rule makes no *substantive* change in the right of the party of obtain appropriate information through a subpoena. Instead, it merely changes procedures to insure victims are treated fairly by having the opportunity to file a motion to quash where such a motion is appropriate. The court is then authorized to grant the victim's motion to quash under the same standards that already apply to other motions to quash – where compliance would be "unreasonable or oppressive."[65]

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[61] Pat Reavy, *Quash Smart Subpoenas, DA Says*, DESERET MORNING NEWS, Feb. 1, 2005, at B3.

[62] FED. R. CRIM. P. 17(c).

[63] 18 U.S.C. § 3771(a)(8).

[64] Pat Reavy, *Elizabeth Wants Records Returned*, DESERET MORNING NEWS, Jan. 15, 2005, at B3.

[65] *See* FED. R. CRIM. P. 17(c)(2).

The proposed change does not interfere with the legitimate interests of the government or defendants. The change will not hamper government investigations, because it applies only to subpoenas issued after indictment. (Before indictment, a victim's privacy is protected through grand jury secrecy.) After indictment, the only legitimate purpose for a subpoena by either the government or the defendant is to obtain testimony or evidence for a court hearing. Rule 17 does not permit a subpoena for discovery purposes,[66] although upon a proper showing a party can obtain pre-trial access to materials.[67] Therefore, when challenged by a victim on a motion to quash, the party seeking the evidence will prevail upon a proper showing that the subpoena is appropriate. The only change made by the rule, then, is to give the victim an opportunity for court review in cases where legitimate privacy or other protected interests are at stake. The victim's right to be treated with "fairness" requires nothing less.

Rule 18 - Victims' Interests Considered in Setting Place of Prosecution

The Proposal:

Rule 18 should be amended to require the court to consider the convenience of victims in setting the place of prosecution as follows:

> **Rule 18. Place of Prosecution and Trial**
> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

The Rationale:

This change helps to implement a victim's right to be treated "with fairness."[68] The rule change is quite modest. Rule 18 already requires the court to consider the convenience of the "witnesses" in a case. In many cases, of course, the victim will be a witness. But for clarity in those cases and to cover the cases in which the victim is not a witness, the rule should be amended to refer specifically to victims.

Rule 20 - Victims' Views Considered Regarding Consensual Transfer

The Proposal:

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[66] *See generally United States v. Nixon*, 418 U.S. 683, 689 (1974).

[67] *See* 418 U.S. at 699.

[68] 18 U.S.C. § 3771(a)(8).

Rule 20 should be amended to allow for consideration of the victim's views in any decision to transfer a case as follows:

Rule 20. Transfer for Plea and Sentence

(a) Consent to Transfer. A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States Attorneys in both districts approve the transfer in writing <u>after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns</u>.

Note: a similar change is proposed for Rule 20(d) regarding transfer of juvenile proceedings.

The Rationale:

This change implements the victim's right to be "treated with fairness."[69] The procedure for transferring a case for a plea is not constitutionally required, but rather is designed for the convenience of the defendant and the government.[70] In considering whether such administrative reasons justify a transfer, the concerns of the victim appear to be appropriately entered into the balance. For reasons similar to those discussed above in connection with changes regarding plea procedures, the prosecution is directed to confer with the victim and advise the court if there is any objection to the transfer.[71]

<u>Rule 21 - Victims' Views Considered Regarding Transfer for Prejudice</u>

The Proposal:

Rule 21 should be amended to require consideration of the victim's interest in whether a case should be transferred as follows:

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[69] 18 U.S.C. § 3771(a)(8).

[70] *See generally* WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 321 at 357-58.

[71] *See* Proposed Amendment to Rule 11(c)(1), *supra*.

(e) Victims' Views. The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision.

The Rationale:

Rule 21 authorizes transfer of a case for prejudice or convenience of the parties. The proposed rule would require that the court consider the view of the victim in making any such transfer decision. Such consideration would seem to be part and parcel of protecting the victim's right to be "treated with fairness."[72] In addition, the vicinage provision of Article III and the public's First Amendment right of access to trials gives constitutional overtones to the victim's right in this area.

Victims can have compelling interests in transfer decisions.[73] Typically, victims want to have the case tried in the community in which the crime was committed. Traveling to a remote location to observe trial proceedings can be financially difficult, if not impossible in some cases. Moreover, victims who must travel to distant communities may lose the emotional support of family and friends, which can be especially important when observing emotionally-charged court proceedings.

Defendants, too, have the right to have cases tried locally. Under the Sixth Amendment to the Constitution, "In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an important jury of the State and district wherein the crime shall have been committed . . . ."[74] This right might arguably be viewed as the defendant's to assert or waive as circumstances dictate. For federal cases, however, the vicinage right is not exclusively placed in the hands of the defendant. Instead, Article III provides that the "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial *shall* be held in the state where the said crimes have been committed."[75]

This Article III vicinage right was designed to protect not only the rights of the defendant but also the rights of the community – including victims in the community.[76] Historically, the provision appears to have been a response to abuses of King George III in trundling American patriots off to

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[72] 18 U.S.C. § 3771(a)(8).

[73] *See generally* BELOOF, CASSELL & TWIST, *supra*, Chapt. 6.C (reviewing case law on the victim's interest in venue decisions).

[74] U.S. CONST. amend. VI (emphasis added).

[75] U.S. CONST., Art. III, § 2 (emphasis added).

[76] *See generally* Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658 (2000).

England for trial – an abuse sufficiently important to merit mention in the Declaration of Independence. But the provision is designed to secure a trial within the same political community ("the state") in which the victim would likely reside. The Framers could not specify a narrower subdivision within the state because of differences among the thirteen states in the jury selection process[77] and because the construction of the federal judicial system was a task left to Congress in the future.

The text of the Article III provision contrasts with the Sixth Amendment in that the defendant is not mentioned. This supports the reading that it is a structural guarantee, designed to protect broader interests than the defendant's alone.[78] Moreover, the provision provides for trial in the state "where the Crimes shall have been committed." In most cases, this state would be where the victim resided; whether the defendant also resided in that state was incidental.

An understanding of the Article III provision as protecting the community's interest is bolstered by the Supreme Court's decisions on right of public access to trials. In cases such as *Richmond Newspapers, Inc. v. Virginia*,[79] the Court has held that implicit in the First Amendment is a guarantee of the public's right to attend trials. Compelling victims' interests underlie this guarantee. As the Court has explained, "The presence of interested spectators may keep [the defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions."[80] In addition, "public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct."[81] As Justice Blackmun has emphasized, "The victim of the crime, the family of the victim, [and] others who have suffered similarly, ... have an interest in observing the course of a prosecution."[82] Victims are vitally interested in observing criminal trials because society has withdrawn "both from the victim and the vigilante the enforcement of criminal law, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution."[83]

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[77] *See id.* at 1687 n.156 (citing 4 DEBATES ON THE ADOPTION OF TH FEDERAL CONSTITUTION 150 (Elliot ed. 1836) (1787) (remarks of Gov. Johnston of North Carolina noting differences between juror selection in states of North Carolina and Virginia).

[78] *See* Engel, *supra*, at 1687. *See also* Drew L. Kirshen, *Vicinage*, 29 OKLA L. REV. 803 (1976).

[79] 448 U.S. 555 (1980).

[80] *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (internal citation omitted).

[81] *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984).

[82] *Gannett Co.*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).

[83] *Richmond Newspapers*, 448 U.S. at 571.

To be sure, transferring a trial to a distant city probably does not abridge the public right of access to a trial. But it can surely burden the victim's right, which suggests that victims ought to be heard before any such decision is made.

The Article III vicinage provision and the public right of access to trials provide constitutional underpinnings for construing the victim's rights under the CVRA to include a right to be heard on transfer proceedings. Congress has mandated that victims be "treated with fairness." This is a broad provision intended to be broadly construed, as Senator Feinstein has stated:

> The *broad rights* articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes *the notion of due process*. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to *afford them due process*.[84]

As should be clear from the italicized language, Congress intended to afford crime victims a broad right to due process in criminal proceedings. Due process, of course, uncontroversially includes a right to be heard.[85] Thus, victims should be heard before the court makes a transfer decision.

Concluding that victims have a right to be heard on transfer decision does not mean, of course, that they will dictate the transfer decision. In some cases, for example, the defendant can establish sufficiently pervasive prejudice in a particular community to entitle him to a change of venue to protect his constitutional rights.[86] But the limited point here is that victims may have useful information that the judge ought to consider in reaching a decision. Moreover, even if the judge determines to transfer a case, the victims may have views on where to transfer the case (e.g., to an adjacent state rather than a distant one) or how to impanel an unbiased jury (e.g., importing a jury rather than exporting the trial) that the judge should usefully consider.

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[84] 150 CONG. REC.S2469 (daily ed. Apr.22, 2004) (statement of Sen. Kyl) (emphases added).

[85] *Mullane v. Central Hanover Bank & Trust* Co., 339 U.S. 306, 314 (1950).

[86] *Irvin v. Dowd*, 366 U.S. 717 (1961) (holding that prisoner should have been granted change of venue where pre-trial publicity caused prejudice). *But cf.* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 252 (1995) (calling for abolition of a defendant's right to change venue because it "is, in effect, to accord the defense a whole peremptory challenge against the entire community").

An illustration of the general approach that the proposed rule would embody is found in the leading case from the New Jersey Supreme Court, *State v. Timmendequas*.[87] *Timmendequas* was a capital case in which the trial judge determined to import a jury from a distant community rather than force the family of the young girl who was murdered to travel to another district. Construing New Jersey state law provisions that are similar to the CVRA, the court explained that the trial judge properly considered the views of the victim's family:

> Over the past decade, both nationwide and in New Jersey, a significant amount of legislation has been passed implementing increased levels of protection for victims of crime. Specifically, in New Jersey, the Legislature enacted the "Crime Victim's Bill of Rights," N.J.S.A. 52:4B-34 to -38. That amendment marked the culmination of the Legislature's efforts to increase the participation of crime victims in the criminal justice system. The purpose of the Victim's Rights Amendment was to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of [that goal], the improved treatment of these persons should be assured through the establishment of specific rights." N.J.S.A. 52:4B-35 (1985). One of the enumerated rights guaranteed for victims is "[t]o have inconveniences associated with participation in the criminal justice process minimized to the fullest extent possible." N.J.S.A. 52:4B-36(d). . . .
>
> The [trial] court explicitly stated that it was not favoring the rights of the victims over those of defendant. Rather, it was simply taking their concerns into consideration, as it had not done previously. Taking the concerns of the victim's family into account does not constitute error, provided that the constitutional rights of the defendant are not denied or infringed on by that decision.[88]

For all these reasons, Rule 21 ought to be amended to allow victims to provide information to the judge on transfer decisions.

Rule 23 - Victims' Views Considered Regarding Non-Jury Trial

The Proposal:

The court should be required to consider the views of victims before allowing waiver of a jury trial as follows:

> **Rule 23. Jury or Nonjury Trial**
> (a) **Jury Trial**. If the defendant is entitled to a jury trial, the trial must be by jury unless:
> (1) the defendant waives a jury trial in writing;

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[87] 737 A.2d 55 (N.J. 1999), *cert. denied*, 534 U.S. 858 (2001).

[88] 737 A.2d at 76 (internal citations omitted). The hardship to the victim was established via affidavits from the victim's family provided to the court by the prosecutor.

(2) the government consents; and
(3) the court approves after considering the views of any victims.

The Rationale:

The "preferred" trial method in the federal courts is a jury trial.[89] As Justice Blackmun has explained, the public has interests, independent of a criminal defendant, in monitoring judges, police, and prosecutors – and in being "educated about the manner in which criminal justice is administered."[90]

The Supreme Court has concluded that the right to a jury trial is waivable by the defendant.[91] But to help protect the general public interest in trial by jury, Rule 23 requires not only prosecutor approval,[92] but also judicial approval before proceeding by way of bench trial. This approval requires careful weighing of the competing concerns. The Supreme Court has instructed that "the duty of the trial court . . . [in considering whether to approve a jury trial waiver] is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increased in degree as the offenses dealt with increase in gravity."[93] This is a "serious and weighty" responsibility.[94]

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[89] *Singer v. United States*, 380 U.S. 24, 35 (1965) ("Trial by jury has been established by the Constitution as the 'normal and preferred mode of disposing of issues of fact in criminal cases.'") (citation omitted). *See generally* Rachel E. Barkow, *Recharing the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 68 (2003).

[90] *Gannett Co. v. De Pasquale*, 443 U.S. 368, 428-29 (1979) (Blackmun, J., dissenting in part).

[91] *See Patton v. United States*, 281 U.S. 276 (1930). *But cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196-98 (1991) (mounting a strong argument against *Patton* and noting that before 1930 court decisions had held jury trial could not be waived).

[92] FED. R.CRIM. PRO. 23(a)(2). *See generally* ABA STANDARDS FOR CRIMINAL JUSTICE § 15-1.2, COMMENTARY at 15.17 (2d ed. 1980) (concluding that arguments in favor of requiring prosecutorial approval of jury trial waivers outweigh those against).

[93] *Patton v. United States*, 281 U.S. at 312-13.

[94] *United States v. Saadya*, 750 F.2d 1419, 1421 (9th Cir. 1985) (internal quotation omitted).

To discharge that serious and weighty responsibility, the trial court should receive as much information as possible. The victim may be well-situated to provide information about how the public will view a non-jury trial. The proposed rule change takes the modest step of allowing the victim to be heard before the court approves any non-jury trial, a step that is consistent with the CVRA's command that victims be "treated with fairness."[95]

This change would not interfere with defendants' rights. The Supreme Court has squarely held that the defendant has no constitutional right to unilaterally elect a bench trial.[96] Of course, there may be circumstances were the court believes that, despite a victim's objection, a non-jury trial is nonetheless appropriate. Moreover, in extreme cases the defendant may have a *right* to a non-jury trial where pre-trial publicity has pervasively tainted the jury pool.[97] Nothing in the proposed rule change would interfere with a court's right to approve a bench trial in such circumstances, after considering the victim's perspective.

Rule 32(a) – Deleting Old Definition of Victim

The Proposal:

The definition of "victim" currently contained in Rule 32 should be stricken as follows:

Rule 32. Sentencing and Judgment

~~**(a) Definitions.** The following definitions apply under this rule:~~

~~(1) "Crime of violence or sexual abuse" means:~~

~~(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or~~

~~(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.~~

~~(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.~~

Rationale:

The old definition in Rule 32 is now too narrow because it is limited to crimes of violence or sexual abuse. The CVRA includes all victims within its protections. In the proposed new rules, "victim" would be defined in Rule 1. Accordingly, this narrower definition here can simply be

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[95] 18 U.S.C. § 3771(a)(8).

[96] *Singer*, 380 U.S. at 36 (finding that waiver of jury trial may be conditioned on consent of prosecutor). *Cf.* Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right toa Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(A)*, 23 U.C. DAVIS L. REV. 309 (1993) (urging such that the rules be amended to create such a right, but not considering in any way the victim's interests involved).

[97] *See Singer*, 380 U.S. at 37-38 (leaving this question open).

stricken. The Committee is well aware of this issue, having withdrawn a previous proposal to expand Rule 32 to include all victims in the wake of the CVRA.[98]

Rule 32(c)(1)(B) – Presentence Report Considering Restitution in All Cases

The Proposal:

Rule 32(c)(1)(B) should be amended to require that the presentence report contain restitution information in all cases as follows:

> **(c) Presentence Investigation.**
> **(1) *Required Investigation.***
> (A) *In General.* The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:
> (i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or
> (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.
> (B) *Restitution.* If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

The Rationale:

As currently written, the rule directs that a presentence report contain information about restitution only where the law "requires" restitution. The proposed amendment would change this to direct that all presentence reports contain appropriate restitution information whenever the law "permits" restitution. If the law permits restitution, the court ought to receive information sufficient to allow it to determine whether to order such restitution. Only then can the court appropriately exercise its discretion.

In most cases, restitution is covered by one of two federal statutes: The Mandatory Victims Restitution Act of 1996 (MVRA),[99] and its predecessor, the Victim and Witness Protection Act of

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[98] *See* Letter from Ed Carnes, Chair of the Advisory Comm. On Federal Rules of Criminal Procedure to Hon. David F. Levi, Chair of the Standing Comm. On Rules of Practice and Procedure (May 18, 2004) (noting that proposed expansion of Rule 32 should be withdrawn if the CVRA was passed).

[99] Pub. L. 104-132, Title II, § 201, 110 Stat. 1214, 1227-1236, *codified as* 18 U.S.C. §§3663A, 3664.

1982 (VWPA).[100] The MVRA "firmly directs that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [certain offenses such as crimes of violence] . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate."[101] On the other hand, the earlier VWPA allows for restitution in the court's discretion, after weighing various factors to determine whether restitution is appropriate.[102]

In its current form, Rule 32(c)(1)(B) suggests that the probation officer is required to include information relevant to restitution only when the court is proceeding under the MVRA, because only then is restitution (in the language of the current Rule) "required." There is no sound reason for such a limitation, particularly after the enactment of the CVRA. The CVRA guarantees that victims have "the right to full and timely restitution as provided in law."[103] Even when the court is proceeding under the discretionary VWPA, without appropriate information in the presentence report, the court cannot determine whether to exercise its discretion to award restitution. Therefore, the Rule should be changed to require that the presentence report contain restitution information, from which the court can determine whether to make a restitution award.

(New) Rule 32(c)(3) – Probation Officer to Seek Out Victim Information

The Proposal:

The probation officer preparing a presentence report should be directed to determine whether a victim wishes to provide information for the report as follows:

> (3) *Victim Information.* The probation officer must determine whether any victim wishes to provide information for the presentence report.

The Rationale:

The probation officer should determine whether a victim wishes to provide information for a presentence report. Under the CVRA, the victim has "the right to be reasonably heard at any public

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[100] Pub. L. 97-291, § 4, 96 Stat. 1248, 1249-53, *codified as* 18 U.S.C. §§3663, 3664. *See generally United States v. Bedonie*, 317 F. Supp. 2d 1285 (D. Utah 2004) (discussing different statutes).

[101] 18 U.S.C. § 3663A(a)(1); *see United States v. Monts*, 311 F.3d 993, 1001 (10th Cir. 2002) (restitution under the MVRA is mandatory), *cert. denied*, 538 U.S. 938 (2003).

[102] 18 U.S.C. § 3663A(a)(1)(B); *see United States v. Fountain*, 786 F.2d 790, 801 (7th Cir. 1985) (restitution under the VWPA is discretionary).

[103] 18 U.S.C. § 3771(a)(6).

proceeding in the district court involving . . . sentencing . . . ."[104] This right clearly encompasses the victim's right to "allocute" or make an oral statement at sentencing, as discussed below in connection with Rule 32(i). But the right also seems to include the opportunity to provide information to the probation office during preparation of the presentence report.

The sponsors of the CVRA intended for the right to be heard to be construed broadly. As Senator Kyl explained at some length:

> [The CVRA] provides victims the right to reasonably be heard at any public proceeding involving . . . . sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings. When a victim invokes this right during . . . sentencing proceedings, it is intended that the he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations.
> . . .
>
> It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for *alternative methods* of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by *other reasonable means*. In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the . . . sentencing of the accused. . . .[105]

The Act's other major sponsor, Senator Feinstein, agreed:

> It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the

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[104] 18 U.S.C. § 3771(a)(4).

[105] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen Kyl) (emphases added).

victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.[106]

In light of this legislative history, victims undoubtedly have a right to make an in-court statement at sentencing as part of their right "to be heard." But they also have the right to make reasonable alternative communications with the court. If there is any doubt about whether the right "to be heard" covers communications to the probation officer, clearly the right "to be treated with fairness" would comfortably cover such a requirement. The simplest way to allow cover this is through written communication via the presentence report.

The proposed rule requires the probation office to affirmatively seek out the victim. It seems unlikely that a probation officer could prepare thorough presentence report without obtaining the victim's views. Because there is no way to know in advance whether the victim will have relevant information for the report, the probation officer should be required to investigate whether the victim has useful information. Of course, nothing in the proposed rule change would require the probation officer to include irrelevant information in the report.

Rule 32(e) – Prosecutor to Disclose Presentence Report to Victim

The Proposal:

The prosecutor should be required to disclose relevant parts of the presentence report to victims as follows:

(e) Disclosing the Report and Recommendation.

(1) ***Time to Disclose.*** Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) ***Minimum Required Notice.*** The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.

(3) ***Sentence Recommendation.*** By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

The Rationale:

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[106] *Id.* (statement of Sen. Feinstein).

The CVRA appears to entitle victims to be heard on disputed Guidelines issues and, as a consequence, to review relevant parts of the presentence report. The CVRA gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ."[107] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court.[108] The victim's right to be heard, however, is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" appears to include a right for the victim to speak to disputed Guidelines issues. As Senator (and co-sponsor) Jon Kyl explained, the right includes sentencing recommendations:

> When a victim invokes this right during . . . sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victim's family and the community, and *sentencing recommendations*.[109]

A "sentencing recommendation" will often directly implicate Guidelines issues, particularly where a court gives significant weight to the Guidelines calculation (as most currently do).[110] For example, if the victim wishes to recommend a 60-month sentence when the maximum guideline range is only 30 months, that sentencing recommendation may be meaningless unless a victim can provide a basis for recalculating the Guidelines or departing from the Guidelines.

Congress intended the right to be heard to be construed broadly, as Senator Feinstein stated:

> The victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the

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[107] 18 U.S.C. § 3771(a)(4).

[108] *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (2d ed. 2005 forthcoming) (discussing victim impact statements); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (1994) (same).

[109] 150 CONG.REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (discussing three types of victim impact information).

[110] *See, e.g., United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah 2005) (giving "heavy weight" to Guidelines recommendation).

accused.[111]

Again, it is hard to see how victims can meaningfully provide "any information" that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence.

In addition, the CVRA gives victims the broad and independent right to be "treated with fairness"[112] which would seem to encompass a right of access to relevant parts of the presentence report. The victims right to fairness gives victims a free-standing right to due process. As Senator Kyl instructed:

> The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, *fairness includes the notion of due process*. . . . This provision is intended to direct government agencies and employees, whether they are in the executive or judicial branches, to treat victims of crime with the respect they deserve *and to afford them due process.*[113]

Due process principles dictate that victims have the right to be apprised of Guidelines calculations and related issues. As the Supreme Court has held: "It is . . . fundamental that the right to . . . an opportunity to be heard 'must be granted at a meaningful time and *in a meaningful manner.*'" [114] It is not "meaningful" for victims to make sentencing recommendations without the benefit of knowing what everyone else in that courtroom knows – what the recommended Guidelines range is. Yet Congress plainly intended to pass a law establishing "[f]air play for crime victims, *meaningful participation* of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process. . . ."[115]

A victim's right to be heard regarding the presentence report is important for another reason: insuring proper restitution. Federal law guarantees most victims of serious crimes the right to

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[111] 150 CONG.REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (emphasis added).

[112] 18 U.S.C. § 3771(a)(8).

[113] 150 CONG. REC. S10912 (statement of Sen. Kyl) (Oct. 9, 2004) (emphases added).

[114] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[115] 150 CONG. REC. S4264 (Apr. 22, 2004) (statement of Sen. Kyl) (emphasis added).

restitution.[116] Reinforcing those laws, the new Crime Victims Rights Act also guarantees that victims have "[t]he right to full and timely restitution as provided in law."[117] As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the presentence report. While the restitution statutes have their own detailed procedural provisions,[118] it is unclear how those provisions are integrated with the Guidelines procedural provisions. For all these reasons, the CVRA should be understood as giving victims the right to be heard *before* a court makes any final conclusions about Guidelines calculations and other sentencing matters and to have access to relevant parts of the presentence report.

Last month, I testified before the Sentencing Commission and urged that they change their *Manual* along the lines of the suggestions contained in this memorandum.[119] In particular, I urged the Commission to change its current rule limiting access to the pre-sentence report only to the parties.[120] My proposal was recently disputed by the Practitioners' Advisory Group to the Sentencing Commission. In a February 28, 2005, letter to the Commission,[121] they argue that "nothing in the CVRA or its legislative history states that crime victims should be permitted to review portions of the presentence report, dispute guidelines calculations, raise grounds for departures, or as such rights would seem to imply, appeal a sentence on factual or legal grounds."[122]

The Practitioners' Advisory Group's letter analyzes only the victim's right to be heard. It does not consider whether the victim's right to fairness creates a due process right to review the presentence report and dispute Guidelines calculations. Presumably the Practitioners' Advisory Group, which includes many defense attorneys, would be outraged if sentencing occurred without notice to defendants about relevant parts of the presentence report and recommended Guidelines ranges – and properly so. It would be unfair to force defense counsel to argue sentencing issues without basic information about what is being considered at the sentencing hearing. But the same due process principles dictate that victims should receive this information as well.

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[116] *See* 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); *see also* 18 U.S.C. § 3663 (Victim Witness Protection Act).

[117] 18 U.S.C. § 3771(a)(6).

[118] 18 U.S.C. § 3664.

[119] *See* Testimony of Paul G. Cassell to the U.S. Sentencing Comm'n (Feb. 15, 2005) (available on http://sentencing.typepad.com).

[120] U.S.S.G. § 6A1.2.

[121] Letter from Amy Baron-Evans & Mark Flanagan to Hon. Ricardo Hinojosa (Feb. 28, 2005) (available on http://sentencing.typepad.com).

[122] *Id.* at 2.

The Practitioners' Advisory Group also seemingly raises a concern that can be dispelled. The Group wonders whether a victim's right to be heard on Guidelines issues would imply a right to appeal a sentence on factual or legal grounds. It would not. The CVRA contains its own specific appellate provisions, which permit victim appeals only for denials of their rights.[123] It specifically allows a right to seek "to re-open . . . a sentence" only for violations of a victim's "right to be heard."[124] Moreover, while victims have due process protections, due process does not guarantee a right to an appeal.[125] Finally, the Sentencing Reform Act spells out the limited rights of appeal on Guidelines issues available to only the government and the defense.[126] For all these reasons, victims have the right to review relevant parts of the presentence report and be heard on Guidelines issues in the trial court, but not the right to appeal Guidelines issues to the appellate courts.

The question then arises of how to provide victims access to the presentence report. Nothing in current law precludes releasing presentence reports to victims. Title 18 U.S.C. § 3552 *requires* disclosure to government and defense counsel, but does not forbid further dissemination. Most courts have held that circulation is allowed to third parties upon a proper showing of particularized need approved by the court.[127] Some courts' local rules also additional circulation with an order of the court.[128] Victims should be able to establish particularized need for access to the Guidelines calculations and related parts of the presentence report, as without access they are unable to effectively make a sentencing recommendation.

In view of that legal landscape, the ways in which the Rules could handle disclosure of the presentence reports to victims are:

(1) No Disclosure.

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[123] 18 U.S.C. § 3771(d)(5).

[124] 18 U.S.C. § 3771(d)(5)(A).

[125] *See McKane v. Durston*, 153 U.S. 684 (1894).

[126] 18 U.S.C. § 3742.

[127] *See, e.g., United States v.* Corbitt, 879 F.2d 224, 238 (7th Cir. 1989) (compelling, particularized need standard); *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1173 (2d Cir. 1983) (compelling need standard); *United States v. Schlette*, 842 F.2d 1574, 1576 (9th Cir. 1988) (interests of justice standard).

[128] *See, e.g.*, D. Utah Crim. Local R. 32-1(c) (pre-sentence reports not released without order of the court).

The Rules could opt not to direct disclosure of any type to a victim. In my view, this approach would be inconsistent with CVRA's command that victims be "reasonably heard" at sentencing and be "treated with fairness," for all the reasons explained above.

(2) Complete Disclosure.

Because the victim's right to be heard seemingly includes at least some access to the presentence report, the Rules could direct full disclosure of the pre-sentence report to the victim. While there are apparently no statutory barriers to this approach, legitimate objections might be raised. Portions of the report may contain sensitive private information about the defendant (results of psychiatric examinations, prior history of drug use, childhood sexual abuse, and the like). The report may also disclose confidential law enforcement information that should not be widely circulated. Victims do not need access to these parts of the report. In light of these concerns, total disclosure seems unnecessary.

(3) Selective Disclosure.

The Rules could direct that the probation office redact any presentence report to remove confidential information and the provide the redacted report to the victim. This, too, seems problematic, in that it might require considerable work by busy probation officers to prepare two separate documents (presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential).

(4) Disclosure Through Prosecutors.

The simplest solution to the competing concerns is disclosure through an intermediary, specifically the prosecutor. The prosecutor would serve as the filter for confidential information and could assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors, who are no less busy than probation officers. But the new law already gives victims the right to "confer" with prosecutors[129] – and presumably they will be conferring regarding the important topic of sentencing. Moreover, many U.S. Attorney's Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements. The CVRA also authorizes increased funding of $22 million for the Victim/Witness Assistance Programs in U.S. Attorney's Offices, so presumably they will be able to expand their victim services.[130]

Requiring prosecutors to disclose pre-sentence reports to victims in all cases, even when they are not interested in such disclosure, might be burdensome. Accordingly, disclosure of the report should be required only upon request for a victim.

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[129] 18 U.S.C. § 3771(a)(5).

[130] *See* 118 Stat. 2260, 2264.

Some of the aspects of preparing and disclosing presentence reports are covered in Chapter 6.A of the *United States Sentencing Guidelines Manual*. The *Manual* falls within the jurisdiction of the U.S. Sentencing Commission. Accordingly, the Advisory Committee should coordinate with the Commission to insure that any changes in the Criminal Rules are consistent with the provisions of the *Manual*.

Rule 32(f), (h), (i) – Victim Opportunity to Object to Presentence Report.

The Proposal:

Rule 32(f), (h), and (i) should be amended to allow the victim to object to the presentence report as follows:

(f) Objecting to the Report.

(1) ***Time to Object.*** Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.

(2) ***Serving Objections.*** An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) ***Action on Objections.*** After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

. . .

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The attorney for the government or for the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

(i) Sentencing.

(1) ***In General.*** At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera— any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victims to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to or any victim make a new objection at any time before sentence is imposed.

(2) ***Introducing Evidence; Producing a Statement.*** The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) ***Court Determinations.*** At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

The Rationale:

For the reasons explained in the preceding section, the victim's right to be "reasonably heard" at sentencing hearing encompasses the right to be heard on Guidelines issues. The changes in Rule 32 noted above simply allow the victim to exercise that right at the appropriate points in the Guidelines process.

Changing the rule in this fashion would also clarify the appropriate sequencing at sentencing hearings. Rule 32(i) already allows the victim to submit "any information" about the sentencing.[131] Yet if the experience in my court is any guide, frequently the victim's allocution occurs only after all of the issues surrounding the presentence report have been determined. If the victim's right to provide information to the court is going to have meaning, that information must be allowed to have possible effect on critical sentencing issues, including issues about Guidelines calculations.

The proposed changes would allow the victim to comment at the sentencing hearing on matters within the presentence report. While it might be objected that the victim is not a party to the case, Congress intended that the victim become participants in the process with rights "independent of the government or the defendant . . . ."[132] Those independent rights includes the opportunity to

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[131] FED. R. CRIM. P. 32(i).

[132] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

make "sentencing recommendations."[133] Given that matters in the presentence report may often determine what effect a sentencing recommendation will have, the victim's right would seem to extend to commenting on that report.

As with the changes discussed in the previous section, changes in the *Sentencing Guidelines Manual* are also required here. The Committee should coordinate with the Sentencing Commission to insure that its actions are consistent.

Rule 32(i)(4) - Conforming Amendment to Victims' Right to Be Heard

The Proposal:

Rule 32(i)(4) ought to be amended to conform the definition of victim to that found in the CVRA as follows:

> **(4)** ***Opportunity to Speak.***
>
> (A) *By a Party*. Before imposing sentence, the court must:
>
> (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
>
> (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and
>
> (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.
>
> (B) *By a Victim*. Before imposing sentence, the court must address any victim of ~~a~~ the crime ~~of violence or sexual abuse~~ who is present at sentencing and must permit the victim to speak or submit any information about the sentence. ~~Whether or not the victim is present, a victim's right to address the court may be exercised by the following persons if present:~~
>
> ~~(i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or~~
>
> ~~(ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated~~.
>
> (C) *In Camera Proceedings*. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

The Rationale:

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[133] *Id.*

As noted earlier,[134] Rule 32 currently contains a definition of "victim" that is narrower than that required by the CVRA. The simplest fix is simply to strike the definition of victim and victim's representative here and include an appropriate definition in Rule 1.

(New) Rule 43.1 – Victim's Right to Attend Trials

The Proposal:

A new rule should be added implementing the victim's right to be present at trials and other proceedings as follows:

> **Rule 43.1 Victim's Presence**
> **(a) Victim's Right to Attend.** A victim has the right to attend any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. Before making any determination to exclude a victim, 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 to exclude a victim shall be clearly stated on the record.
> **(b) Proceeding With and Without Notice.** The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing) without proper notice to a victim only if doing so is in the interests of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and the court insures that notice will be properly provided to that victim for all subsequent public proceedings.
> **(c) Numerous Victims**. If the court finds that the number of victims makes it impracticable to according all of the victims the right to be present, the court shall fashion a reasonable procedure to facilitate victims' attendance.
> (d) **Right to be Heard on Victims' Issues**. In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.

The Rationale:

The Rules should reflect the CVRA's command that victims have the right to attend public proceedings in all but the most unusual circumstances. The CVRA guarantees victims the right to attend a proceeding "unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that

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[134] *See* discussion accompanying Rules 1, 32(a), *supra*.

proceeding."[135] This is a fundamental right for victims. As the President's Task Force on Victims of Crime concluded: "The crime is often one of the most significant events in the lives of victims and their families. They, no less than the defendant, have a legitimate interest in the fair adjudication of the case, and should therefore, as an exception to the general rule providing for the exclusion of witnesses, be permitted to be present for the entire trial."[136] The CVRA implements this recommendation by "allow[ing] crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pre-trial, trial, or post-trial proceedings."[137] Most states have also now adopted some form of a victim's right to attend court proceedings, including the trial.[138]

One possible way of addressing the victim's right to be present would be to leave the matter to the Federal Rules of Evidence. Federal Rule of Evidence 615 – the so-called "rule on witnesses" – requires exclusion of witnesses with certain exceptions. Among the exceptions is a fourth exception for "a person authorized by statute to be present."[139] This exception was added to cover crime victims,[140] who had a right to attend trials subject to certain conditions even before the passage of the CVRA.[141] Without the explicit listing of this exception, some trial courts had simply overlooked the victim's right to attend – most notoriously in the Oklahoma City bombing trial.[142]

But relying merely on Rule 615 to cover the victim's right to attend proceedings would be inadequate. First, the defendant's right to attend proceedings is sufficiently important to merit treatment in a specific rule in the Federal Rules of Criminal Procedure – Rule 43. The proposed victim's rule – Rule 43.1 – would evenhandedly mirror that treatment for victims.

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[135] 18 U.S.C. § 3771(a)(3).

[136] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 80-81 (1982).

[137] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[138] *See generally* Douglas E. Beloof & Paul G. Cassell, *The Victim's Right to Attend Trial: The Emerging National Consensus*, __ LEWIS & CLARK L. REV. ___ (forthcoming 2005).

[139] FED. R. EVID. 615(4).

[140] *See* FED. R. EVID. 615, Adv. Comm. Notes, 1998 Amendments.

[141] *See* 42 U.S.C. § 10606 (1990) (replaced by the CVRA).

[142] *See* Cassell, *Barbarians at the Gates?*, *supra*, 1999 UTAH L. REV. at 515-22; S. REP. 108-191, 108th Cong., 1st Sess. 20-21 (2003). I served as counsel for the victims of the bombing who were pursuing this issue, and later called the omission in Rule 615 to the attention of the Evidence Committee.

Second, Rule 615 does not appear to comprehensively handle the victim's right to attend. For starters, it would seem that the Advisory Committee Notes in the Federal Rules of Evidence now need to be revised to reference the CVRA. Otherwise, judges, prosecutors, and defense counsel might simply be unaware that a victim whose testimony will not be materially affected is now "authorized by statute" to be present. Even if the legally-trained actors in the system realize the CVRA's ramifications, most crime victims are not legally trained and lack experience in the criminal justice system. Therefore, their rights should be laid out in the most direct manner possible – specifically by listing their right to attend in the criminal rules.

Finally, providing the details of the victim's right to attend is important for practical reasons. The CVRA qualifies the victim's right to attend by requiring exclusion when the victim's testimony "would be materially altered if the victim heard other testimony at that proceeding."[143] The CVRA, however, contains additional procedural requirements that judges must follow before excluding a victim: "Before making any determination . . . [to exclude a victim], 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."[144] The Act also requires that "the reasons for any decision to exclude the victim shall be clearly stated on the record."[145] These procedural requirements are new and potentially complex. Moreover, issues surrounding victim attendance at criminal proceedings are likely to occur frequently. Victims can appeal any exclusion order, and appellate courts must take up those appeals expeditiously.[146] Accordingly, it is important that lawyers, judges, and victims have the new rule and its procedural requirements at their fingertips, rather than being forced to dig it out through some cross-reference to the United States Code. For all these reasons, subsection (a) of the proposed rule simply tracks verbatim the substantive and procedural requirements of the CVRA.

Because the issues addressed in subsection (a) potentially bear on the how Federal Rule of Evidence 615 should be drafted, the Criminal Rules Committee should coordinate its actions with the Evidence Rules Committee.

Subsection (a) also limits the right to attend to "public" proceedings. It is clear that the CVRA intended to make no change in the circumstances in which proceedings could be closed to the public. As Senator Feinstein and Senator Kyl explained in a colloquy regarding the law, "the Government or the defendant can request, and the court can order, judicial proceedings to be closed

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[143] 18 U.S.C. § 3771(a)(3).

[144] 18 U.S.C. § 3771(b).

[145] 18 U.S.C. § 3771(b).

[146] 18 U.S.C. § 3771(d)(3).

under existing laws. [The CVRA] is not intended to alter those laws or their procedures in any ways . . . . In this regard, it is not our intent to alter 28 C.F.R. § 50.9 in any respect."[147]

Subsection (b) turns to the potentially complex subject of whether the court may go forward with a proceeding when the victim is not present. If the victim has been properly notified but has elected not to attend the proceeding, of course the court may proceed. The tricky issue is what do when the victim is absent because of lack of notice of the proceeding. It could be argued that the court has no choice but to reschedule such a proceeding, just as it would be required to reschedule a proceeding where the defendant had not received notice. The CVRA mandates that courts "shall ensure" that crime victims receive their rights.[148] One of the rights is notice for court proceedings.[149] If the victim has not received notice of a proceeding, then going forward with the proceeding apparently violates the victim's rights. As Senator Kyl explained, "It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself."[150]

The proposed rule stakes out a more limited position than the absolute requirement of proper victim notification. Proposed Rule 43.1 would allow the court to move forward with all proceedings – other than trial or sentencing – without notice to the victim provided three conditions are met: (1) doing so is in the interests of justice, (2) the court provides prompt notice to the victim of the court's action and of the victim's right to seek reconsideration of the action if a victim's right is affected, and (3) the court insures that notice will be properly provided to the victim for all subsequent public proceedings.

Each of these three conditions serves important purposes. For starters, the court should not move forward unless the interests of justice are served – the first requirement. The court should also notify the victim of the opportunity to seek reconsideration of the court's action if a victim's right is affected. For example, if the court holds a bail hearing without proper notice to the victim and determines to release a defendant, the victim should be advised of this fact and of the right to ask the court to reconsider that bail decision. (The CVRA, as noted earlier, gives victims the right to provide information regarding bail decisions.[151]) Finally, if the court is moving forward without

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[147] 150 Cong. Rec. S4268 (daily ed. Apr. 22, 2004) (statements of Sen. Kyl and Sen. Feinstein).

[148] 18 U.S.C. § 3771(b).

[149] 18 U.S.C. § 3771(a)(2).

[150] 150 CONG. REC. S10910 (statement of Sen. Kyl) (Oct. 9, 2004) (reprinted in Appendix B).

[151] *See* 18 U.S.C. § 3771(a)(4).

proper notice to a victim at a particular proceeding, it seems only fair that the problem be solved for future proceedings – the third requirement.

The proposed rule would not authorize a court to proceed with either a trial or sentencing without proper notice to the victim. With respect to trials, a victim of a crime simply deserves the opportunity to see the evidence against her victimizer. If some modest delay in the trial must occur to make this happen, that is a small price to pay for respecting the victim's right to attend the trial. With respect to sentencing, here too a victim simply deserves the right to make a statement – to tell her victimizer about the damage done by his crime and to urge the court to impose an appropriate sentence. Moreover, neither a trial nor a sentencing can redone. Double jeopardy principles may well forbid retrial even when a victim has received no notice,[152] and the CVRA itself bars a new trial remedy.[153] So too, sentencings would appear to be subject to limitations that might prevent a crime victim from obtaining a resentencing[154] – although the CVRA directly allows for re-sentencings in certain limited circumstances.[155]

While neither trial nor sentencing could proceed without proper notice to the victim, this limitation will affect only a small number of cases for a short period of time. A large percentage of victims may choose to waive any right to receive notice. For those victims electing to receive notice, presumably notice will be properly given in the vast majority of cases. Even apart from notice requirements, the majority of victims will be trial witnesses, and therefore will have been subpoenaed to attend trial. Victims will also often be aware of sentencings through the work of probation officers in preparing presentence reports. In the tiny minority of cases where notice has not been properly provided, notice will often be only a telephone call away. While the burdens of delaying a trial or sentencing are not trivial, Congress has required that the victim's rights must take precedence. Subsection (b) faithfully implements that determination.

Subsection (c) of the proposed rule deals with the victim's right to attend in situations involving multiple victims. Congress has recognized that in some situations – e.g., the Oklahoma

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[152] *See* U.S. CONST., amend. V. *See generally* Douglas Evan Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. ___ (forthcoming).

[153] 18 U.S.C. § 3771(d)(5).

[154] *See* FED. R. CRIM. P. 35 (correction of sentence allowed only for technical or other clear error). Whether denial of a victim's right constitutes "clear error" subject to correction presumably will need to be resolved in future cases.

[155] 18 U.S.C. § 3771(d)(5) (authorizing a victim motion to "re-open a . . . sentence" if right was denied); *see* 150 CONG. REC. S10910 (statement of Sen. Kyl) (Oct. 9, 2004) (reprinted in Appendix B) (discussing this provision). In light of these provisions, the Committee may need to consider redrafting Rule 35 to allow re-opening of sentences imposed in violation of victims' rights.

City bombing – it is not possible to afford all victims the opportunity to attend trials. The CVRA accordingly provides that in situations where "the number of crime victims makes it impracticable" to protect rights for all victims, the court "shall fashion a reasonable procedure" to give effect to victims' concerns.[156] Possible procedures include closed circuit transmission of the proceedings to an ceremonial courtroom, auditorium or other facility that will accommodate many people. To permit such transmission, an amendment to Rule 53 is proposed below.

Subsection (d) gives victims a general right to be heard on issues "directly affecting" their rights. The CVRA specifically mandates that victims have the right to be heard about release of the defendant, a plea, or a sentence.[157] The right to be heard at these hearings have been addressed elsewhere in these proposed rules. But courts sometimes will consider other issues that directly affect victims' rights. For example, courts may consider whether to release the address and telephone number of the victim to the defendant.[158] It makes little sense for the court to decide this issue without hearing from the victim, particularly since the CVRA gives victims the right "to be reasonably protected from the accused."[159] Subsection (d) would cover this situation and others similar to it by allowing victims who are present at a hearing to be heard on issues "directly" affecting their rights.

Rule 44.1 – Discretionary Appointment of Counsel for Victim

The Proposal:

The court's discretionary authority to appoint counsel for a victim should be included in a new rule as follows:

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising their rights as provided by law.

The Rationale:

An argument could be made that the CVRA guarantees crime victims the right to counsel. After all, the CVRA guarantees victims the right to be "treated with fairness" and fairness could be

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[156] 18 U.S.C. § 3771(d)(2).

[157] 18 U.S.C. § 3771(a)(4).

[158] *See* discussion of changes to Rule 12.1, *supra.*

[159] 18 U.S.C. § 3771(a)(1).

understood as embracing the assistance of counsel.[160] At the same time, however, nothing in the CVRA directly mandates counsel for victims. As Senator Kyl explained, "This bill does not provide victims with a right to counsel but recognizes that a victim may enlist counsel on their own."[161]

Courts, however, have inherent authority to appoint a volunteer lawyer to represent a crime victim. While the CVRA does not *create* a right to counsel for victims, nothing in the Act deprived the courts of their pre-existing inherent authority. The courts generally have the right to appoint volunteer counsel in civil cases,[162] a power that would seem to extend to criminal cases. Indeed, the Supreme Court has left open the question of whether federal courts possess the inherent authority to *require* counsel to provide legal services to the poor.[163] The local rules of some federal courts already explicitly recognize this power.[164] In addition, Title 28 broadly permits the court in both civil and criminal cases to "request an attorney to represent *any person* unable to afford counsel."[165] Finally, before *Gideon*, courts could request that lawyers provide assistance to indigent criminal defendants. In light of all these facts, federal courts likely have the inherent power to request attorneys to represent indigent crime victims.[166]

In addition, at least one statute already directly authorize federal courts to appoint counsel for child victims in certain cases. Title 18 U.S.C. § 3509 provides: "The court may appoint a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child." Congress, however, has not yet provided

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[160] *Cf. Gideon v. Wainwright*, 372 U.S. 335, 388 (1963) (discussing "fairness" to the defendant as a reason for recognizing a right to appointed counsel).

[161] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl).

[162] *See generally* Judy E. Zelin, *Court Appointment of Attorney to Represent, Without Compensation, Indigent in Civil Action*, 52 A.L.R.4TH 1063 (1987 & 2004 Supp.).

[163] *Mallard v. United States District Court*, 490 U.S. 296, 307 & n.8 (1989).

[164] *See, e.g.*, D. UTAH CIV. R. 83-1.1(b)(3) ("Any attorney who is admitted to the bar of this court must agree, as a condition of such admission, to engage in a reasonable level of pro bono work when requested to do so by the court").

[165] 28 U.S. § 1915(e)(1) (emphasis added).

[166] *See* BELOOF, CASSELL & TWIST, *supra*, Chapt 6.A (reaching this conclusion).

funding for this particular right.[167] Criminal Justice Act funding is also unavailable for victim representation, as that Act is limited to criminal defense.[168]

The proposed rule would simply recognize this discretionary power of the courts to appoint volunteer counsel. The rule is purely discretionary (the court "may" appoint counsel) and is limited to situations where the interests of justice require appointment. The rule does not address payment for counsel, as this matter must be left to subsequent appropriations from Congress. The court, however, ask for volunteer counsel to assist victims.

There is good reason to expect that volunteers will be forthcoming. Not only are many attorneys willing to undertake pro bono representation, but the CVRA itself authorizes millions of dollars in funding for victim representation around the country. The authorization includes support for the National Crime Victims Law Institute at the Northwestern School of Law of Lewis and Clark College to help establish eleven legal offices around the country representing crime victims.[169]

Finally, it might be argued that this subject need not be discussed in a rule, because the court's inherent authority to seek counsel would exist even without a rule. Both courts and victims, however, will find it useful to have this authority close at hand in the criminal rules. In addition, prosecutors are obligated by the CVRA, "in the event of any material conflict of interest between the prosecutor and the crime victim" to "advise the crime victim of the conflict and take reasonable steps to direct the crime victim to the appropriate legal referral, legal assistance, or legal aid agency."[170] This may frequently require prosecutors to help victims obtain legal counsel. Accordingly, a separate rule on this subject is appropriate.

For all these reasons, the Rules should be amended to recognize the court's authority to appoint volunteer counsel to represent a crime victim.

Rule 46 - Victims' Right to Be Heard Regarding Defendant's Release from Custody

The Proposal:

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[167] Memorandum from the Administrative Office of the United States Courts, to the Judges, United States District Court United States Magistrate Judges, (March 19, 1991) (Available from the Administrative Office).

[168] *See* 18 U.S.C. § 3006A(a)(1).

[169] *See* 42 U.S.C. 10603d; *see also* 150 Cong. Rec. S4266 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) (noting appropriations for the National Crime Victims Law Institution "to provide grants and assistance to lawyers to help victims of crime in court"; funding sufficient to "provide for two new regional offices and nine specific clinics").

[170] 18 U.S.C. § 3771(c)(2).

Victims should be explicitly given the right to be heard regarding the defendant's release from custody as follows:

> **(k) Victims' Right to Be Heard.** A victim has the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.

The Rationale:

The CVRA guarantees victims the right "to be reasonably heard" at "any public proceeding . . . involving release . . . ."[171] A similar right already exists for victims of stalking offenses.[172] The proposed rule simple recognizes that right, and further directs that the court shall consider the views of the victim. The victim's right to be heard would be meaningless if the court did not consider the victim's view. Moreover, existing law appear to recognize that the court should consider the victim's concerns.[173]

Rule 48 – Victims' Views on Dismissal to be Considered.

The Proposal:

The court should be required to consider the views of victims in deciding whether to grant dismissal as follows:

> **Rule 48. Dismissal**
> **(a) By the Government.** The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.

The Rationale:

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[171] 18 U.S.C. § 3771(a)(4).

[172] 18 U.S.C. § 2263.

[173] *See, e.g.,* 18 U.S.C. § 3142(c) (court to consider whether release of the defendant "will endanger the safety of any other person").

This proposed change would implement a victim's right to be "treated with fairness" and to be heard at any proceeding "involving release" of the defendant by requiring the court to consider the views of the victim before granting a government motion to dismiss a charge. The rule already requires leave of court before a dismissal can be approved. In determining whether to grant leave, the court should consider whether dismissal is "clearly contrary to manifest public interest."[174] Among the relevant factors in making this public interest determination are whether the prosecution is motivated by "animus towards the victim."[175] The proposed rule would simply require the court to consider the views of the victim in making this determination, leaving the weight to be given to those views up to the court.

Rule 50 – Victims' Right to Proceedings Free From Unreasonable Delay.

The Proposal:

A victim's right to proceedings free from unreasonable delay should be recognized as follows:

> **(b) Defendant's Right Against Delay.** The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.
> **(c) Victim's Right Against Delay.** The court shall assure that a victim's right to proceedings free from unreasonable delay is protected. A victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of a victim, the court shall state its reasons in the record.

The Rationale:

The CVRA gives victims the right "to proceedings free from unreasonable delay."[176] In addition, child victims previously had the right to a "speedy trial" in certain situations.[177] A number of states have similar provisions.[178]

The proposed rule would give effect to these rights by requiring courts to protect against unreasonable delay. Of course, in some situations, delay is reasonable. In others, however, the court should deny a motion to continue to bring closure to a victim. As Senator Feinstein has explained:

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[174] *United States v. Cowan*, 524 F.2d 504,513 (5th Cir. 1975).

[175] *In re Richards*, 213 F.3d 773, 787 (3rd Cir. 2000).

[176] 18 U.S.C. § 3771(a)(7).

[177] 18 U.S.C. § 3509(j).

[178] *See* BELOOF, CASSELL & TWIST, *supra*, Chapt. 6.B; Cassell, *Balancing the Scales of Justice*, *supra*, 1994 UTAH L. REV. at 1406.

> This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.[179]

The proposed rule gives victims the right to be heard on any continuance. This is consistent with the intent of the CVRA's drafters. As Senator Kyl stated: "This provision [in the CVRA] should be interpreted so that any decision to schedule, reschedule, or continue criminal cases *should include victim input* through the victim's assertion of the right to be free from unreasonable delay."[180]

The proposed rule also requires that the court state its reason for granting any continuance. This requirement stems from a recommendation from the President's Task Force on Victims of Crime. The Task Force noted "the inherent human tendency to postpone matters, often for insufficient reason," and accordingly recommended that "reasons for any granted continuance . . . be clearly stated on the record."[181] Several states have adopted similar provisions.[182]

Rule 51 – Claiming Error Regarding Victims' Rights.

The Proposal:

The procedures for a victim to assert error should be spelled out in the rules as follows:

> **Rule 51. Preserving Claimed Error**
> **(a) Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.

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[179] 150 CONG. REC. S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein).

[180] 150 CONG. REC. S10910 (statement of Sen. Kyl) (Oct. 9, 2004) (emphasis added) (reprinted in Appendix B).

[181] PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76 (1982).

[182] *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-4435(B) (courts required to "state on the record the reason for [any] continuance"); Utah Code Ann. 77-38-7(3)(a) (court required to "enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays").

(b) Preserving a Claim of Error. A party or a victim may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

The Rationale:

The CVRA authorizes victim appeals and includes expedited procedures for handling those appeals.[183] The proposed rule would simply fold in victims to the existing rule regarding preservation of errors.

Rule 53 – Closed-Circuit Transmission of Proceedings for Victims

The Proposal:

Closed-circuit transmission of court proceedings for victims should be authorized as follows:

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

(b) Closed-Circuit Transmission for Victims. In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.

The Rationale:

The CVRA grants victims the right to attend trials, as noted previously in connection with Rule 43.1. At the same time, however, the CVRA recognizes that in some situations with many victims, the court may have to craft "reasonable procedures" to protect victims rights.[184] One such reasonable procedure would appear to be closed-circuit transmission of court proceedings to a

[183] *See* 18 U.S.C. § 3771(d)(3).

[184] 18 U.S.C. § 3771(d)(2).

facility sufficiently large to accommodate all the victims. Indeed, this was the procedure followed in the Oklahoma City bombing case.[185]

The proposed rule would authorize such transmission in appropriate cases. The language for the proposed rule comes from 42 U.S.C. § 10608(a), which authorizes closed-circuit transmissions "notwithstanding any provision of the Federal Rules of Criminal Procedure to the contrary" in cases in which a proceeding has been transferred more than 350 miles – e.g., the Oklahoma City bombing trial. There appears to be no good reason to limit such transmissions to such situations where venue has been transferred in light of the CVRA's mandate that the court fashion "reasonable procedures" to protect the rights of multiple victims. The proposed rule simply authorizes courts to allow such transmissions in appropriate cases.

Rule 58 – Victims and Petty Offenses.

The Proposal:

Courts should hear from victims regarding sentences in petty cases as follows:

(3) ***Sentencing.*** The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. The court must also give victims an opportunity to be heard. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.

The Rationale:

The CVRA gives all "victims" the right to be heard at sentencing. Victim includes anyone who is directly and proximately harmed by "a Federal offense."[186] The Act does not require that the offense be a felony or misdemeanor. Accordingly, a victim has a right to be heard at sentencing for any petty offense.

CONCLUSION

The CVRA will require significant changes to the Federal Rules of Criminal Procedure. In this memorandum, I have tried to provide one possible way to implement the congressional command that victims become participants in the criminal justice process, with specific language and supporting analysis for each change. Undoubtedly there are many reasonable ways of implementing the CVRA. But since the Committee will be making many decisions about how to best change the rules, one concluding thought may be worth highlighting.

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[185] Jo Thomas, *Trial to Be Shown in Oklahoma for Victims*, THE NEW YORK TIMES, Jan. 30, 1997, at A14.

[186] 18 U.S.C. § 3771(e).

Congress will be paying close attention to how courts protect the new victims' rights. For example, the CVRA directs the Administrative Office to report each year the number of time that victims have attempted to assert their rights and been denied the relief they requested.[187] More generally, Congress viewed the new Act as an important step to protecting crime victims – a "new and bolder approach than has ever been tried before in our Federal System."[188] Congress is eagerly awaiting to see the results of this approach. As Senator Leahy warned, "Passage of this bill will necessitate careful oversight of its implementation by Congress."[189] And victims' advocates, too, will be watching carefully.

In light of this congressional and victims' interest, the Judiciary should comprehensively protect crime victims' rights by changes in court rules. If Congress believes that the federal rules fail to faithfully reflect crime victims' concerns, it can of course directly amend the rules. But such direct amendments may not sufficiently attend to the needs of the judicial branch or others involved in the criminal justice process. It is in that spirit of eliminating any need for congressional intervention that I offer these proposals as a possible starting place for discussion.

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[187] 18 U.S.C. § 3771 Note (requiring the Administrative Office of the courts to file an annual report with Congress concerning the number of times a victim's right is asserted and denied by federal courts).

[188] 150 CONG. REC. S4260 (statement of Sen. Feinstein) (Apr. 22, 2004).

[189] *Id.* at S4271 (statement of Sen. Leahy).

APPENDICES

Appendix A: Text of the Crime Victims' Rights Act and Related Provisions

3771. 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 proceeding involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public proceeding.

(4) The right to be reasonably heard at any public proceeding involving release, plea, or sentencing.

(5) The 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). 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) CONFLICT.-In the event of any material conflict of interest between the prosecutor and the crime victim, the prosecutor shall advise the crime victim of the conflict and take reasonable steps to direct the crime victim to the appropriate legal referral, legal assistance, or legal aid agency.

(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, the crime victim's lawful representative, and the attorney for the Government may assert the rights established in this chapter. 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 contained in this chapter, the court shall fashion a procedure to give effect to this chapter.

(3) WRIT OF MANDAMUS.-If a Federal court denies any right of a crime victim under this chapter or under the Federal Rules of Criminal Procedure, the Government or the crime victim may apply for a writ of mandamus to the appropriate court of appeals. The court of appeals shall take up and decide such application forthwith and shall order such relief as may be necessary to protect the crime victim's ability to exercise the rights.

(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) NEW TRIAL.-In no case shall a failure to afford a right under this chapter provide grounds for a new trial.

(6) NO CAUSE OF ACTION.-Nothing in this chapter shall be construed to authorize a cause of action for damages.

(e) DEFINITIONS.-For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(f) PROCEDURES TO PROMOTE COMPLIANCE.-

(1) REGULATIONS.-Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) CONTENTS.-The regulations promulgated under paragraph (1) shall-

(A) establish an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.".

(b) TABLE OF CHAPTERS.-The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

237. Crime victims' rights3771.

(c) REPEAL.-Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

SEC. 3. INCREASED RESOURCES FOR ENFORCEMENT OF CRIME VICTIMS' RIGHTS.

(a) CRIME VICTIMS LEGAL ASSISTANCE GRANTS.-The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404C the following:

SEC. 1404D. CRIME VICTIMS LEGAL ASSISTANCE GRANTS.

(a) IN GENERAL.-The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public and private entities, to develop, establish, and maintain programs for the enforcement of crime victims' rights as provided in law.

(b) FALSE CLAIMS ACT.-Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.".

(b) AUTHORIZATION OF APPROPRIATIONS.-In addition to funds made available under section 1402(d) of the Victims of Crime Act of 1984, there are authorized to be appropriated to carry out this Act-

(1) $2,000,000 for fiscal year 2005 and $5,000,000 for each of fiscal years 2006, 2007, 2008, and 2009 to United States Attorneys Offices for Victim/Witnesses Assistance Programs;

(2) $2,000,000 for fiscal year 2005 and $5,000,000 in each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for enhancement of the Victim Notification System;

(3) $300,000 in fiscal year 2005 and $500,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for staff to administer the appropriation for the support of the National Crime Victim Law Institute or other organizations as designated under paragraph (4);

(4) $7,000,000 for fiscal year 2005 and $11,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of-

(A) the National Crime Victim Law Institute and the establishment and operation of the Institute's programs to provide counsel for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments that have laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code; or

(B) other organizations substantially similar to that organization as determined by the Director of the Office for Victims of Crime.

(c) INCREASED RESOURCES TO DEVELOP STATE-OF-THE-ART SYSTEMS FOR NOTIFYING CRIME VICTIMS OF IMPORTANT DATES AND DEVELOPMENTS.-The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404D the following:

SEC. 1404E. CRIME VICTIMS NOTIFICATION GRANTS.

(a) IN GENERAL.-The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public or private entities, to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments relating to the criminal proceedings at issue in a timely and efficient manner, provided that the jurisdiction has laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code.

(b) INTEGRATION OF SYSTEMS.-Systems developed and implemented under this section may be integrated with existing case management systems operated by the recipient of the grant.

(c) AUTHORIZATION OF APPROPRIATIONS.-In addition to funds made available under section 1402(d), there are authorized to be appropriated to carry out this section-

(1) $5,000,000 for fiscal year 2005; and

(2) $5,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009.

(d) FALSE CLAIMS ACT.-Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.".

SEC. 4. REPORTS.

(a) ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.-Not later than 1 year after the date of enactment of this Act and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached.

(b) GENERAL ACCOUNTING OFFICE.-

(1) STUDY.-The Comptroller General shall conduct a study that evaluates the effect and efficacy of the implementation of the amendments made by this Act on the treatment of crime victims in the Federal system.

(2) REPORT.-Not later than 3 years after the date of enactment of this Act, the Comptroller General shall prepare and submit to the appropriate committees a report containing the results of the study conducted under subsection (a).

Appendix B: Section-by-Section Analysis by Senator Kyl

150 CONG. REC. S10910-01 (Oct. 9, 2004)

Mr. KYL.

Mr. President, as the primary drafter of Title I of H.R. 5107, I would like to make a few comments. After extensive consultation with my colleagues, broad bipartisan consensus was reached and the language in Title I was agreed to.

I would like to make it clear that it is not the intent of this bill to limit any laws in favor of crime victims that may currently exist, whether these laws are statutory, regulatory, or found in case law. I would like to turn to the bill itself and address the first section, (a)(1), the right of the crime victim to be reasonably protected. Of course the government cannot protect the crime victim in all circumstances. However, where reasonable, the crime victim should be provided accommodations such as a secure waiting area, away from the defendant before and after and during breaks in the proceedings. The right to protection also extends to require reasonable conditions of pre-trial and post-conviction relief that include protections for the victim's safety.

I would like to address the notice provisions of (a)(2). The notice provisions are important because if a victim fails to receive notice of a public proceeding in the criminal case at which the victim's right could otherwise have been exercised, that right has effectively been denied. Public court proceedings include both trial level and appellate level court proceedings. It does not make sense to enact victims' rights that are rendered useless because the victim never knew of the proceeding at which the right had to be asserted. Simply put, a failure to provide notice of proceedings at which a right can be asserted is equivalent to a violation of the right itself. Equally important to this right to notice of public proceedings is the right to notice of the escape or release of the accused. This provision helps to protect crime victims by notifying them that the accused is out on the streets.

For these rights to notice to be effective, notice must be sufficiently given in advance of a proceeding to give the crime victim the opportunity to arrange his or her affairs in order to be able to attend that proceeding and any scheduling of proceedings should take into account the victim's schedule to facilitate effective notice.

Restrictions on public proceedings are in 28 CFR Sec. 50.9 and it is not the intent here today to alter the meaning of that provision.

Too often crime victims have been unable to exercise their rights because they were not informed of the proceedings. Pleas and sentencings have all too frequently occurred without the victim ever knowing that they were taking place. Victims are the persons who are directly harmed by the crime and they have a stake in the criminal process because of that harm. Their lives are significantly altered by the crime and they have to live with the consequences for the rest of their lives. To deny them the opportunity to know of and be present at proceedings is counter to the fundamental principles of this country. It is simply wrong. Moreover, victim safety requires that notice of the release or escape of an accused from custody be made in a timely manner to allow the victim to make informed choices about his or her own safety. This provision ensures that takes place.

I would like to turn to (a)(3), which provides that the crime victim has the right not to be excluded from any public proceedings. This language was drafted in a way to ensure that the

government would not be responsible for paying for the victim's travel and lodging to a place where they could attend the proceedings.

In all other respects, this section is intended to grant victims the right to attend and be present throughout all public proceedings.

This right is limited in two respects. First, the right is limited to public proceedings, thus grand jury proceedings are excluded from the right. Second, the government or the defendant can request, and the court can order, judicial proceedings to be closed under existing laws. This provision is not intended to alter those laws or their procedures in any way. There may be organized crime cases or cases involving national security that require procedures that necessarily deny a crime victim the right not to be excluded that would otherwise be provided under this section. This is as it should be. National security matters and organized crime cases are especially challenging and there are times when there is a vital need for closed proceedings. In such cases, the proceedings are not intended to be interpreted as "public proceedings" under this bill. In this regard, it is not our intent to alter 28 CFR Sec. 50.9 in any respect.

Despite these limitations, this bill allows crime victims, in the vast majority of cases, to attend the hearings and trial of the case involving their victimization. This is so important because crime victims share an interest with the government in seeing that justice is done in a criminal case and this interest supports the idea that victims should not be excluded from public criminal proceedings, whether these are pre-trial, trial, or post-trial proceedings.

When "the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding," a victim may be excluded. The standards of "clear and convincing evidence" and "materially altered" are extremely high and intended to make exclusion of the victim quite rare, especially since (b) says that "before 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 *S10911criminal proceeding." It should be stressed that (b) requires that "the reasons for any decision denying relief under this chapter shall be clearly stated on the record." A judge should explain in detail the precise reasons why relief is being denied.

This right of crime victims not to be excluded from the proceedings provides a foundation for (a)(4), which provides victims the right to reasonably be heard at any public proceeding involving release, plea, or sentencing. This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an independent participant in the proceedings. When a victim invokes this right during plea and sentencing proceedings, it is intended that the he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations. Of course, the victim may use a lawyer, at the victim's own expense, to assist in the exercise of this right. This bill does not provide victims with a right to counsel but recognizes that a victim may enlist a counsel on their own.

It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the

court. Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. In such cases, communication by the victim to the court is permitted by other reasonable means. In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. This bill intends for this right to be heard to be an independent right of the victim.

It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard.

Of course, in providing victim information or opinion it is important that the victim be able to confer with the prosecutor concerning a variety of matters and proceedings. Under (a)(5), the victim has a reasonable right to confer with the attorney for the government in the case. This right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. The right, however, it is not limited to these examples. This right to confer does not give the crime victim any right to direct the prosecution. Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings after charging. I would note that the right to confer does impair the prosecutiorial discretion of the Attorney General or any officer under his direction, as provided (d)(6).

I would like to turn now to restitution in (a)(6). This section provides the right to full and timely restitution as provided in law. We specifically intend to endorse the expansive definition of restitution given by Judge Cassell in *U.S. v. Bedonie* and *U.S. v. Serawop* in May 2004. This right, together with the other rights in the act to be heard and confer with the government's attorney in this act, means that existing restitution laws will be more effective.

I would like to move on to (a)(7), which provides crime victims with a right to proceedings free from unreasonable delay. This provision does not curtail the government's need for reasonable time to organize and prosecute its case. Nor is the provision intended to infringe on the defendant's due process right to prepare a defense. Too often, however, delays in criminal proceedings occur for the mere convenience of the parties and those delays reach beyond the time needed for defendant's due process or the government's need to prepare. The result of such delays is that victims cannot begin to put the criminal justice system behind them and they continue to be victimized. It is not right to hold crime victims under the stress and pressure of future court proceedings merely because it is convenient for the parties or the court.

This provision should be interpreted so that any decision to schedule, reschedule, or continue criminal cases should include victim input through the victim's assertion of the right to be free from unreasonable delay.

I would add that the delays in criminal proceedings are among the most chronic problems faced by victims. Whatever peace of mind a victim might achieve after a crime is too often inexcusably postponed by unreasonable delays in the criminal case. A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims, a new focus on limiting unreasonable delays in the criminal process to accommodate the victim is a positive start.

I would like to turn to (a)(8). The broad rights articulated in this section are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

It is not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process. This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims' law that this bill replaces.

I would also like to comment on (b), which directs courts to ensure that the rights in this law be afforded and to record, on the record, any reason for denying relief of an assertion of a crime victim. This provision is critical because it is in the courts of this country that these rights will be asserted and it is the courts that will be responsible for enforcing them. Further, requiring a court to provide the reasons for denial of relief is necessary for effective appeal of such denial.

Turning briefly to (c), there are several important things to point out. First, this provision requires that the government inform the victim that the victim can seek the advice of the attorney, such as from the legal clinics for crime victims contemplated under this law, such as the law clinics at Arizona State University and those supported by the National Crime Victim Law Institute at the Law School at Lewis and Clark College in Portland, Oregon. This is an important protection for crime victims because it ensures the independent and individual nature of their rights. Second, the notice section immediately following limits the right to notice of release where such notice may endanger the safety of the person being released. There are cases, particularly in domestic violence cases, where there is danger posed by an intimate partner if the intimate partner is *S10912 released. Such circumstances are not the norm, even in domestic violence cases as a category of cases. This exception should not be relied upon as an excuse to avoid notifying most victims.

I would now like to address the enforcement provisions of the bill in (d). This provision allows a crime victim to enter the criminal trial court during proceedings involving the crime against the victim, to stand with other counsel in the well of the court, and assert the rights provided by this bill. This provision ensures that crime victims have standing to be heard in trial courts so that they are heard at the very moment when their rights are at stake and this, in turn, forces the criminal justice system to be responsive to a victim's rights in a timely way. Importantly, however, the bill does not allow the defendant in the case to assert any of the

victim's rights to obtain relief. This prohibition prevents the individual accused of the crime from distorting a right intended for the benefit of the individual victim into a weapon against justice.

The provision allows the crime victim's representative and the attorney for the government to go into a criminal trial court and assert the crime victim's rights. The inclusions of representatives and the government's attorney in the provision are important for a number of reasons. First, allowing a representative to assert a crime victim's rights ensures that where a crime victim is unable to assert the rights on his or her own for any reason, including incapacity, incompetence, minority, or death, those rights are not lost. The representative for the crime victim can assert the rights. Second, a crime victim may choose to enlist a private attorney to represent him or her in the criminal case-this provision allows that attorney to enter an appearance on behalf of the victim in the criminal trial court and assert the victim's rights. The provision also recognizes that, at times, the government's attorney may be best situated to assert a crime victim's rights either because the crime victim is not available at a particular point in the trial or because, at times, the crime victim's interests coincide with those of the government and it makes sense for a single person to express those joined interests. Importantly, however, the provision does not mean that the government's attorney has the authority to compromise or co-opt a victim's right. Nor does the provision mean that by not asserting a victim's right the government's attorney has waived that right. The rights provided in this bill are personal to the individual crime victim and it is that crime victim that has the final word regarding which of the specific rights to assert and when. Waiver of any of the individual rights provided can only happen by the victim's affirmative waiver of that specific right.

In sum, without the ability to enforce the rights in the criminal trial and appellate courts of this country any rights afforded are, at best, rhetoric. We are far past the point where lip service to victims' rights is acceptable. The enforcement provisions of this bill ensure that never again are victim's rights provided in word but not in reality.

I want to turn to (d)(2) because it is an unfortunate reality that in today's world there are crimes that result in multiple victims. The reality of those situations is that a court may find that the sheer number of victims is so large that it is impracticable to accord each victim the rights in this bill. The bill allows that when the court makes that finding on the record the court must then fashion a procedure that still gives effect to the bill and yet takes into account the impracticability. For instance, in the Oklahoma City bombing case the number of victims was tremendous and attendance at any one proceeding by all of them was impracticable so the court fashioned a procedure that allowed victims to attend the proceedings by close circuit television. This is merely one example. Another may be to allow victims with a right to speak to be heard in writing or through other methods. Importantly, courts must seek to identify methods that fit the case before that to ensure that despite the high number of crime victims, the rights in this bill are given effect. It is a tragic reality that cases may involve multiple victims and yet that fact is not grounds for eviscerating the rights in this bill. Rather, that fact is grounds for the court to find an alternative procedure to give effect to this bill.

I now want to turn to another critical aspect of enforcement of victims' rights, (d)(3). This subsection provides that a crime victim who is denied any of his or her rights as a crime victim has standing to seek appellate review of that denial. Specifically, the provision allows a crime victim to apply for a writ of mandamus to the appropriate appellate court. The provision provides that court shall take the writ and shall order the relief necessary to protect the crime victim's

right. This provision is critical for a couple of reasons. First, it gives the victim standing to appear before the appellate courts of this country and ask for review of a possible error below. Second, while mandamus is generally discretionary, this provision means that courts must review these cases. Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This provision ensures review and encourages courts to broadly defend the victims' rights.

Without the right to seek appellate review and a guarantee that the appellate court will hear the appeal and order relief, a victim is left to the mercy of the very trial court that may have erred. This country's appellate courts are designed to remedy errors of lower courts and this provision requires them to do so for victim's rights. For a victim's right to truly be honored, a victim must be able to assert the rights in trial courts, to then be able to have denials of those rights reviewed at the appellate level, and to have the appellate court take the appeal and order relief. By providing for all of this, this bill ensures that victims' rights will have meaning. It is the clear intent and expectation of Congress that the district and appellate courts will establish procedures that will allow for a prompt adjudication of any issues regarding the assertion of a victim's right, while giving meaning to the rights we establish.

I would like to turn our attention to (d)(4) because that also provides an enforcement mechanism. This section provides that in any appeal, regardless of the party initiating the appeal, the government can assert as error the district court's denial of a crime victim's right. This subsection is important for a couple of reasons. First, it allows the government to assert a victim's right on appeal even when it is the defendant who seeks appeal of his or her conviction. This ensures that victims' rights are protected throughout the criminal justice process and that they do not fall by the wayside during what can often be an extended appeal that the victim is not a party to.

I would like to turn to the next provision, (d)(5). This provision is not intended to prevent courts from vacating decisions in non-trial proceedings, such as proceedings involving release, delay, pleas, or sentencings, in which victims' rights were not protected, and ordering those proceedings to be redone.

It is important for victims' rights to be asserted and protected throughout the criminal justice process, and for courts to have the authority to redo proceedings such as release, delay, pleas, and sentencings, where victims' rights are abridged.

I want to turn to the definitions in the bill, contained in (e). There are a couple of key points to be made about the definitions. A "crime victim" is defined as a person directly and proximately harmed as a result of a federal offense or an offense in the District of Columbia. This is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged. Additionally, crime victims may, for any number of reasons, want to employ an attorney to represent them in court. This definition of crime victim allows crime victims to do that. It also assures that when, for any reason, crime victims unable to assert rights on their own-those rights will still be protected.

Now I would like to turn to the portion of the bill concerning administrative compliance with victims' rights. The provisions of (f) are relatively self-explanatory, but it important to point out that these procedures are completely separate from and in no way limit the victim's rights in the previous section.

I also would like to make it clear that it is the intention of the Congress *S10913

that the money authorized in 1404D for the Director of the Office for Victims of Crimes "for the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments . . ." is intended to support the work of the National Crime Victim Law Institute at the Law School at Lewis and Clark College in Portland, Oregon, and to replicate across the nation the clinics that it is supporting, fashioned after the Crime Victims Legal Assistance Project housed at Arizona State University College of Law and run by Arizona Voice for Crime Victims. The Director of OVC should take care to make sure that these funds go into the support of these programs so that crime victims can receive free legal counsel to enforce their rights in our federal courts. Only in this way will be able to fully and fairly test whether statutes are enough to protect victims' rights. There is no substitute for testing these rights in our courts to see if they have the power to change a culture that for too long has ignored the victim.

Let me comment briefly on the provision on reports. Under (a), the Administrative Office of the U.S. Courts to report annually the number of times a right asserted in a criminal case is denied the relief requested, and the reasons therefore, as well as the number of times a mandamus action was brought and the result of that mandamus.

Such reporting is the only way we in the Congress and other interested parties can observe whether reforms we mandate are being carried out. No one doubts the difficulty of obtaining case-by-case information of this nature. Yes, this information is critical to understanding whether federal statutes really can effectively protect victim's rights or whether a constitutional amendment is necessary. We are certain that affected executive and judicial agencies can work together to implement effective administrative tools to record and amass this data. We would certainly encourage the National Institute of Justice to support any needed research to get this system in place.

One final point. Throughout this Act reference is made to the " accused." The intent is for this word to be used in the broadest sense to include both those charged and convicted so that the rights we establish apply throughout the criminal justice system.

Appendix C – Proposed Amendments to the Federal Rules of Criminal Procedure

All inserts or changes made by Judge Cassell are underlined or ~~lined out~~.

FEDERAL RULES OF CRIMINAL PROCEDURE
Effective March 21, 1946, as amended to December 31, 2004

TITLE I. APPLICABILITY

Rule 1. Scope; Definitions

(a) Scope.

(1) In General. *These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.*

(2) State or Local Judicial Officer. *When a rule so states, it applies to a proceeding before a state or local judicial officer.*

(3) Territorial Courts. *These rules also govern the procedure in all criminal proceedings in the following courts:*

(A) the district court of Guam;

(B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and

(C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.

(4) Removed Proceedings. *Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.*

(5) Excluded Proceedings. *Proceedings not governed by these rules include:*

(A) the extradition and rendition of a fugitive;

(B) a civil property forfeiture for violating a federal statute;

(C) the collection of a fine or penalty;

(D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise;

(E) a dispute between seamen under 22 U.S.C. §§ 256–258; and

(F) a proceeding against a witness in a foreign country under 28 U.S.C. § 1784.

(b) Definitions. *The following definitions apply to these rules:*

(1) "Attorney for the government" means:

(A) the Attorney General or an authorized assistant;

(B) a United States attorney or an authorized assistant;

(C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and

(D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

(2) "Court" means a federal judge performing functions authorized by law.

(3) "Federal judge" means:

(A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451;

(B) a magistrate judge; and

(C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule

relates.

(4) "Judge" means a federal judge or a state or local judicial officer.

(5) "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631–639.

(6) "Oath" includes an affirmation.

(7) "Organization" is defined in 18 U.S.C. § 18.

(8) "Petty offense" is defined in 18 U.S.C. § 19.

(9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States.

(10) "State or local judicial officer" means:

(A) a state or local officer authorized to act under 18 U.S.C. § 3041; and

(B) a judicial officer empowered by statute in the District of Columbia or in any commonwealth, territory, or possession to perform a function to which a particular rule relates.

(11) "Victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under these rules, but in no event shall the defendant be named as such guardian or representative.

(c) Authority of a Justice or Judge of the United States. *When these rules authorize a magistrate judge to act, any other federal judge may also act.*

Rule 2. Interpretation

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration to the government, defendants, and victims, and to eliminate unjustifiable expense and delay.

TITLE II. PRELIMINARY PROCEEDINGS

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. *If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If a defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant.*

(b) Form.

(1) Warrant. *A warrant must:*

(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(B) describe the offense charged in the complaint;

(C) command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer; and

(D) be signed by a judge.

(2) Summons. *A summons must be in the same form as a warrant except that it must require the defendant to appear before a magistrate judge at a stated time and place.*

(c) Execution or Service, and Return.

(1) By Whom. *Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.*

(2) Location. *A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.*

(3) Manner.

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be

mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

(4) Return.

(A) After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to the marshal or other authorized person for execution or service.

Rule 5. Initial Appearance

(a) In General.

(1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

(2) Exceptions.

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) Appearance Upon a Summons. *When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.*

(b) Arrest Without a Warrant. *If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.*

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

(1) Arrest in the District Where the Offense Was Allegedly Committed. *If the defendant is arrested in the district where the offense was allegedly committed:*

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed. *If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:*

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(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:*

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(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 form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(d) Procedure in a Felony Case.

(1) Advice. *If the defendant is charged with a felony, the judge must inform the defendant of the following:*

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) Consulting with Counsel. *The judge must allow the defendant reasonable opportunity to consult with counsel.*

(3) Detention or Release. *The judge must detain or release the defendant as provided by statute or these rules.*

(4) Plea. *A defendant may be asked to plead only under Rule 10.*

(e) Procedure in a Misdemeanor Case. *If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).*

(f) Video Teleconferencing. *Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.*

Rule 5.1. Preliminary Hearing

(a) In General. *If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:*

(1) the defendant waives the hearing;

(2) the defendant is indicted;

(3) the government files an information under Rule 7(b) charging the defendant with a felony;

(4) the government files an information charging the defendant with a misdemeanor; or

(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.

(b) Selecting a District. *A defendant arrested in a district other than where the offense was allegedly committed may elect to have the preliminary hearing conducted in the district where the prosecution is pending.*

(c) Scheduling. *The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.*

(d) Extending the Time. *With the defendant's consent and upon a showing of good cause—taking into account the public interest in the prompt disposition of criminal cases—a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.*

(e) Hearing and Finding. *At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.*

(f) Discharging the Defendant. *If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.*

(g) Recording the Proceedings. *The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations.*

(h) Producing a Statement.

(1) In General. *Rule 26.2(a)–(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.*

(2) Sanctions for Not Producing a Statement. *If a party disobeys a Rule 26.2 order to deliver a statement to the moving party, the magistrate judge must not consider the testimony of a witness whose statement is withheld.*

TITLE III. THE GRAND JURY, THE INDICTMENT, AND THE INFORMATION

Rule 6. The Grand Jury

(a) Summoning a Grand Jury.

(1) In General. *When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.*

(2) Alternate Jurors. *When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.*

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. *Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.*

(2) Motion to Dismiss an Indictment. *A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.*

(c) Foreperson and Deputy Foreperson. *The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths and affirmations and will sign all indictments. The foreperson—or another juror designated by the foreperson—will record the number of jurors concurring in every indictment and*

will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. *The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.*

(2) During Deliberations and Voting. *No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.*

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. *Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.*

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government— that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that

impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

> *(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any State, State subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.*
>
> *(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.*
>
> *(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:*
>
> > *(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—*
> >
> > > *• actual or potential attack or other grave hostile acts of a foreign power or its agent;*
> > >
> > > *• sabotage or international terrorism by a foreign power or its agent; or*

• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

• the national defense or the security of the United States; or

• the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs— of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; ~~or~~

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. *The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.*

(5) Closed Hearing. *Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.*

(6) Sealed Records. *Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.*

(7) Contempt. *A knowing violation of Rule 6, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6, may be punished as a contempt of court.*

(f) Indictment and Return. *A grand jury may indict only if at least 12 jurors concur. The grand jury—or its foreperson or deputy foreperson—must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.*

(g) Discharging the Grand Jury. *A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.*

(h) Excusing a Juror. *At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.*

(i) "Indian Tribe" Defined. *"Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a–1.*

Rule 7. The Indictment and the Information

(a) When Used.

(1) Felony. *An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:*

(A) by death; or

(B) by imprisonment for more than one year.

(2) Misdemeanor. *An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).*

(b) Waiving Indictment. *An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment.*

(c) Nature and Contents.

*(1) **In General.** The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in section 3282.*

*(2) **Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.*

*(3) **Citation Error.** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.*

*(d) **Surplusage.** Upon the defendant's motion, the court may strike surplusage from the indictment or information.*

*(e) **Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.*

*(f) **Bill of Particulars.** The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.*

Rule 8. Joinder of Offenses or Defendants

*(a) **Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both— are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.*

*(b) **Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.*

Rule 9. Arrest Warrant or Summons on an Indictment or Information

(a) Issuance. *The court must issue a warrant—or at the government's request, a summons—for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it. The court may issue more than one warrant or summons for the same defendant. If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant. The court must issue the arrest warrant to an officer authorized to execute it or the summons to a person authorized to serve it.*

(b) Form.

(1) Warrant. *The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk and must describe the offense charged in the indictment or information.*

(2) Summons. *The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.*

(c) Execution or Service; Return; Initial Appearance.

(1) Execution or Service.

(A) The warrant must be executed or the summons served as provided in Rule 4(c)(1), (2), and (3).

(B) The officer executing the warrant must proceed in accordance with Rule 5(a)(1).

(2) Return. *A warrant or summons must be returned in accordance with Rule 4(c)(4).*

(3) Initial Appearance. *When an arrested or summoned defendant first appears before the court, the judge must proceed under Rule 5.*

TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 10. Arraignment

(a) In General. *An arraignment must be conducted in open court and must consist of:*

(1) ensuring that the defendant has a copy of the indictment or information;

(2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment or information.

(b) Waiving Appearance. *A defendant need not be present for the arraignment if:*

(1) the defendant has been charged by indictment or misdemeanor information;

(2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and

(3) the court accepts the waiver.

(c) Video Teleconferencing. *Video teleconferencing may be used to arraign a defendant if the defendant consents.*

Rule 10.1 Notice to Victims.

(a) Identification of Victim. *During the prosecution of a case, the attorney for the government shall at the earliest reasonable opportunity, identify the victims of the crime.*

(b) Notice of Case Events. *During the prosecution of a crime, the attorney for the government shall make reasonable efforts to provide victims the earliest possible notice of:*

(1) The scheduling, including scheduling changes and/or continuances, of each court proceeding that the victim is either required to attend or entitled to attend;
(2) The release or detention status of a defendant or suspected offender;
(3) The filing of charges against a defendant, or the proposed dismissal of all charges, including the placement of the defendant in a pretrial diversion program and the conditions thereon;
(4) The right to make a statement about pretrial release of the defendant;
(5) The victim's right to make a statement about acceptance of a plea of guilty or nolo contendere;
(6) The victim's right to attend public proceeding;
(7) If the defendant is convicted, the date and place set for sentencing and the victim's right to address the court at sentencing; and
(8) after the defendant is sentenced, of the sentence imposed, and the availability of the Bureau of Prisons notification program which shall provide the date, if any, on which the offender will be eligible for parole or supervised release.

(c) Multiple Victims. *The attorney for the government shall advise the court if the attorney believes that the number of victims makes it impracticable to provide personal notice to each victim. If the court finds that the number of victims makes it impracticable to give personal notice to each victim desiring to receive notice, the court shall fashion a reasonable procedure calculated to give reasonable notice under the circumstances.*

Rule 11. Pleas

(a) Entering a Plea.

(1) In General. *A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.*

(2) Conditional Plea. *With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.*

(3) Nolo Contendere Plea. *Before accepting a plea of nolo contendere, the court must consider the parties' and victims' views and the public interest in the effective administration of justice.*

(4) Failure to Enter a Plea. *If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.*

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. *Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:*

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
(C) the right to a jury trial;
(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
(G) the nature of each charge to which the defendant is pleading;
(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
(I) any mandatory minimum penalty;
(J) any applicable forfeiture;
(K) the court's authority to order restitution;
(L) the court's obligation to impose a special assessment;
(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and
(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. *Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).*

(3) Determining the Factual Basis for a Plea. *Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.*

(4) Victim's Views. *Before the court accepts a plea of guilty or nolo contendere or allows any plea to be withdrawn, the court must address any victim who is present personally in open court. During this address, the court must determine whether the victim wishes to present views regarding the proposed plea or withdrawal and, if so, what those views are. The court shall consider the victim's views in acting on the proposed plea or withdrawal.*

(c) Plea Agreement Procedure.

(1) In General. *An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. The attorney for the government shall make reasonable efforts to notify identified victims of, and consider the victims' views about, any proposed plea negotiations. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser*

or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. *The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera. When a plea is presented in open court, the attorney for the government or attorney for any victim shall advise the court when the attorney is aware that the victim has any objection to the proposed plea agreement.*

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(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.

(4) Accepting a Plea Agreement. *If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.*

(5) Rejecting a Plea Agreement. *If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):*

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. *A defendant may withdraw a plea of guilty or nolo contendere:*

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or
(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. *After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.*

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. *The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.*

(g) Recording the Proceedings. *The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).*

(h) Harmless Error. *A variance from the requirements of this rule is harmless error if it does not affect substantial rights.*

Rule 12. Pleadings and Pretrial Motions

(a) Pleadings. *The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.*

(b) Pretrial Motions.

(1) In General. *Rule 47 applies to a pretrial motion.*

(2) Motions That May Be Made Before Trial. *A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.*

(3) Motions That Must Be Made Before Trial. *The following must be raised before trial:*

(A) a motion alleging a defect in instituting the prosecution;
(B) a motion alleging a defect in the indictment or information— but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;
(C) a motion to suppress evidence;
(D) a Rule 14 motion to sever charges or defendants; and
(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).
(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. *The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.*

(d) Ruling on a Motion. *The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.*

(e) Waiver of a Defense, Objection, or Request. *A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.*

(f) Recording the Proceedings. *All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.*

(g) Defendant's Continued Custody or Release Status. *If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.*

(h) Producing Statements at a Suppression Hearing. *Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.*

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

(1) Government's Request. *An attorney for the government may request in writing that the defendant notify an attorney for the government of any intended alibi defense. The request must state the time, date, and place of the alleged offense.*

(2) Defendant's Response. *Within 10 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:*

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

(1) Disclosure. *If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:*

(A) the name~~, address, and telephone number~~ of each witness and the address and telephone number of each witness (other than a victim) that the government intends to rely on to establish the defendant's presence at the scene of the alleged offense; and

(B) each government rebuttal witness to the defendant's alibi defense.

(2) Time to Disclose. *Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.*

(c) Continuing Duty to Disclose. *Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness, and the address; and telephone number of each additional witness (other than a victim) if:*

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(d) Exceptions. *For good cause, the court may grant an exception to any requirement of Rule 12.1(a)–(c).*

(e) Failure to Comply. *If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the defendant's alibi. This rule does not limit the defendant's right to testify.*

(f) Inadmissibility of Withdrawn Intention. *Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.*

Rule 12.2. Notice of an Insanity Defense; Mental Examination

(a) Notice of an Insanity Defense. *A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.*

(b) Notice of Expert Evidence of a Mental Condition. *If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.*

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the

court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) Disclosing Results and Reports of Capital Sentencing Examination. *The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.*

(3) Disclosing Results and Reports of the Defendant's Expert Examination. *After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.*

(4) Inadmissibility of a Defendant's Statements. *No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:*

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

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

(e) Inadmissibility of Withdrawn Intention. *Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.*

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

(1) Notice in General. *If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.*

(2) Contents of Notice. *The notice must contain the following information:*

(A) the law enforcement agency or federal intelligence agency involved;
(B) the agency member on whose behalf the defendant claims to have acted; and
(C) the time during which the defendant claims to have acted with public authority.

(3) Response to the Notice. *An attorney for the government must serve a written response on the defendant or the defendant's attorney within 10 days after receiving the defendant's notice, but no later than 20 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.*

(4) Disclosing Witnesses.

(A) Government's Request. An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 20 days before trial.

(B) Defendant's Response. Within 7 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) Government's Reply. Within 7 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, ~~address,~~ and telephone number of each witness, and the address of each witness (other than the victim) that the government intends to rely on to oppose the defendant's public-authority defense.

(5) Additional Time. *The court may, for good cause, allow a party additional time to comply with this rule.*

(b) Continuing Duty to Disclose. *Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness, and the address, and telephone number of any additional witness (other than a victim) if:*

(1) the disclosing party learns of the witness before or during trial; and

(2) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(c) Failure to Comply. *If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.*

(d) Protective Procedures Unaffected. *This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.*

(e) Inadmissibility of Withdrawn Intention. *Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.*

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) Nongovernmental Corporate Party. *Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.*

(2) Organizational Victim. *If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.*

(b) Time for Filing; Supplemental Filing. *A party must:*

(1) file the Rule 12.4(a) statement upon the defendant's initial appearance; and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

Rule 13. Joint Trial of Separate Cases

The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

Rule 14. Relief from Prejudicial Joinder

(a) Relief. *If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant, or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.*

(b) Defendant's Statements. *Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.*

Rule 15. Depositions

(a) When Taken.

(1) In General. *A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.*

(2) Detained Material Witness. *A witness who is detained under 18 U.S.C. § 3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.*

(b) Notice.

*(1) **In General.** A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.*

*(2) **To the Custodial Officer.** A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.*

(c) Defendant's Presence.

*(1) **Defendant in Custody.** The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:*

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

*(2) **Defendant Not in Custody.** A defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant— absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right.*

***(d) Expenses.** If the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay:*

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

***(e) Manner of Taking.** Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:*

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

***(f) Use as Evidence.** A party may use all or part of a deposition as provided by the Federal Rules of Evidence.*

***(g) Objections.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.*

***(h) Depositions by Agreement Permitted.** The parties may by agreement take and use a deposition with the court's consent.*

***(i) Victim Attendance.** Victims can attend any public deposition taken under this rule under the same conditions as govern a victim's attendance at trial.*

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

(A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- *the statement is within the government's possession, custody, or control; and*
- *the attorney for the government knows—or through due diligence could know—that the statement exists;*

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) Organizational Defendant. Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) Defendant's Prior Record. Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) Reports of Examinations and Tests. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) Expert Witnesses. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) Information Not Subject to Disclosure. *Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.*

(3) Grand Jury Transcripts. *This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.*

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) Expert Witnesses. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

(2) Information Not Subject to Disclosure. *Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:*

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. *A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:*

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. *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) Failure to Comply. *If a party fails to comply with this rule, the court may:*

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Rule 17. Subpoena

(a) Content. *A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.*

(b) Defendant Unable to Pay. *Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.*

(c) Producing Documents and Objects.

(1) In General. *A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.*

(2) Quashing or Modifying the Subpoena. *On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.*

(d) Service. *A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.*

(e) Place of Service.

(1) In the United States. *A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.*

(2) In a Foreign Country. *If the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service.*

(f) Issuing a Deposition Subpoena.

(1) Issuance. *A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.*

(2) Place. *After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.*

(g) Contempt. *The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. § 636(e).*

(h) Information Not Subject to a Subpoena.

(1) No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

(2) After indictment, no record or document containing personal or confidential information about a victim may be subpoenaed without notice to the victim, given through the attorney for the government or for the victim. On motion made promptly by the victim, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

Rule 17.1. Pretrial Conference

On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant's attorney unless it is in writing and is signed by the defendant and the defendant's attorney.

TITLE V. VENUE

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Rule 19. [Reserved]

Rule 20. Transfer for Plea and Sentence

(a) Consent to Transfer. *A prosecution may be transferred from the district where the indictment or information is pending, or from which a warrant on a complaint has been issued, to the district where the defendant is arrested, held, or present if:*

(1) the defendant states in writing a wish to plead guilty or nolo contendere and to waive trial in the district where the indictment, information, or complaint is pending, consents in writing to the court's disposing of the case in the transferee district, and files the statement in the transferee district; and

(2) the United States attorneys in both districts approve the transfer in writing, after consultation with any victim. If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the court where the indictment or information is pending of the victim's concerns.

(b) Clerk's Duties. *After receiving the defendant's statement and the required approvals, the clerk where the indictment, information, or complaint is pending must send the file, or a certified copy, to the clerk in the transferee district.*

(c) Effect of a Not Guilty Plea. *If the defendant pleads not guilty after the case has been transferred under Rule 20(a), the clerk must return the papers to the court where the prosecution began, and that court must restore the proceeding to its docket. The defendant's statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.*

(d) Juveniles.

(1) Consent to Transfer. *A juvenile, as defined in 18 U.S.C. § 5031, may be proceeded against as a juvenile delinquent in the district where the juvenile is arrested, held, or present if:*

(A) the alleged offense that occurred in the other district is not punishable by death or life imprisonment;

(B) an attorney has advised the juvenile;

(C) the court has informed the juvenile of the juvenile's rights—including the right to be returned to the district where the offense allegedly occurred—and the consequences of waiving those rights;

(D) the juvenile, after receiving the court's information about rights, consents in writing to be proceeded against in the transferee district, and files the consent in the transferee district;

(E) the United States attorneys for both districts approve the transfer in writing, after consultation with any victim; and

(F) the transferee court approves the transfer.

If any victim objects to the transfer, the United States attorney in the transferring district or the victim's attorney shall advise the transferring court of the victim's concerns

(2) Clerk's Duties. *After receiving the juvenile's written consent and the required approvals, the clerk where the indictment, information, or complaint is pending or where the alleged offense occurred must send the file, or a certified copy, to the clerk in the transferee district.*

Rule 21. Transfer for Trial

(a) For Prejudice. *Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.*

(b) For Convenience. *Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice.*

(c) Proceedings on Transfer. *When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.*

(d) Time to File a Motion to Transfer. *A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.*

(e) Victims' Views. *The court shall not transfer any proceeding without giving any victim an opportunity to be heard. The court shall consider the views of the victim in making any transfer decision.*

Rule 22. [Transferred]

TITLE VI. TRIAL

Rule 23. Jury or Nonjury Trial

(a) Jury Trial. *If the defendant is entitled to a jury trial, the trial must be by jury unless:*

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves after considering the views of any victims.

(b) Jury Size.

(1) In General. *A jury consists of 12 persons unless this rule provides otherwise.*

(2) Stipulation for a Smaller Jury. *At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:*

(A) the jury may consist of fewer than 12 persons; or

(B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary to excuse a juror for good cause after the trial begins.

(3) Court Order for a Jury of 11. *After the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.*

(c) Nonjury Trial. *In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.*

Rule 24. Trial Jurors

(a) Examination.

(1) In General. *The court may examine prospective jurors or may permit the attorneys for the parties to do so.*

(2) Court Examination. *If the court examines the jurors, it must permit the attorneys for the parties to:*

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) Peremptory Challenges. *Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.*

(1) Capital Case. *Each side has 20 peremptory challenges when the government seeks the death penalty.*

(2) Other Felony Case. *The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.*

(3) Misdemeanor Case. *Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.*

(c) Alternate Jurors.

(1) In General. *The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.*

(2) Procedure.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) Retaining Alternate Jurors. *The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.*

(4) Peremptory Challenges. *Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.*

(A) One or Two Alternates. One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) Three or Four Alternates. Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) Five or Six Alternates. Three additional peremptory challenges are permitted when five or six alternates are impaneled.

Rule 25. Judge's Disability

(a) During Trial. *Any judge regularly sitting in or assigned to the court may complete a jury trial if:*

(1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) After a Verdict or Finding of Guilty.

(1) In General. *After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.*

(2) Granting a New Trial. *The successor judge may grant a new trial if satisfied that:*

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

Rule 26. Taking Testimony

In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077.

Rule 26.1. Foreign Law Determination

A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a

court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.

Rule 26.2. Producing a Witness's Statement

(a) Motion to Produce. *After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.*

(b) Producing the Entire Statement. *If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.*

(c) Producing a Redacted Statement. *If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any privileged or unrelated portions, the court must order delivery of the redacted statement to the moving party. If the defendant objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.*

(d) Recess to Examine a Statement. *The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.*

(e) Sanction for Failure to Produce or Deliver a Statement. *If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.*

(f) "Statement" Defined. *As used in this rule, a witness's "statement" means:*

(1) a written statement that the witness makes and signs, or otherwise adopts or approves;

(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or

(3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

(g) Scope. *This rule applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules:*

(1) Rule 5.1(h) (preliminary hearing);

(2) Rule 32(i)(2) (sentencing);

(3) Rule 32.1(e) (hearing to revoke or modify probation or supervised release);

(4) Rule 46(j) (detention hearing); and

(5) Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

Rule 26.3. Mistrial

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and
to suggest alternatives.

Rule 27. Proving an Official Record

A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

Rule 28. Interpreters

The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. *After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.*

(b) Reserving Decision. *The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.*

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. *A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court*

discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.

(2) Ruling on the Motion. *If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.*

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

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

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

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

(3) Appeal.

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

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

Rule 29.1. Closing Argument

Closing arguments proceed in the following order:

(a) the government argues;

(b) the defense argues; and

(c) the government rebuts.

Rule 30. Jury Instructions

(a) In General. *Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.*

(b) Ruling on a Request. *The court must inform the parties before closing arguments how it intends to rule on the requested instructions.*

(c) Time for Giving Instructions. *The court may instruct the jury before or after the arguments are completed, or at both times.*

(d) Objections to Instructions. *A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's*

presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

Rule 31. Jury Verdict

(a) Return. *The jury must return its verdict to a judge in open court. The verdict must be unanimous.*

(b) Partial Verdicts, Mistrial, and Retrial.

(1) Multiple Defendants. *If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.*

(2) Multiple Counts. *If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed.*

(3) Mistrial and Retrial. *If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.*

(c) Lesser Offense or Attempt. *A defendant may be found guilty of any of the following:*

(1) an offense necessarily included in the offense charged;

(2) an attempt to commit the offense charged; or

(3) an attempt to commit an offense necessarily included in the offense charged, if the attempt is an offense in its own right.

(d) Jury Poll. *After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.*

TITLE VII. POST–CONVICTION PROCEDURES

Rule 32. Sentencing and Judgment

~~***(a) Definitions.*** *The following definitions apply under this rule:*~~

~~*(1) "Crime of violence or sexual abuse" means:*~~

~~*(A) a crime that involves the use, attempted use, or threatened use of physical force against another's person or property; or*~~

~~*(B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.*~~

~~*(2) "Victim" means an individual against whom the defendant committed an offense for which the court will impose sentence.*~~

(b) Time of Sentencing.

(1) In General. *The court must impose sentence without unnecessary delay.*

(2) Changing Time Limits. *The court may, for good cause, change any time limits prescribed in this rule.*

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) Restitution. If the law ~~requires~~ permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. *The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.*

(3) Victim Information. *The probation officer must determine whether any victim wishes to provide information for the presentence report.*

(d) Presentence Report.

(1) Applying the Sentencing Guidelines. *The presentence report must:*

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. *The presentence report must also contain the following information:*

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires.

(3) Exclusions. *The presentence report must exclude the following:*

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. *Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.*

(2) Minimum Required Notice. *The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period. The attorney for the government shall, if any victim requests, communicate the relevant contents of the presentence report to the victim.*

(3) Sentence Recommendation. *By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.*

(f) Objecting to the Report.

(1) Time to Object. *Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report. The attorney for the government or for the victim shall raise for the victim any reasonable objection by the victim to the presentence report.*

(2) Serving Objections. *An objecting party must provide a copy of its objections to the opposing party and to the probation officer.*

(3) Action on Objections. *After receiving objections, the probation officer may meet with the parties and the victim to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.*

(g) Submitting the Report. *At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.*

(h) Notice of Possible Departure from Sentencing Guidelines. *Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The attorney for the government or the victim shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.*

(i) Sentencing.

(1) In General. *At sentencing, the court:*

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera— any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys and any victim to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to or any victim make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. *The court may permit the parties or the victim to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.*

(3) Court Determinations. *At sentencing, the court:*

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

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

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

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

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

(j) Defendant's Right to Appeal.

(1) Advice of a Right to Appeal.

(A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) Appealing a Sentence. After sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. *If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.*

(k) Judgment.

(1) In General. *In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.*

(2) Criminal Forfeiture. *Forfeiture procedures are governed by Rule 32.2.*

Rule 32.1. Revoking or Modifying Probation or Supervised Release

(a) Initial Appearance.

(1) Person In Custody. *A person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge.*

(A) If the person is held in custody in the district where an alleged violation occurred, the initial appearance must be in that district.

(B) If the person is held in custody in a district other than where an alleged violation occurred, the initial appearance must be in that district, or in an adjacent district if the appearance can occur more promptly there.

(2) Upon a Summons. *When a person appears in response to a summons for violating probation or supervised release, a magistrate judge must proceed under this rule.*

(3) Advice. *The judge must inform the person of the following:*

(A) the alleged violation of probation or supervised release;

(B) the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(C) the person's right, if held in custody, to a preliminary hearing under Rule 32.1(b)(1).

(4) Appearance in the District With Jurisdiction. *If the person is arrested or appears in the district that has jurisdiction to conduct a revocation*

hearing—either originally or by transfer of jurisdiction—the court must proceed under Rule 32.1(b)–(e).

(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:*

(A) if the alleged violation occurred in the district of arrest, conduct a preliminary hearing under Rule 32.1(b) and either:

(i) transfer the person to the district that has jurisdiction, if the judge finds probable cause to believe that a violation occurred; or

(ii) dismiss the proceedings and so notify the court that has jurisdiction, if the judge finds no probable cause to believe that a violation occurred; or

(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; and

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

(6) Release or Detention. *The magistrate judge may release or detain the person under 18 U.S.C. § 3143(a) pending further proceedings. The burden of establishing that the person will not flee or pose a danger to any other person or to the community rests with the person.*

(b) Revocation.

(1) Preliminary Hearing.

(A) In General. If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.

(B) Requirements. The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:

(i) notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;

(ii) an opportunity to appear at the hearing and present evidence; and

(iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.

(C) Referral. If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

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

(A) written notice of the alleged violation;
(B) disclosure of the evidence against the person;
(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear; and
(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel.

(c) Modification.

(1) In General. *Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel.*

(2) Exceptions. *A hearing is not required if:*
(A) the person waives the hearing; or
(B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and
(C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.

(d) Disposition of the Case. *The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).*

(e) Producing a Statement. *Rule 26.2(a)–(d) and (f) applies at a hearing under this rule. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.*

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. *A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.*

(b) Entering a Preliminary Order of Forfeiture.

(1) In General. *As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.*

(2) Preliminary Order. *If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without*

regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) Seizing Property. *The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing—or at any time before sentencing if the defendant consents—the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.*

(4) Jury Determination. *Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.*

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) In General. *If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.*

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) Entering a Final Order. *When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.*

(3) Multiple Petitions. *If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are*

made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. *An ancillary proceeding is not part of sentencing.*

(d) Stay Pending Appeal. *If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.*

(e) Subsequently Located Property; Substitute Property.

(1) In General. *On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:*

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) Procedure. *If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:*

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) Jury Trial Limited. *There is no right to a jury trial under Rule 32.2(e).*

Rule 33. New Trial

(a) Defendant's Motion. *Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.*

(b) Time to File.

(1) Newly Discovered Evidence. *Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.*

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

Rule 34. Arresting Judgment

(a) In General. *Upon the defendant's motion or on its own, the court must arrest judgment if:*

(1) the indictment or information does not charge an offense; or

(2) the court does not have jurisdiction of the charged offense.

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

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. *Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.*

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. *Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:*

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) Later Motion. *Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:*

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. *In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.*

(4) Below Statutory Minimum. *When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.*

(c) "Sentencing" Defined. *As used in this rule, "sentencing" means the oral announcement of the sentence.*

Rule 36. Clerical Error

After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

Rule 37. [Reserved]

Rule 38. Staying a Sentence or a Disability

(a) Death Sentence. *The court must stay a death sentence if the defendant appeals the conviction or sentence.*

(b) Imprisonment.

(1) Stay Granted. *If the defendant is released pending appeal, the court must stay a sentence of imprisonment.*

(2) Stay Denied; Place of Confinement. *If the defendant is not released pending appeal, the court may recommend to the Attorney General that the defendant be confined near the place of the trial or appeal for a period reasonably necessary to permit the defendant to assist in preparing the appeal.*

(c) Fine. *If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay a sentence to pay a fine or a fine and costs. The court may stay the sentence on any terms considered appropriate and may require the defendant to:*

(1) deposit all or part of the fine and costs into the district court's registry pending appeal;

(2) post a bond to pay the fine and costs; or

(3) submit to an examination concerning the defendant's assets and, if appropriate, order the defendant to refrain from dissipating assets.

(d) Probation. *If the defendant appeals, the court may stay a sentence of probation. The court must set the terms of any stay.*

(e) Restitution and Notice to Victims.

(1) In General. *If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay—on any terms considered appropriate—any sentence providing for restitution under 18 U.S.C. § 3556 or notice under 18 U.S.C. § 3555.*

(2) Ensuring Compliance. *The court may issue any order reasonably necessary to ensure compliance with a restitution order or a notice order after disposition of an appeal, including:*

(A) a restraining order;

(B) an injunction;

(C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or

(D) an order requiring the defendant to post a bond.

(f) Forfeiture. *A stay of a forfeiture order is governed by Rule 32.2(d).*

(g) Disability. *If the defendant's conviction or sentence creates a civil or employment disability under federal law, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay the disability pending appeal on any terms considered appropriate. The court may issue any order reasonably necessary to protect the interest represented by the disability pending appeal, including a restraining order or an injunction.*

Rule 39. [Reserved]

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Arrest for Failing to Appear 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 the arrest.*

(b) Proceedings. *The judge must proceed under Rule 5(c)(3) as applicable.*

(c) Release or Detention Order. *The judge may modify any previous release or detention order issued in another district, but must state in writing the reasons for doing so.*

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) Scope. *This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.*

(2) Definitions. *The following definitions apply under this rule:*

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(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 authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.

(c) Persons or Property Subject to Search or Seizure. *A warrant may be issued for any of the following:*

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) Probable Cause. *After receiving an affidavit or other information, a magistrate judge 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 under Rule 41(c).*

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(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 appropriate means, including facsimile transmission.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant, 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.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(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. *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) execute the warrant within a specified time no longer than 10 days;

(B) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(C) return the warrant to the magistrate judge designated in 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. The magistrate judge must enter the contents of the proposed duplicate original warrant into an original warrant.

(C) Modifications. The magistrate judge may direct the applicant to modify the proposed duplicate original warrant. 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 time it is issued, and direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Noting the Time. *The officer executing the warrant must enter on its face the exact date and time it is executed.*

(2) 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) 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) Return. *The officer executing the warrant must promptly return it—together with a 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.*

(g) Motion to Return Property. *A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the*

court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. *A defendant may move to suppress evidence in the court where the trial will occur, as Rule 12 provides.*

(i) Forwarding Papers to the Clerk. *The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.*

Rule 42. Criminal Contempt

(a) Disposition After Notice. *Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.*

(1) Notice. *The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:*

(A) state the time and place of the trial;

(B) allow the defendant a reasonable time to prepare a defense; and

(C) state the essential facts constituting the charged criminal contempt and describe it as such.

(2) Appointing a Prosecutor. *The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.*

(3) Trial and Disposition. *A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.*

(b) Summary Disposition. *Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.*

TITLE IX. GENERAL PROVISIONS

Rule 43. Defendant's Presence

(a) When Required. *Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:*

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) When Not Required. *A defendant need not be present under any of the following circumstances:*

(1) Organizational Defendant. *The defendant is an organization represented by counsel who is present.*

(2) Misdemeanor Offense. *The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.*

(3) Conference or Hearing on a Legal Question. *The proceeding involves only a conference or hearing on a question of law.*

(4) Sentence Correction. *The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).*

(c) Waiving Continued Presence.

(1) In General. *A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:*

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect. *If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.*

Rule 43.1 Victim's Presence

(a) Victim's Right to Attend. *A victim has the right to attend any public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding. Before making any determination to exclude a victim, 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 to exclude a victim shall be clearly stated on the record.*

(b) Proceeding With and Without Notice. *The court may proceed with a public proceeding without a victim if proper notice has been provided to that victim under Rule 10.1. The court may proceed with a public proceeding (other than a trial or sentencing) without proper notice to a victim only if doing so is in the interests of justice, the court provides prompt notice to that victim of the court's action and of the victim's right to seek*

reconsideration of the action if a victim's right is affected, and the court insures that notice will be properly provided to that victim for all subsequent public proceedings.
(c) Numerous Victims. *If the court finds that the number of victims makes it impracticable to according all of the victims the right to be present, the court shall fashion a reasonable procedure to facilitate victims' attendance.*
(d) ***Right to be Heard on Victims' Issues.*** *In addition to rights to be heard established elsewhere in these rules, at any public proceeding at which a victim has the right to attend, the victim has the right to be heard on any matter directly affecting a victim's right.*

Rule 44. Right to and Appointment of Counsel

(a) Right to Appointed Counsel. *A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.*

(b) Appointment Procedure. *Federal law and local court rules govern the procedure for implementing the right to counsel.*

(c) Inquiry Into Joint Representation.

(1) Joint Representation. *Joint representation occurs when:*

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and

(B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

(2) Court's Responsibilities in Cases of Joint Representation. *The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.*

Rule 44.1 Counsel for Victims.

When the interests of justice require, the court may appoint counsel for a victim to assist the victim in exercising their rights as provided by law.

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) Day of the Event Excluded. *Exclude the day of the act, event, or default that begins the period.*

(2) Exclusion from Brief Periods. *Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.*

(3) Last Day. *Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the*

next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) "Legal Holiday" Defined. *As used in this rule, "legal holiday" means:*

(A) the day set aside by statute for observing:

(i) New Year's Day;
(ii) Martin Luther King, Jr.'s Birthday;
(iii) Washington's Birthday;
(iv) Memorial Day;
(v) Independence Day;
(vi) Labor Day;
(vii) Columbus Day;
(viii) Veterans' Day;
(ix) Thanksgiving Day;
(x) Christmas Day; and

(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.

(b) Extending Time.

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

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

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

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

(c) Additional Time After Service. *When these rules permit or require a party to act within a specified period after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).*

Rule 46. Release from Custody; Supervising Detention

(a) Before Trial. *The provisions of 18 U.S.C. §§ 3142 and 3144 govern pretrial release.*

(b) During Trial. *A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.*

(c) Pending Sentencing or Appeal. *The provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.*

(d) Pending Hearing on a Violation of Probation or Supervised Release. *Rule 32.1(a)(6) governs release pending a hearing on a violation of probation or supervised release.*

(e) Surety. *The court must not approve a bond unless any surety appears to be qualified. Every surety, except a legally approved corporate surety, must demonstrate by affidavit that its assets are adequate. The court may require the affidavit to describe the following:*

(1) the property that the surety proposes to use as security;

(2) any encumbrance on that property;

(3) the number and amount of any other undischarged bonds and bail undertakings the surety has issued; and

(4) any other liability of the surety.

(f) Bail Forfeiture.

(1) Declaration. *The court must declare the bail forfeited if a condition of the bond is breached.*

(2) Setting Aside. *The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose if:*

(A) the surety later surrenders into custody the person released on the surety's appearance bond; or

(B) it appears that justice does not require bail forfeiture.

(3) Enforcement.

(A) Default Judgment and Execution. If it does not set aside a bail forfeiture, the court must, upon the government's motion, enter a default judgment.

(B) Jurisdiction and Service. By entering into a bond, each surety submits to the district court's jurisdiction and irrevocably appoints the district clerk as its agent to receive service of any filings affecting its liability.

(C) Motion to Enforce. The court may, upon the government's motion, enforce the surety's liability without an independent action. The government must serve any motion, and notice as the court prescribes, on the district clerk. If so served, the clerk must promptly mail a copy to the surety at its last known address.

(4) Remission. *After entering a judgment under Rule 46(f)(3), the court may remit in whole or in part the judgment under the same conditions specified in Rule 46(f)(2).*

(g) Exoneration. *The court must exonerate the surety and release any bail when a bond condition has been satisfied or when the court has set aside or remitted the forfeiture. The court must exonerate a surety who deposits cash in the amount of the bond or timely surrenders the defendant into custody.*

(h) Supervising Detention Pending Trial.

(1) In General. *To eliminate unnecessary detention, the court must supervise the detention within the district of any defendants awaiting trial and of any persons held as material witnesses.*

(2) Reports. *An attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days pending indictment, arraignment, or trial. For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a).*

(i) Forfeiture of Property. *The court may dispose of a charged offense by ordering the forfeiture of 18 U.S.C. § 3142(c)(1)(B)(xi) property under 18 U.S.C. § 3146(d), if a fine in the amount of the property's value would be an appropriate sentence for the charged offense.*

(j) Producing a Statement.

(1) In General. *Rule 26.2(a)–(d) and (f) applies at a detention hearing under 18 U.S.C. § 3142, unless the court for good cause rules otherwise.*

(2) Sanctions for Not Producing a Statement. *If a party disobeys a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony at the detention hearing.*

(k) Victims' Right to Be Heard. *Victims have the right to be heard regarding any decision to release the defendant. The court shall consider the views of victims in making any release decision, including such decisions in petty cases. In a case where the court finds that the number of victims makes it impracticable to accord all of the victims the right to be heard in open court, the court shall fashion a reasonable procedure to facilitate hearing from representative victims.*

Rule 47. Motions and Supporting Affidavits

(a) In General. *A party applying to the court for an order must do so by motion.*

(b) Form and Content of a Motion. *A motion—except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion by other means. A motion must state the grounds on which it is based and the relief or order sought. A motion may be supported by affidavit.*

(c) Timing of a Motion. *A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.*

(d) Affidavit Supporting a Motion. *The moving party must serve any supporting affidavit with the motion. A responding party must serve any opposing affidavit at least one day before the hearing, unless the court permits later service.*

Rule 48. Dismissal

(a) By the Government. *The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent. In deciding whether to grant the government's motion to dismiss, the court shall consider the views of any victims.*

(b) By the Court. *The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in:*

(1) presenting a charge to a grand jury;
(2) filing an information against a defendant; or
(3) bringing a defendant to trial.

Rule 49. Serving and Filing Papers

(a) When Required. *A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.*

(b) How Made. *Service must be made in the manner provided for a civil action. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.*

(c) Notice of a Court Order. *When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.*

(d) Filing. *A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.*

Rule 50. Prompt Disposition

(a) Scheduling Preference. *Scheduling preference must be given to criminal proceedings as far as practicable.*

(b) Defendant's Right Against Delay. *The court shall assure that the defendant's right to a speedy trial is protected, as provided by the Speedy Trial Act.*

(c) Victims Right Against Delay. *The court shall assure that the victim's right to proceedings free from unreasonable delay is protected. The victim has the right to be heard regarding any motion to continue any proceeding. If the court grants a motion to continue over the objection of the victim, the court shall state its reasons in the record.*

[All of Rule 54 was moved to Rule 1.]

Rule 51. Preserving Claimed Error

(a) Exceptions Unnecessary. *Exceptions to rulings or orders of the court are unnecessary.*

(b) Preserving a Claim of Error. *A party or a victim may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party or a victim does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.*

Rule 52. Harmless and Plain Error

(a) Harmless Error. *Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.*

(b) Plain Error. *A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.*

Rule 53. Courtroom Photographing and Broadcasting Prohibited

(a) General Rule. *Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.*

(b) Closed-Circuit Transmission for Victims. *In order to permit victims of crime to watch criminal trial proceedings, the court may authorize closed-circuit televising of the proceedings for viewing by victims or other persons the court determines have a compelling interest in doing so.*

Rule 54. [Transferred] 1

Rule 55. Records

The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

Rule 56. When Court Is Open

(a) In General. *A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order.*

(b) Office Hours. *The clerk's office—with the clerk or a deputy in attendance—must be open during business hours on all days except Saturdays, Sundays, and legal holidays.*

(c) Special Hours. *A court may provide by local rule or order that its clerk's office will be open for specified hours on Saturdays or legal holidays other than those set aside by statute for observing New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.*

Rule 57. District Court Rules

(a) In General.

(1) Adopting Local Rules. *Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule must be consistent with—but not duplicative of—federal statutes and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.*

(2) Limiting Enforcement. *A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of an unintentional failure to comply with the requirement.*

(b) Procedure When There Is No Controlling Law. *A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.*

(c) Effective Date and Notice. *A local rule adopted under this rule takes effect on the date specified by the district court and remains in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public.*

Rule 58. Petty Offenses and Other Misdemeanors

(a) Scope.

(1) In General. *These rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge, unless this rule provides otherwise.*

(2) Petty Offense Case Without Imprisonment. *In a case involving a petty offense for which no sentence of imprisonment will be imposed, the court may follow any provision of these rules that is not inconsistent with this rule and that the court considers appropriate.*

(3) Definition. *As used in this rule, the term "petty offense for which no sentence of imprisonment will be imposed" means a petty offense for which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed.*

(b) Pretrial Procedure.

(1) Charging Document. *The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.*

(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:*

(A) the charge, and the minimum and maximum penalties, including imprisonment, fines, any special assessment under 18 U.S.C. § 3013, and restitution under 18 U.S.C. § 3556;

(B) the right to retain counsel;

(C) the right to request the appointment of counsel if the defendant is unable to retain counsel—unless the charge is a petty offense for which the appointment of counsel is not required;

(D) the defendant's right not to make a statement, and that any statement made may be used against the defendant;

(E) the right to trial, judgment, and sentencing before a district judge—unless:

(i) the charge is a petty offense; or

(ii) the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) the right to a jury trial before either a magistrate judge or a district judge—unless the charge is a petty offense; and

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

(3) Arraignment.

(A) Plea Before a Magistrate Judge. A magistrate judge may take the defendant's plea in a petty offense case. In every other misdemeanor case, a magistrate judge may take the plea only if the defendant consents either in writing or on the record to be tried before a magistrate judge and specifically waives trial before a district judge. The defendant may plead not guilty, guilty, or (with the consent of the magistrate judge) nolo contendere.

(B) Failure to Consent. Except in a petty offense case, the magistrate judge must order a defendant who does not consent to trial before a magistrate judge to appear before a district judge for further proceedings.

(c) Additional Procedures in Certain Petty Offense Cases. *The following procedures also apply in a case involving a petty offense for which no sentence of imprisonment will be imposed:*

(1) Guilty or Nolo Contendere Plea. *The court must not accept a guilty or nolo contendere plea unless satisfied that the defendant understands the nature of the charge and the maximum possible penalty.*

(2) Waiving Venue.

(A) Conditions of Waiving Venue. If a defendant is arrested, held, or present in a district different from the one where the indictment, information, complaint, citation, or violation notice is pending, the defendant may state in writing a desire to plead guilty or nolo contendere; to waive venue and trial in the district where the proceeding is pending; and to consent to the court's disposing of the case in the district where the defendant was arrested, is held, or is present.

(B) Effect of Waiving Venue. Unless the defendant later pleads not guilty, the prosecution will proceed in the district where the defendant was arrested, is held, or is present. The district clerk must notify the clerk in the original district of the defendant's waiver of venue. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

(3) Sentencing. *The court must give the defendant an opportunity to be heard in mitigation and then proceed immediately to sentencing. <u>The court must also give victims an opportunity to be heard</u>. The court may, however, postpone sentencing to allow the probation service to investigate or to permit either party to submit additional information.*

(4) Notice of a Right to Appeal. *After imposing sentence in a case tried on a not-guilty plea, the court must advise the defendant of a right to appeal the conviction and of any right to appeal the sentence. If the defendant was convicted on a plea of guilty or nolo contendere, the court must advise the defendant of any right to appeal the sentence.*

(d) Paying a Fixed Sum in Lieu of Appearance.

(1) In General. *If the court has a local rule governing forfeiture of collateral, the court may accept a fixed-sum payment in lieu of the defendant's appearance and end the case, but the fixed sum may not exceed the maximum fine allowed by law.*

(2) Notice to Appear. *If the defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the district clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may give the defendant an additional opportunity to pay a fixed sum in lieu of appearance. The district clerk must serve the notice on the defendant by mailing a copy to the defendant's last known address.*

(3) Summons or Warrant. *Upon an indictment, or upon a showing by one of the other charging documents specified in Rule 58(b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by an attorney for the government, a summons. The showing of probable cause must be made under oath or under penalty of perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's arrest.*

(e) Recording the Proceedings. *The court must record any proceedings under this rule by using a court reporter or a suitable recording device.*

(f) New Trial. *Rule 33 applies to a motion for a new trial.*

(g) Appeal.

(1) From a District Judge's Order or Judgment. *The Federal Rules of Appellate Procedure govern an appeal from a district judge's order or a judgment of conviction or sentence.*

(2) From a Magistrate Judge's Order or Judgment.

(A) Interlocutory Appeal. Either party may appeal an order of a magistrate judge to a district judge within 10 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) Appeal from a Conviction or Sentence. A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 10 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

(C) Record. The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the docket entries. For purposes of the appeal, a copy of

the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record. The Director of the Administrative Office of the United States Courts must pay for those copies.

(D) Scope of Appeal. The defendant is not entitled to a trial de novo by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge.

(3) Stay of Execution and Release Pending Appeal. *Rule 38 applies to a stay of a judgment of conviction or sentence. The court may release the defendant pending appeal under the law relating to release pending appeal from a district court to a court of appeals.*

Rule 59. [Deleted]

Rule 60. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

ADVISORY COMMITTEE
ON
CRIMINAL RULES

Charleston, SC
April 4-5, 2005
Volume II

AGENDA
CRIMINAL RULES COMMITTEE MEETING
APRIL 4-5, 2005
CHARLESTON, SOUTH CAROLINA

I PRELIMINARY MATTERS

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

B. Review and Approval of Minutes of October 2004, Meeting in Santa Fe, New Mexico

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

II. CRIMINAL RULES UNDER CONSIDERATION

A. Rule Amendments Approved by Congress, December 2004 (No Memo)

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 (No Memo)

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

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

C. Proposed Amendments to Rules Published for Public Comment.

1. Rule 5. Initial Appearance. Proposed amendment permits transmission of documents by reliable electronic means. (Memo)

2. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means. (Memo)

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. (Memo)

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

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. (Memo)

III REPORTS OF SUBCOMMITTEES

A. Rules 11, 32 & 35 (*Booker/FanFan* package of rules) (Memo)

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

C. Proposed New Rule 49.1, to Implement E-Government Act (Memo).

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Rules 4 and 5, Professor Malone's Proposal (Memo)

B. Rule 6, Grand Jury; Technical Amendment (Memo)

C. Rule 10, Waiver of Arraignment, Judge McClure's Proposal (Memo)

D. Rules 16 and 32, James Felman's Proposal (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. **Rules Affected by the Crime Victims Rights Act, Judge Cassell's Proposals (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**

A. **Fall Meeting – October 24-25, 2005, San Francisco**

B. **Other**

Appendices Attached to Report of Brady Subcommittee

REPORT OF THE *BRADY* SUBCOMMITTEE

SEPTEMBER 30, 2004

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

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[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.

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APPENDIX "B"

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C

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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:

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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.

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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]

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[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 dismissed 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

MATERIALS TRANSMITTED TO *BRADY* SUBCOMMITTEE: LOCAL RULES AND ORDERS RE FJC *BRADY* REPORT

MARCH 8, 2005

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

Laural L. Hooper, Jennifer E. Marsh, and Brian Yeh

Federal Judicial Center
October 2004

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

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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(i).

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

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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.").

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

March 2, 2005

MEMORANDUM TO BRADY SUBCOMMITTEE

RE: *Supplemental Data to FJC Report: Treatment of Brady v. Maryland Materials*

We recently completed a review of all local court rules and standing orders posted by federal courts on the internet regarding the handling of *Brady* information. We had hoped to survey individual judges' standing orders posted on court web sites, but found only a minority of judges have posted their standing orders. (Under the E-Government Act of 2002, judges have until April 16, 2005, to post their orders on the court web sites.) In our review, we found new data supplementing the FJC's *Brady v. Maryland* report in the following few instances:

• Table 1. District Court Documents That Reference *Brady* Material (Page 8)

The District of the Northern Mariana Islands has a local rule similar to the Northern District of California, which is listed on Table 1. Although the Northern Mariana Islands is a U.S. Territory, it does have a district court that was established by Congress in 1977. It probably should be included in Table 1 under "Local rules." Also, we noted that the Northern District of West Virginia was inadvertently omitted from Table 1 under "Local rules." The number of district courts with local rules addressing *Brady* materials, as supplemented by the new data, should probably be revised from 16 to 18 courts (counting the District of the Northern Mariana Islands and N.D.W.V.).

We also found a standing court order in the Midland-Odessa-Pecos Division of the Western District of Texas that supplements the information in Table 1 under "Standard orders."

• Footnote 31 (Page 9)

The Western District of Texas (Midland-Odessa-Pecos Division) and District of the Northern Mariana Islands define *Brady* materials supplementing the information in footnote 31 on page 9.

• Footnote 38 (Page 10)

The Western District of Texas (Midland-Odessa-Pecos Division) requires automatic disclosure of *Brady* information supplementing the material in footnote 38 and accompanying text.

• Table 2. Districts with Time Requirements for Prosecutorial Disclosure of *Brady* Material (Page 12)

The District of the Northern Mariana Islands requires the government to disclose *Brady* information at the pretrial conference supplementing the material under "At the pretrial conference" in Table 2.

• Footnote 49 (page 13)

We found four standing orders of individual judges in the Western District of Pennsylvania that require disclosure of *Brady* material "well in advance of trial," which differs slightly from the court's local rules requiring disclosure within five days of arraignment. The information supplements the citation in footnote 49 on page 13.

As a reminder, the conference call for the *Brady* subcommittee will be held on **Monday, March 7, 2005, at 2:00 p.m. Eastern Time**. The Sprint operator will contact you shortly before 2:00 p.m. If you need to contact the operator for any reason, please call Sprint directly at 800-473-8794, provide them with confirmation # 38864576, and advise them the chairperson is John Rabiej.

John K. Rabiej

cc: Laural L. Hooper

LEONIDAS RALPH MECHAM
Director

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Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

March 8, 2005
Via Overnight Mail

MEMORANDUM TO BRADY SUBCOMMITTEE

Re: *Local Rules and Court Orders re FJC Report on Brady v. Maryland*

Attached are 28 local rules, court orders, statements, and checklists referred to on page 8, Table 1, of the Federal Judicial Center's report, *Treatment of Brady v. Maryland Materials in U.S. District and State Courts.*

John K. Rabiej

Attachments

cc: Professor Sara Sun Beale

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").

Lance_Wilson@nvd.uscourts.gov
08/30/2004 01:44 PM

To lhooper@fjc.gov
cc
bcc
Subject Fw: Request for information for the Advisory Committee on Criminal Rules

Chantel

Laurel - Please see Judge Leavitt's response to your question in the attachment below. Please contact me if you need additional information. Thanks.

Lance S. Wilson
District Court Executive
----- Forwarded by Lance Wilson/NVD/09/USCOURTS on 08/30/2004 10:43 AM -----

Lawrence Leavitt/NVD/09/USCOURTS 08/30/2004 10:40 AM		To Lance Wilson/NVD/09/USCOURTS@USCOURTS cc Subject Re: Fw: Request for information for the Advisory Committee on Criminal Rules(Document link: Lance Wilson)

Lance, you may e-mail the attached response: ------> (See attached file: Brady obligations.wpd)

Lance Wilson/NVD/09/USCOURTS 08/30/2004 09:18 AM		To Lawrence Leavitt/NVD/09/USCOURTS@USCOURTS cc Subject Fw: Request for information for the Advisory Committee on Criminal Rules

In the District of Nevada there is no Local Rule of Criminal Practice or Special Order that codifies or otherwise addresses *Brady v. Maryland*. In almost all criminal cases, however, the government and the defendant enter into a Joint Discovery Statement, which is an agreement signed by counsel memorializing the parties' respective discovery obligations. Section II of the Joint Discovery Statement sets forth the government's obligations regarding *Brady* materials as follows:

> Pursuant to the ruling in *Brady v. Maryland*, 373 U.S. 83 ... that "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," the government will disclose before the trial any evidence favorable to the defendant which is material to the guilt (or innocence) of the defendant. Such disclosure is limited to evidence which is known by Government counsel or which could become known by the exercise of due diligence.

Section II of the Joint Discovery Statement requires that *Brady* material be disclosed "before the trial," and imposes on government counsel a due diligence obligation consistent with the requirements of *Brady*. The government's normal practice is to provide *Brady* material to defense counsel five days prior to commencement of trial. A defendant who believes the material should be provided earlier than that may apply for an order directing the government to do so.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

CR. MISC. #534

STANDING ORDER ON CRIMINAL DISCOVERY

It is the court's policy to rely on the standard discovery procedure as set forth in this Order as the sole means of the exchange of discovery in criminal cases except in extraordinary circumstances. This Order is intended to promote the efficient exchange of discovery without altering the rights and obligations of the parties, but at the same time eliminating the practice of routinely filing perfunctory and duplicative discovery motions.

INITIAL DISCLOSURES:

(1) **Disclosure by the Government.** At arraignment, or on a date otherwise set by the court for good cause shown, the government shall tender to defendant the following:

(A) Fed. R. Crim. P. 16(a) Information. All discoverable information within the scope of Rule 16(a) of the Federal Rules of Criminal Procedure.

(B) Brady Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of Brady v. Maryland, 373 U.S. 83 (1963).

(C) Giglio Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of United States v. Giglio, 405 U.S. 150 (1972).

(D) Testifying informant's convictions. A record of prior convictions of any alleged informant who will testify for the government at trial.

(E) Defendant's identification. If a line-up, show-up, photo spread or similar, procedure was used in attempting to identify the defendant, the exact procedure and participants shall be described and the results, together with any pictures, and photographs, shall be disclosed.,

(F) Inspection of vehicles, vessels, or aircraft. If any vehicle, vessel, or aircraft, was allegedly utilized in the commission of any offenses charged, the government shall permit the defendant's counsel and any expert selected by the defense to inspect it, if it is in the custody of any governmental authority.

(G) Defendant's latent prints. If latent fingerprints, or prints of any type, have been, identified by a government expert as those of the defendant, copies thereof shall be provided.

(H) Fed. R. Evid.404(b). The government shall advise the defendant of its intention to introduce evidence in its case in chief at trial, pursuant to Rule 404(b) of the Federal Rules of Evidence.

(I) Electronic Surveillance Information. If the defendant was an aggrieved person as defined in 18 U.S.C. ' 2510(11), the government shall so advise the defendant and set forth the detailed circumstances thereof.

(2) **Obligations of the Government.**

(A) The government shall anticipate the need for, and arrange for the transcription of the grand jury testimony of all witnesses who will testify in the government's case in chief, if subject to Fed. R. Crim. P. 26.2 and 18 U.S.C. ' 3500. Jencks Act materials and witnesses' statements shall be provided as required by Fed. R. CRIM. P. 26.2 and 18 U.S.C. ' 3500. However, the government, and where applicable, the defendant, are requested to make such materials and statements available to the other party sufficiently in advance as to avoid any delays or interruptions at trial. The court suggests an early disclosure of Jencks Act materials.,

(B) The government shall advise all government agents and officers involved in the case to preserve all rough notes.

(C) The identification and production of all discoverable evidence or information is the personal responsibility of the Assistant United States Attorney assigned to the case and may not be delegated without the express permission of the court.

(3) **Disclosures to U.S. Probation**. At arraignment, or on a date otherwise designated by the court upon good cause shown, the government shall tender to the U.S. Probation Office all essential information needed by U.S. Probation to accurately calculate the sentencing guideline range for the defendant, including, but not limited to, information regarding the nature of the offense (offense level), the nature of the victim and the injury sustained by the victim, defendant's role in the offense, whether defendant obstructed justice in the commission of the crime, defendant's criminal history, and any information regarding defendant's status as a career offender/armed career criminal. In addition, in order to comply with the requirements of the Anti-Terrorism Act, the government shall produce to the U.S. Probation Office information regarding the victims of defendant's alleged criminal activity, including, but not limited to, the identity of the victim by name, address, and phone number, and the nature and extent of the victim's loss or injury.

(4) Disclosures by the Defendant. If defendant accepts or requests disclosure of discoverable information pursuant to Fed. R. CRIM. P. 16(a)(1)(C), (D), or (E), defendant, on or before a date set by the court, shall provide to the government all discoverable information within the scope of Fed. R. Crim. P. 16(b).

SUPPLEMENTATION. The provisions of Fed. R. CRIM. P. 16(c) are applicable. It shall be the duty of counsel for all parties to immediately reveal to opposing counsel all newly discovered information, evidence, or other material within the scope of this Rule, and there is a continuing duty upon each attorney to disclose expeditiously.

MOTIONS FOR DISCOVERY. No attorney shall file a discovery motion without first conferring with opposing counsel, and no motion will be considered by the court unless it is accompanied by a certification of such conference and a statement of the moving party's good faith efforts to resolve the subject matter of the motion by agreement with opposing counsel. No discovery motions shall be filed for information or material within the scope of this Rule unless it is a motion to compel, a motion for protective order or a motion for an order modifying discovery. See Fed. R. CRIM. P. 16(d). Discovery requests made pursuant to Fed. R. CRIM. P. 16 and this Order require no action on the part of this court and shall not be filed with the court, unless the party making the request desires to preserve the discovery matter for appeal.

Done this 4th day of February, 1999.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	Case Number:
	)	
Plaintiff,	)	ORDER
	)	FOR THE PROGRESSION
vs.	)	OF A CRIMINAL CASE
	)	
,	)	
	)	
Defendant.	)	JUDGE

Upon arraignment of ~~Defendant this date and the~~ entry of plea of not guilty,

IT IS ORDERED:

1. Trial of this case is set for on, or as soon thereafter as the case is called;

2. By, if a request be made, counsel shall confer and accomplish the automatic discovery provided for in Rule 16, Fed. R. Cr. P., and shall adhere to the continuing duty to disclose such matters pursuant to Rule 16(c), Fed. R. Cr. P.;

3. If after compliance with Rule 16 there is necessity for the filing of pretrial motions, they shall be filed by, and that time limit will not be extended by the court except for good cause shown. In this connection, the United States Attorney shall disclose **Brady v. Maryland** (and its progeny) material as soon as practicable. Should the Defendant nonetheless file a motion for such disclosure, such motion shall state with specificity the material sought. In the event that any motions are filed seeking bills of particulars or discovery of facts, documents, or evidence, as part of the motion **the moving party shall** recite that counsel for the movant has conferred with opposing counsel regarding the subject of the motion in an attempt to reach agreement on the contested matters without the involvement of the court and that such attempts have been unsuccessful. The motion shall further state the dates and times of such conferences;

4. If any pretrial motion is filed by either side, a copy thereof and the supporting brief required by the provisions of NELR 7.4 shall be simultaneously submitted to the undersigned United States Magistrate Judge. Opposing briefs shall be submitted **within five (5) working days** thereafter. The submission of briefs may be delayed until after an evidentiary hearing on the motion **but only** upon a written request made within the original time to submit a brief **and** upon order of the court;

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. Defendant.	Case No. CR **PROCEDURAL ORDER**

In order to provide for the just determination of every criminal proceeding, the Board of Judges for the District Court for the District of Idaho has adopted a uniform Procedural Order to be used in criminal proceedings. United States Magistrate Judges are authorized to enter the Procedural Order at the time of the arraignment of a defendant pursuant to 28 U.S.C. § 636 (b)(1)(A).

The Procedural Order shall be construed to secure simplicity in procedure, fairness in the administration of justice, and elimination of unjustifiable expense and delay under the provisions of Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 12, Motions and Defenses; Fed. R. Crim. P. 16, Discovery; Fed. R. Crim. P. 17.1, Pretrial Conferences; and govern the submission of pretrial briefs and jury instructions.

The Procedural Order does not create any rights and/or obligations, nor is it intended to create any such rights, that are contrary to established case law, federal statutory law, the Federal Rules of Evidence ("Fed. R. Ev.") or the Federal Rules of Criminal Procedure.

I.

DISCOVERY

THEREFORE, IT IS HEREBY ORDERED THAT: See Part I, P 5.

1. As to each of the following discovery requests, when so requested by the defendant, the attorney for the government shall within seven (7) calendar days from the date of the arraignment on the indictment, disclose to the defendant and make available for inspection, copying, or photographing all of the following which are currently within the possession, custody, or control of the government. As to material not currently in the possession of the government, but through the exercise of due diligence may become known to the attorney for the government, such material shall be produced as soon as practicable after its discovery, but at a minimum for the defendant to make effective use of it at trial:

REQUESTED:

A. Upon request of a defendant, that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged; and the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial; and where the defendant is a corporation, partnership, association, or

provided for by this order be denied, restricted or deferred, or make such other order as is appropriate.

4. Unless objected to by the government at the time of the arraignment, all documentation submitted to the court in support of or in connection with any search warrant issued in connection with this case, and with regard to any such search warrant material filed under seal, such order of seal is hereby withdrawn as to the defendant and such materials shall be deemed unsealed as to the defendant. The attorney for the government, as well as the Clerk of Court, shall make available for inspection and copying by counsel for the defendant any and all such search warrant material including but not limited to: applications for search warrants (whether granted or denied), all affidavits, declarations and materials in support of such search warrants, all search warrants and all search warrant returns.

Government objects: YES/NO

5. The Court strongly encourages the government to produce any information currently in its possession and described in the following paragraphs within seven (7) calendar days of the date of the arraignment on the indictment, in conjunction with the material being produced under Part I, paragraph 1 of this Procedural Order. As to any materials not currently in the possession of the government, including information that may not be exculpatory in nature at the time of the arraignment but as the case proceeds towards trial may become exculpatory because of subsequent events, then the government shall, as soon as practicable and at a minimum for the defendant to make effective use of it at trial, disclose the information. 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.

A. Disclose all material evidence within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Aqurs*, 427 U.S. 97 (1976) and *Kyles v. Whitley*, 514 U.S. 419 (1995) and their progeny.

B. Disclose the existence and substance of any payments, promises of immunity, leniency, preferential treatment or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 362 U.S. 264 (1959), and their progeny.

C. Disclose the criminal record of any and all prior convictions of any witness who will testify for the government at trial that may be admissible under Fed. R. Ev. 609.

D. Disclose whether a defendant was identified in any lineup, show up, photo spread or similar identification proceeding, and make available any pictures utilized or resulting therefrom and the names of all identifying witnesses.

E. Government investigators are to be instructed to preserve all rough notes of interviews in those circumstances where legal authority imposes such an obligation. If the defendant would be entitled to examine the rough notes of a government investigator under existing law, the court encourages the government to provide the notes to the defendant in a timely manner so the attorney for the defendant may have sufficient opportunity to review the notes and at a minimum to make effective use of the material at trial, without the trial being

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. _____
	)	
_____,	)	
	)	
Defendant.	)	

DRAFT

SCHEDULING AND TRIAL ORDER

I. SCHEDULING CONFERENCE

Present for a scheduling conference on _____ were defendant _____ and his counsel _____ and counsel for the government, _____. The following matters were discussed at the scheduling conference:

A. DISCOVERY

Defendant has [no] prior convictions.
The Government has [no]incriminating statements of defendant.
Evidence was [not] obtained by search and seizure incident to _____.
There is [no] electronic surveillance.
There were [no] identification proceedings, use of lineups or photographs.
There are [no] informants.
There have been [no] inducements to witnesses.
There will be [no] expert witnesses.
There is [no] Brady or Giglio material.

b. Whether the defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt.

3. If the defendant gives notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition, **on or before** _____, the defendant shall identify the experts and provide a summary of the witnesses' opinions, the bases and reasons for those opinions and the witnesses' qualifications.

4. If the defendant complies with the requirements of V.B.2. and V.B.3., on or before _____, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

VI. EVIDENCE FAVORABLE TO THE DEFENSE

A. BRADY EVIDENCE

Within ten days from the date of this Order, the Government is directed to disclose all evidence favorable to the defendant within the meaning of Brady v. Maryland.

B. GIGLIO IMPEACHMENT EVIDENCE

No later than the Friday before the pretrial conference, the Government is directed to disclose all evidence which may tend to adversely affect the credibility of any person called as a witness by the government pursuant to Giglio v. United States and United States v. Agurs, including the arrest and/or conviction record of each government witness, any offers of immunity or lenience, whether made directly or indirectly, to any government witness in exchange for testimony and the amount of money or other remuneration given to any witness.

PLEASE NOTE: The parties are to be prepared to disclose to the Court at the final pretrial conference in this case the method used to determine whether any favorable evidence exists in the government's investigative file. 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 purposes of ascertaining whether

evidence favorable to the defense is contained in the file. The Court considers such evidence to include evidence favorable to the accused which may have a bearing on guilt or punishment and evidence which adversely affects the credibility of any important government witness.

C. ENTRAPMENT EVIDENCE

Within ten days from the date of this Order, the government is directed to provide discovery, inspection, and copying or photographing of any information suggesting entrapment of the defendant which is within the possession, custody or control of the government or the existence of which is known or by the exercise of due diligence may become known to the government attorney.

D. WITNESS INDUCEMENTS

No later than the Friday before the pretrial conference, the government is directed to provide written disclosure of: (a) the names(s) and address(es) of the witness(es) to whom the government has made a promise; (b) all promises or inducements made to any witness(es); (c) all agreements entered into with any witness(es); and (d) the amount of money or other remuneration given to any witness(es).

E. INFORMANTS

Unless the government has made a claim of privilege as to an informant, **no later than the Friday before the pretrial conference,** the government is directed to provide: (a) the name(s) and address(es) of the informant(s); (b) all promises or inducements to the informant(s); (c) all agreements entered into with the informant(s); (d) the amount of money or other remuneration given to the informant(s); (e) identification of the informant's prior testimony; (f) evidence of psychiatric treatment; (g) evidence of the informant's narcotic habit; and (h) the name, address and phone number for the lawyer(s) for the informant(s) if represented by counsel. If an informant objects to the disclosure of his or her address, the government shall produce the informant to defense counsel for a determination of whether or not the informant will consent to an interview.

VII. PRETRIAL FILINGS

A. PRETRIAL MOTIONS

On or before _____, the parties shall file any relevant pretrial motions. Any suggestions in opposition shall be filed **on or before** _____. For defendants who are represented by counsel, the Court will only accept pretrial filings made by counsel. Pro se filings **will not** be accepted for defendants who are represented by counsel.

H. STATEMENTS PRESENTING BRUTON ISSUES

There are no co-defendants and thus no Bruton issues.

VIII. WITNESS ADDRESSES

In lieu of providing the address of any witness required by this Order, counsel for the government or defendant may produce the witness for interview by opposing counsel.

IX. CERTIFICATE OF COMPLIANCE

Prior to the pretrial conference, counsel for the government and for each defendant will sign and file with the Court a certificate indicating that counsel has produced all discovery in accordance with the deadlines established in the Scheduling Order and has timely complied with all pretrial filing deadlines up to the date of the pretrial conference.

IT IS SO ORDERED.

John_Medearis@tned.uscourts.gov
08/26/2004 04:53 PM

To lhooper@fjc.gov
cc Patricia_McNutt@tned.uscourts.gov
bcc
Subject Fw: Request for information for the Advisory Committee on Criminal Rules

Ms. Hooper,

My Clerk, Pat McNutt, has asked me to respond to your request.

Our judges have not enacted a local rule codifying Brady. I am most familiar with the practice followed by Chief Judge R. Allan Edgar and Judge Curtis L. Collier. Each of them has the magistrate judge enter a Discovery and Scheduling Order in their criminal cases which covers the government's obligations under Brady. I have attached an example. As you can see, the order states: (1) that the timing of the disclosure is governed by United States v. Presser, 844 F. 2d 1275 (6th Cir. 1988); (2) that the disclosures are automatic and do not require a request; (3) that due diligence is not mentioned; and (4) that the issue of sanctions is also not mentioned. As to issues (3) and (4) which are not mentioned, I don't think the Clerk's Office can speak for the judges on their position.

We have five other district judges in our district who are assigned criminal cases. If you would like for me to provide you with copies of their orders, please let me know.

If I can be of any other assistance, please do not hesitate to call or email.

John Medearis
Chief Deputy Clerk
Eastern District of Tennessee
423.752.5285 x 216

(See attached file: Criminal Scheduling Order.wpd)

Laural Hooper/Research/FJC@FJC
08/26/2004 09:55 AM

To Michael Hall/AKD/09/USCOURTS@USCOURTS, Debbie Hackett/ALMD/11/USCOURTS@USCOURTS, Perry Mathis/ALND/11/USCOURTS@USCOURTS, James McCormack/ARED/08/USCOURTS@USCOURTS, Chris Johnson/ARWD/08/USCOURTS@USCOURTS, Richard Weare/AZD/09/USCOURTS@USCOURTS, Sherri

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	Case No. 1:04-CR-111
vs.	)	Mag. No. 04-292M
	)	
DARRELL BURGESS	)	JUDGE COLLIER
ROBERT BYNUM	)	
REGINALD LOCKLIN	)	
REGINALD NUNN	)	

DISCOVERY AND SCHEDULING ORDER

If the parties in this action have not already done so, they shall within fourteen (14) days (Tuesday, August 31, 2004) from the date of the entry of this order on the docket confer and the following shall be accomplished:

A. Upon request of the defendant, the government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof, which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government:

1. Any relevant written or recorded statements made by the defendant.

2. The defendant's arrest and conviction record.

3. Results or reports of physical or mental examinations, and of scientific tests, including, without limitation, any handwriting analysis or experiments, which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

B. Upon request of the defendant, the government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof, which are within the possession, custody or control of the government, or the existence of which is known or by the exercise of due diligence may become known to the government:

1. The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a then known to be government agent which the government intends to offer in evidence at trial.

H. The government shall advise its agents and officers involved in this case to preserve all rough notes.

I. Upon request, the government shall advise the defendant of the general nature of any evidence it intends to offer at trial under Rule 404(b), Federal Rules of Evidence.

J. The government shall state whether the defendant was an aggrieved person, as defined in 18 U.S.C. § 2510(11) of any electronic surveillance, and if so, shall set forth in detail the circumstances thereof.

K. Upon request, the government shall provide the defense, for independent expert examination, copies of all latent fingerprints or palm prints which have been identified by a government expert as those of the defendant.

L. The parties shall make every possible effort in good faith to stipulate all facts or points of law, the truth and existence of which is not contested and the early resolution of which will expedite the trial.

M. The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference. No stipulation made by defense counsel at the conference shall be used against the defendant unless the stipulation is reduced to writing and signed by the defendant and his counsel.

The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady v. Maryland, 373 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976) (exculpatory evidence), and United States v. Bagley, 473 U.S. 667 (1985) (impeachment evidence). Timing of such disclosure is governed by United States v. Presser, 844 F.2d 1275 (6th Cir. 1988).

It shall be the continuing duty of counsel for both sides to immediately reveal to opposing

counsel all newly discovered information or other material within the scope of this order.

government, and the government has declined the request, or

(2) The item of discovery sought in the motion is included in or covered by this discovery order; that a formal request for the item has been made to the government, and the government has declined the request.

Sanctions may be imposed for failure to follow this procedure.

SO ORDERED.

s/William B. Mitchell Carter
UNITED STATES MAGISTRATE JUDGE

Western District of Texas

(1)

References to *Brady* and *Giglio* are made in the model checklist contained in CR-16 (see p. 32 of the paper copy of the local rules).

One of the items to be disclosed is "Exculpatory material (*Brady*)", and another item is "Impeachment material (*Giglio*, *Napue*, FRE 608, 609)".

Local Court **CR-16**

WEST'S TEXAS RULES OF COURT
LOCAL COURT RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS
SECTION II. CRIMINAL RULES

Current with amendments received through 2/1/2004

RULE **CR-16**. DISCOVERY AND INSPECTION

(a) Discovery Conference and Agreement.
(1) The parties need not make standard discovery requests, motions, or responses if, not later than the deadline for filing pretrial motions (or as otherwise authorized by the court), they confer, attempt to agree on procedures for pretrial discovery, and sign and file a copy of the Disclosure Agreement Checklist appended to this rule.
(2) If the Disclosure Agreement Checklist indicates that a party intends to disclose, but does not currently possess, certain listed information, that party must disclose the information as soon as practicable.
(3) If the Disclosure Agreement Checklist indicates that a party refuses to disclose information, the other party may file motions regarding the undisclosed information within 10 days after filing of the checklist. (4) Filing of the Disclosure Agreement Checklist does not preclude a party from filing motions relating to information not listed in the checklist.
(b) Timing of Discovery.
(1) *Discovery Deadlines.* Unless otherwise ordered by the court, or agreed to by the parties in writing:
(A) The parties must provide discovery in connection with pretrial release or detention not later than the commencement of a hearing on pretrial release or detention;
(B) The parties must provide discovery in connection with a pretrial hearing, other than a pretrial release or detention hearing, not later than 48 hours before the hearing; and
(C) The parties must provide discovery in connection with trial, whether agreed to by the parties or otherwise required, not later than:
(i) 14 days after arraignment; or
(ii) if the defendant has waived arraignment, within 14 days after the latest scheduled arraignment date.
(2) *Earlier Disclosure.* The court encourages prompt disclosure, including disclosure before the deadlines set out in this rule.
(3) *Disclosure After Motions Deadline.* The disclosure of information after the expiration of a motions deadline usually provides good cause for an extension of time to file motions based on that information.
(4) *Continuing Duty to Disclose.* The parties have a continuing duty to disclose promptly to opposing counsel all newly discovered information the party is required to disclose, or has agreed to disclose in the Disclosure Agreement Checklist.
(c) Late Disclosure.
(1) The late disclosure of material information under this rule is not usually a ground for exclusion of evidence, unless:
(A) the information was within the party's possession, custody or control, and its existence was known, or by the exercise of due diligence could have been known, to the party's attorney; and
(B) the party's attorney has not made good faith efforts to obtain and disclose the information on time.

(2) If not excluded under subsection (c)(1), material information that is not timely disclosed usually provides good cause for:
(A) extending the time to file a motion or notice, or to request a hearing, based on the late-disclosed information;
(B) extending a deadline for reaching a plea-bargain agreement; and
(C) continuing the trial setting.

Committee Notes

1. Subsection (a) and the appended checklist provide a formal means by which the parties can, by agreement, regulate their discovery practice. This is not intended to preclude other agreed discovery methods (such as the open-file discovery regularly practiced in some divisions).
2. Subsection (b) sets out discovery deadlines. Like Rule CR-12, subsection (b) explicitly recognizes that other deadlines may be set by court order. It also allows the parties to agree to other deadlines in writing. The subsection includes a deadline for trial discovery of 14 days from arraignment. Because the deadline for pretrial motions under Rule CR-12 is 10 days from arraignment, this discovery deadline does not resolve the potential problem caused by motions being due before discovery is provided. The potential problem is dealt with by subsection (b)(3).
3. Subsection (c) deals with the problem of late-disclosed discovery. The rule recognizes that, when late disclosure of evidence is done in good faith, it should not usually provide grounds for excluding the evidence, but usually does provide cause for a continuance or other extension of time. Subsection (c) is not intended to limit the court's discretion under Federal Rule of Criminal Procedure 16(d).
4. The disclosure agreement checklist appended to the rule does not include specific reference to confidential informants. There are some cases in which an "informant" category on the checklist would not capture the unique circumstances regarding cooperating individuals; in those cases, any reference to informants on the checklist could be prejudicial to the Government, or misleading to the defense. Nevertheless, the identity and location of informants are important, recurring discovery issues. Subsection (a)(4) allows the defense to file discovery motions regarding informants; alternatively, the parties may address the issue in the "other matters" section of the checklist. If the checklist indicates that the Government refuses to disclose information regarding an informant, subsection (a)(3) would provide the defendant additional time to file a motion for disclosure.

UNITED STATES v. _____ NO. _____ CR _____

PARTIES' DISCLOSURE AGREEMENT CHECKLIST

	Disclosed		Will Disclose Upon Receipt		Refuse to Disclose		Not Applicable		Comments
	Gov't	Def	Gov't	Def	Gov't	Def	Gov't	Def	

Police/Agent Reports

Rule 12(d)(2) material

Intercepted communications (18 U.S.C. § 2510, consensual)

Rule 16 material

Defendant statement

Defendant record

Documents

Tangible Objects

Examination/ test reports

Experts

FRE 404(b) material

Immigration file

Eyewitness ID (lineup, showup, photo spread)

Exculpatory material (Brady)

Impeachment material (Giglio, Napue, FRE 608, 609)

Witness list

Witness statements (Rule 26.2, 18 U.S.C. § 3500)

Guideline calculation material (U.S.S.G. § 6B1.2)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

UNITED STATES OF AMERICA	:	
VS.	:	NO.3:04-CR-20(CAR)
PAUL PETTIGREW **a/k/a PAUL PETTIGREE** **a/k/a "BOGRIP",**	:	**Violation(s): Drug Related**
Defendant(s)	:	

STANDARD PRETRIAL ORDER

Pursuant to reference of pretrial criminal motions to the undersigned, the within order is intended to address those commonly filed pretrial motions and requests identified below whether or not said motions have actually been submitted by the parties named above at this point in time. The parties are ORDERED AND DIRECTED to abide by the dictates hereof:

Within **TWENTY (20) DAYS** of receipt of this order, the defendant(s) (hereinafter referred to in the singular but applicable to all defendants named above) must submit any requests and/or notices hereunder and such additional motions as may be pertinent to this case; thereafter, the United States shall have **TWENTY (20) DAYS** after receipt of any request, notice and/or additional motion in which to file a response; movant may then submit a reply within **TEN (10) DAYS**. The parties may also seek clarification of any order set forth herein. Any motions to dismiss and/or to suppress evidence will be addressed by the district judge to whom this case has been assigned. Recognizing that in some cases a defendant may lack knowledge of evidence potentially subject to suppression until disclosure of discovery materials by the government in accordance with this order, MOTIONS TO SUPPRESS EVIDENCE may be filed outside the twenty day period set forth above. In no event, however, shall a MOTION TO SUPPRESS EVIDENCE be filed more than **TWENTY (20) DAYS** after said evidence has been disclosed by the government to the defendant.

It shall be incumbent upon counsel for the defendant and for the United States to promptly advise the court of the failure of the opposite party to comply with the dictates of this order and of the need, if any, to compel compliance, in accordance with ***Local Rule***

DISCOVERY AND INSPECTION UNDER *BRADY* AND RULE 16; DISCLOSING IMPEACHING INFORMATION AND EXCULPATORY EVIDENCE

A defendant has a right only to discovery of evidence pursuant to Rule 16 of the ***Federal Rules of Criminal Procedure*** or ***Brady v. Maryland***, 373 U.S. 83 (1963), and its progeny. ***Brady*** prohibits the United States from suppressing evidence favorable to a defendant if that evidence is material either to guilt or to punishment. ***Brady***, 373 U.S. at p. 87. Because the credibility of a witness may determine guilt or innocence, impeaching evidence is material to guilt and thus falls within the ***Brady*** rule. See ***Giglio v. United States***, 405 U.S. 150, 154 (1972);***Williams v. Dutton***, 400 F.2d 797, 800 (5th Cir.1968), ***cert. denied***, 393 U.S. 1105 (1969).

UPON REQUEST, the United States is directed to disclose Rule 16 evidence and ***Brady*** evidence other than impeaching information as soon as reasonably possible. In accordance with the usual practice in this court, the United States is directed to disclose impeaching information about a witness no later than the evening before the witness' anticipated testimony. The United States need not furnish defendant with ***Brady*** information which the defendant has or, with reasonable diligence, the defendant could obtain himself. ***United States v. Slocum***, 708 F.2d 587, 599 (11th Cir.1983).

UPON REQUEST, the United States is also directed to disclose impeaching information about any non-witness declarant no later than the evening before the United States anticipates offering the declarant's statements in evidence.

Pursuant to Rule 12(b)(4)of the ***Federal Rules of Criminal Procedure***, should the defendant **REQUEST** notice of the intention of the government to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 of the Rules, the government is directed to so advise the defendant of any evidence or statements which may be subject to any motions to suppress.

Should the United States **REQUEST** disclosure of evidence by a defendant herein under Rule 16(b)(1), that defendant is directed to comply with said rule as soon as reasonably possible.

REVEALING "THE DEAL"

Where the government fails to disclose evidence of any understanding or agreement as to future 77877prosecution of a key government witness, due process may require reversal of the conviction. ***Giglio v. United States, supra,***; ***Napue v. Illinois***, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); ***Smith v. Kemp***, 715 F.2d 1459, 1463 (11th Cir.), ***cert. denied***, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983);***Williams v. Brown***, 609 F.2d. 216, 221 (5th Cir.1980). The government has a duty to disclose such understandings for they directly affect the credibility of the witness. This duty of disclosure is even more important where the witness provides the key testimony against the accused. ***See Giglio***, 405 U.S. at 154-55, 92 S.Ct. at 766. ***Haber v. Wainwright***, 756 F.2d 1520, 1523 (11th Cir.1985).

"The thrust of ***Giglio*** and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony . . ." ***Smith v. Kemp***, ***supra*** at 1467, which testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." ***Giglio,*** 405 U.S. at 154, 92 S.Ct. at 766, quoting ***Napue v. Illinois, supra***. ***Brown v. Wainwright***, 785 F.2d 1457, 1465 (11th Cir.1986).

Accordingly, **UPON REQUEST**, the United States is directed to comply fully with ***Giglio, supra***, and its progeny by disclosing the existence and substance of any such promises of immunity, leniency or preferential treatment. In accordance with the policy of ***Brady v. Maryland, supra***, the United States is directed to furnish to the defendant such requested information within a reasonable period of time from the date of this order.

PRODUCTION AND PRESERVATION OF ORIGINAL INTERVIEW NOTES

The Eleventh Circuit has held that the United States has a responsibility to try in good faith to preserve important material in a criminal trial. ***United States v. Nabors***, 707 F.2d 1294, 1296 (11th Cir.1983). The government is directed to comply with the dictates of ***Nabors***. However, there is no legal requirement that the government retain all materials, notes and other memoranda prepared by federal, state or local government agents in connection with the investigation and preparation of its case.

DEFENDANT'S STATEMENTS

To the extent that Rule 16(a)(1)(A) of the ***Federal Rules of Criminal Procedure*** provides for disclosure of statements made by the defendant, the United States **upon request** is directed to provide said information to the defendant.

STATEMENTS OF CO-DEFENDANTS AND ALLEGED CO-CONSPIRATORS (if applicable)

If any co-defendant or co-conspirator who made a statement is a government witness, that statement generally must be provided to the defendant after the witness testifies on direct examination. ***See***, 18 U.S.C.A. §3500(a)(West 1985); ***United States v. Nabrit***, 554 F.2d 247, 249 (5th Cir. 1977). However, it is the policy of this court to require the government to provide ***Jencks Act*** materials to a defendant no later than the evening before the anticipated testimony of the witness. The United States shall be governed accordingly. Unless a co-defendant or co-conspirator is to be a government witness, the ***Jencks Act*** does not require disclosure of his statement(s). If any statements by a co-defendant or co-conspirator are exculpatory, they must be produced by the United States along with other ***Brady*** material **UPON REQUEST**.

LIST OF GOVERNMENT WITNESSES

The law is clear that in noncapital cases, the granting of a defendant's request for a list of adverse witnesses is a matter of judicial discretion. ***United States v. Colson***, 662 F.2d 1389, 1391 (11th Cir.1981); ***United States v. Chaplinski***, 579 F.2d 373 (5th Cir.1978), ***cert. denied***, 439 U.S. 1050 (1978). ***See United States v. Johnson***, 713 F.2d 654, 659 (11th Cir.1983 - "A criminal defendant has no absolute right to a list of the government's witnesses in advance of trial.") A defendant who desires discovery of the United States' witness list must make a specific showing of the need for and reasonableness of obtaining the list. ***United States v. Greater Syracuse Board of Realtors, Inc.***, 438 F.Supp. 376, 382 (N.D.N.Y.1977).

Furthermore, common sense dictates that if there is no obligation mandated by law to reveal the identity of one who has been interviewed for the purpose of being a witness at trial, no such obligation exists to reveal the identity of a potential witness who has not been interviewed in expectation of being called as a witness at trial.

The government shall not be required to disclose the names of its witnesses in this proceeding absent a **REQUEST** therefor and a specific showing of the need for and

reasonableness of obtaining the list.

EXPERT WITNESSES

The United States need not disclose the names of any witnesses, expert or otherwise, absent a **REQUEST** therefor and a specific showing of the need for and reasonableness of obtaining the list. ***United States v. Greater Syracuse Board of Realtors, Inc., supra.*** (See discussion under "List of Witnesses" above). ***See also United States v. Reyes***, 911 F.Supp. 64, 65 (N.D.N.Y. 1996).

However, insofar as the defendant may also seek the reports, analyses and conclusions of any such expert witnesses as well as disclosure of the information and data upon which such expert witnesses have based their opinions, the United States must provide the results or reports of physical or mental examinations and of scientific tests or experiments in its possession in accordance with Rules 16(a)(1)(D) and (E) of the ***Federal Rules of Criminal Procedure*** **UPON REQUEST**.

OTHER CRIMES, WRONGS OR ACTS

Regarding any request for records and information revealing prior misconduct or bad acts attributable to any witness, Rule 16 (a)(1) of the ***Federal Rules of Criminal Procedure*** provides that the United States shall furnish to a defendant a copy of his prior criminal record, if any. Insofar as any request for the pretrial disclosure of evidence of defendant's transactions or conduct and that of any alleged co-defendants or co-conspirators which is not the subject matter of the indictment herein but which the United States might offer as evidence on the question of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, the United States is directed to comply with the requirements of law set forth in ***Brady v. Maryland***, 373 U.S. 83 (1963) and its progeny, Rule 16 of the ***Federal Rules of Criminal Procedure***, and Rule 404(b) of the ***Federal Rules of Evidence***. **UPON REQUEST** by the defendant, unless good cause for not disclosing is established by the government, the government shall provide reasonable notice in advance of trial of the general nature of any such evidence it intends to introduce at trial, in accordance with Rule 404(b) of the ***Federal Rules of Evidence***.

JENCKS ACT MATERIALS

Congress provided in the ***Jencks Act*** that statements and reports made by a government witness which are in the possession of the United States need not be furnished to the defendant until after the witness has testified on direct examination. 18 U.S.C.A. §3500(a) (West 1985). In addition, Rule 26.2(a) of the ***Federal Rules of Criminal Procedure*** provides that witness statements must be produced after the witness' direct examination.

The ***Jencks Act*** (18 U.S.C. §3500, et seq.) provides in pertinent part as follows:

> *(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.*
>
> * * *
>
> *(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means---*
>
> *(1) a written statement made by said witness and signed or otherwise adopted or approved by him;*
>
> *(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporan- eously with the making of such oral statement; or*
>
> *(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.*

Statements and reports made by a government witness which are favorable to defendant and are material to guilt or punishment are within the purview of both ***Brady*** and the ***Jencks Act***. The former Fifth Circuit has recognized that when alleged ***Brady*** material is contained in ***Jencks Acts*** material, disclosure is generally timely if the government complies with the ***Jencks Act***. ***United States v. Martino***, 648 F.2d 367, 384 (5th Cir.1981); ***United States v. Anderson***, 574 F.2d 1347, 1352 (5th Cir.1978). It is the policy of this court to require the government to provide ***Jencks Act*** materials to a defendant no later than the evening before the anticipated testimony of the witness. The United States shall be governed accordingly.

SEARCH AND SEIZURE

Regarding any **REQUEST** for production by the United States of documents and information obtained by the government as a result of any search or seizure of the defendant or any co-defendant as well as any buildings, vehicles, dwellings or premises of the defendant, any co-defendant, or any co-conspirator (as well as production of any

evidence of such a search or seizure which would tend to taint or make illegal any search or seizure), the United States is directed to comply with Rule 16 of the ***Federal Rules of Criminal Procedure*** and with ***Brady v. Maryland***, ***supra***, and its progeny if such a **REQUEST** is made by the defendant.

SURVEILLANCE

The United States is directed to comply with Rule 16 of the ***Federal Rules of Criminal Procedure*** and with ***Brady v. Maryland, supra***, and its progeny regarding any **REQUEST** to disclose various records, information and evidence obtained through surveillance (electronic or otherwise) as well as information pertaining to the type surveillance device or devices used by the government in any such surveillance.

FILING ADDITIONAL MOTIONS

If and when a defendant wishes to file an additional motion or motions, the court can then consider the propriety thereof, in light of the time restrictions herein imposed and cause shown for filing such motions after the filing deadline. ***Fed.R.Crim.P.*** 12(f).

ADOPTION OF MOTIONS OF OTHER DEFENDANTS
(if applicable)

Because of the burden imposed upon the court in determining which, if any, motions filed by one defendant may or may not apply to another defendant, it is the policy of the undersigned to require each defendant to file his/her own separate motions. Therefore, motions filed on behalf of one defendant will not be adopted for use by other defendants.

ADDITIONAL PEREMPTORY CHALLENGES

Consideration of a **REQUEST** for additional peremptory challenges is best left to the judge to whom a case is assigned for trial. Accordingly, any such request must be brought to the attention of the trial judge no later than twenty-four hours prior to the date set for the trial of this case.

NEED FOR HEARING ON MOTIONS

This court's policy requires that pretrial motions be supported by written briefs; hearings on most motions are not contemplated absent a demonstrable need.

CONDUCT OF VOIR DIRE

Whether voir dire is to be conducted by the trial judge or by counsel for the parties is addressed to the discretion of the trial judge. Counsel are directed to contact the trial judge assigned to this case to ascertain the voir dire policy employed by him as well as any requirements for the pretrial submission of suggested voir dire questions to the court, if appropriate.

It is the policy of this court to send a standard juror questionnaire to each individual drawn to serve as a juror. This form is forwarded to each juror along with the jury summons and is then returned to the clerk of court. COUNSEL ARE ADVISED THAT THESE QUESTIONNAIRES MAY BE REVIEWED BY THEM IN THE CLERK'S OFFICE PRIOR TO TRIAL.

The questionnaires and the information obtained therefrom are *privileged* and **NOT TO BE DISCLOSED** to anyone other than your client or other members or employees of your law firm without the written consent of the presiding judge. Any copies of completed questionnaires and any other documents containing juror information shall be destroyed immediately after trial.

NOTE: IF THE COURT CONDUCTS VOIR DIRE, IT WILL NOT ASK FOR THE SAME INFORMATION ON VOIR DIRE.

SUPERSEDING INDICTMENT(S)

In the event the indictment forming the basis for the prosecution of the defendant herein is superseded by one or more indictments, this order shall be applicable to said "superseding" indictment(s). Motions and requests submitted herein and responses thereto shall be applicable to the superseding indictment without the necessity of re-filing. The parties shall have TEN (10) DAYS following arraignment on the superseding

indictment to make additional requests under this order and/or to file additional motions.

APPLICATION OF *SPEEDY TRIAL ACT*

Pursuant to provisions of the ***Speedy Trial Act***, 18 U.S.C. §3161, *et seq.*, the time from the filing of any request or motion hereunder until disposition by the court is excludable in computing the time within which the trial of this case must commence. For purposes of the ***Speedy Trial Act***, all requests and/or motions submitted as to matters dealt with herein shall be deemed disposed of as of the date of their filing with the Clerk of court. Any additional motions, such as motions to dismiss, motions to suppress, motions for bills of particulars, and motions to obtain grand jury minutes, shall be promptly disposed of by the court after the filing of responses thereto. For that reason, all parties are directed to submit timely responses to any additional motions submitted.

SO ORDERED AND DIRECTED, this_____day of August, 2004.

United States District Court
Middle District of Georgia

CLAUDE W. HICKS, JR.
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	
	CRIMINAL FILE NO.
v.	**1:04-CR-**
	Magistrate Judge
Defendant.	

ORDER

I. A pretrial conference shall be held in this case on, _____ **2004 , at 9:30 a.m.** before the undersigned Magistrate Judge on the 18th Floor , Courtroom 1834, United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia. Counsel who will actually handle the trial of the case must be present. The defendant need not be present. LCrR 17.1 (N.D. Ga.).

Please note *that it shall be the responsibility of defendant's counsel to notify the office of the undersigned and counsel for the government if no pretrial conference is required.*

II. Prior to the above-scheduled conference, the following shall occur:

III. ***Filing Pretrial Motions***

The parties are reminded that pretrial disclosure in criminal cases generally is governed by FED. R. CRIM. P. 16 or pursuant to case law, such as *Brady v. Maryland*, 373 U.S. 83 (1963), and that the government ordinarily has no basis upon which to object. The local rules require any party seeking relief through a motion to confer with opposing counsel in an attempt to resolve disputed matters ***prior to*** the filing of motions related thereto. LCrR 12.1.D (N.D. Ga.). Moreover, FED. R. CRIM. P. 16 directs that the government must produce discoverable material upon only a "request" of the defendant.

Therefore, counsel are **DIRECTED NOT** to file any motion for materials or information or other relief that: (1) the opposing party agrees to provide, or (2) the party is entitled to inspect and copy under applicable criminal rules and case law, **UNLESS** the attorney certifies to the court in writing that: (1) the materials have been requested from the opposing party or the motion for other relief has been discussed with the counsel for the opposing party, and (2) the opposing counsel declines to provide the materials/information/relief requested. If counsel believes it is necessary to document what is requested from, or agreed to by, the

government, he or she may do so by letter to opposing counsel, without filing or copying such letter with the Court, or counsel may re-label his or her standard motions as "Requests" and serve them on opposing counsel, but **NOT** file them with the Clerk's Office or the Court. The Court **WILL** discuss any such requests at the pretrial conference. The requests or letters may later be used to support a motion for sanctions or to compel, if the opposing party fails to comply with his or her legal obligations or agreements. *See* FED. R. CRIM. P. 16(d)(2) (as amended December 1, 2002).

If, after consultation and failure to reach an agreement with opposing counsel, counsel files a motion for materials or information outside the scope of FED. R. CRIM. P. 16 and relevant case law, he or she shall do so **ONLY** by making a particularized showing that relates to the facts of this case.

IV. ***Standard Rulings***

The following rulings are made in this case and are **intended to obviate the need for standard, non-particularized motions on these subjects**. Any party who disagrees with these standard rulings may file a particularized motion for relief therefrom, including a motion to compel or for a protective order.

A. ***Discovery Materials:*** Upon request of the defendant, the government is directed to provide to the defendant all materials and information falling within the scope of FED. R. CRIM. P. 16 and LCrR 16.1 (N.D. Ga.), including but not limited to an inventory of all items seized from the defendant by law enforcement officials which the government intends to introduce at trial. The government has a continuing duty to disclose any evidence that is subject to discovery or inspection. *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir. 2003); FED. R. CRIM. P. 16(c).

B. ***Discovery and Disclosure of Evidence Arguably Subject to Suppression and of Evidence Which is Exculpatory and/or Impeaching:*** Upon request of the defendant, the government is directed to comply with FED. R. CRIM. P. 16 and with FED. R. CRIM. P. 12 by providing notice as specified in section II.B, *supra*. The government is also directed to provide all materials and information that are arguably favorable to the defendant in compliance with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny. Exculpatory material as defined in *Brady* and *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), must be provided

sufficiently in advance of trial to allow a defendant to use it effectively. Impeachment material must be provided no later than production of the *Jencks* Act statements.

C. ***Rule 404(b):*** Upon request of the defendant, the government is directed to provide to the defense a summary of any evidence it intends to offer of other crimes, wrongs or acts pursuant to FED. R. EVID. 404(b). If the 404(b) evidence pertains to acts or conduct of the defendant which is alleged to have occurred within the Northern District of Georgia, the summary required to be provided under this heading and the rule shall be provided no later than ten (10) days before trial. If the acts or conduct is alleged to have occurred outside the Northern District of Georgia, the summary required to be provided under this heading shall be provided no later than twenty-one (21) days before trial.

D. ***Preservation of Evidence and Handwritten Notes of Agents***: The government is directed to preserve all evidence and handwritten notes of law enforcement officers pertaining to this case and the defendant.

( ) The delay between the original and rescheduled pretrial conferences shall be excluded from Speedy Trial Act calculations because the Court finds that the reason for the delay was for good cause and the interests of justice in granting the continuance outweigh the public's and the defendant's rights to a speedy trial. 18 U.S.C. § 3161, *et seq.*

( ) The delay between the original and rescheduled pretrial conferences shall not be excluded for Speedy Trial Act purposes. 18 U.S.C. § 3161, *et seq.*

IT IS SO ORDERED, this _ day of _____, 2004.

P:\Pretrial Order.wpd

LR 116.1

WEST'S MASSACHUSETTS RULES OF COURT
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[LOCAL RULES CONCERNING CRIMINAL CASES]

Current with Amendments received through 07/1/2004

RULE 116.1 DISCOVERY IN CRIMINAL CASES

(A) Discovery Alternatives.
(1) *Automatic Discovery.* In all felony cases, unless a defendant waives automatic discovery, all discoverable material and information in the possession, custody, or control of the government and that defendant, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for those parties, must be disclosed to the opposing party without formal motion practice at the times and under the automatic discovery procedures specified in this Local Rule.
(2) *Non-automatic Discovery.* In felony cases, if the defendant waives automatic discovery, and in non-felony cases the defendant must obtain discovery directly through the provisions of the Federal Rules of Criminal Procedure in the manner provided under Local Rule 116.3.
(B) Waiver. A defendant shall be deemed to have requested all the discovery authorized by Fed. R. Crim. P. 16(a)(1)(A)-(D) unless that defendant files a Waiver of Request for Disclosure (the "Waiver") at, or within fourteen (14) days after, arraignment. If the Waiver is not timely filed, the defendant shall be subject to the correlative reciprocal discovery obligations of Fed. R. Crim. P. 16(b) and of this Local Rule and shall be deemed to have consented to the exclusion of time for Speedy Trial Act purposes as provided in L.R. 112.2(A)(2).
(C) Automatic Discovery Provided By The Government.
(1) *Following Arraignment.* Unless a defendant has filed the Waiver, within twenty-eight (28) days of arraignment--or within fourteen (14) days of receipt by the government of a written statement by the defendant that no Waiver will be filed--the government must produce to the defendant:
(a) Fed. R. Crim. P. 16 Materials. All of the information to which the defendant would be entitled under Fed. R. Crim. P. 16(a)(1)(A)-(D).
(b) Search Materials. A copy of any search warrant (with supporting application, affidavit, and return) and a written description of any consent search or warrantless search (including an inventory of evidence seized):
(i) which resulted in the seizure of evidence or led to the discovery of evidence that the government intends to offer as part of its case-in-chief; or
(ii) was obtained for or conducted of the defendant's property, residence, place of business, or person, in connection with investigation of the charges contained in the indictment.
(c) Electronic Surveillance.
(i) A written description of any interception of wire, oral, or electronic communications as defined in 18 U.S.C. § 2510, relating to the charges in the indictment in which the defendant was intercepted and a statement whether the government intends to offer any such communications as evidence in its case-in-chief; and
(ii) A copy of any application for authorization to intercept such communications relating to the charges contained in the indictment in which the defendant was named as an

interceptee or pursuant to which the defendant was intercepted, together with all supporting affidavits, the court orders authorizing such interceptions, and the court orders directing the sealing of intercepted communications under 18 U.S.C. § 2518(a).
(d) Consensual Interceptions.
(i) A written description of any interception of wire, oral, or electronic communications, relating to the charges contained in the indictment, made with the consent of one of the parties to the communication ("consensual interceptions"), in which the defendant was intercepted or which the government intends to offer as evidence in its case-in-chief.
(ii) Nothing in this subsection is intended to determine the circumstances, if any, under which, or the time at which, the attorney for the government must review and produce communications of a defendant in custody consensually recorded by the institution in which that defendant is held.
(e) Unindicted Coconspirators. As to each conspiracy charged in the indictment, the name of any person asserted to be a known unindicted coconspirator. If subsequent litigation requires that the name of any such unindicted coconspirator be referenced in any filing directly with the court, that information must be redacted from any public filing and be filed under L.R. 7.2 pending further order of the court.
(f) Identifications.
(i) A written statement whether the defendant was a subject of an investigative identification procedure used with a witness the government anticipates calling in its case-in-chief involving a line-up, show-up, photospread or other display of an image of the defendant.
(ii) If the defendant was a subject of such a procedure, a copy of any videotape, photospread, image or other tangible evidence reflecting, used in or memorializing the identification procedure.
(2) *Exculpatory Information.* The timing and substance of the disclosure of exculpatory evidence is specifically provided in L.R. 116.2.
(D) Automatic Discovery Provided by the Defendant. In felony cases if the defendant has not filed the Waiver, within twenty-eight (28) days after arraignment, the defendant must produce to the government all material described in Fed. R. Crim. P. 16(b)(1)(A) and (B).

Effective September 1, 1990; amended September 8, 1998, effective December 1, 1998.

U. S. Dist. Ct. Rules D.Mass., LR 116.1
MA R USDCT LR 116.1
END OF DOCUMENT

LR 116.2

WEST'S MASSACHUSETTS RULES OF COURT
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[LOCAL RULES CONCERNING CRIMINAL CASES]

Current with Amendments received through 07/1/2004

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:
(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;
(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; or
(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:
(1) Within the time period designated in L.R. 116.1(C)(1):
(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.
(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. § 3731.
(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.
(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.
(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.
(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.
(2) Not later than twenty-one (21) days before the trial date established by the judge who will preside:
(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.
(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.
(c) Any statement or a description of such a statement, made orally or in writing by any

person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.
(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.
(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its case-in-chief.
(f) A written description of any conduct that may be admissible under Fed. R. Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.
(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.
(3) No later than the close of the defendant's case: Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.
(4) Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs: A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.
(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

Adopted September 8, 1998, effective December 1, 1998.

U. S. Dist. Ct. Rules D.Mass., LR 116.2
MA R USDCT LR 116.2
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S.D. Fla. L.R., Gen Rule 88.10

WEST'S FLORIDA RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
FLORIDA
GENERAL RULES

Current with amendments received through 2/1/2004

RULE 88.10 CRIMINAL DISCOVERY

A. The government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof, which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the government:
1. Written or recorded statements made by the defendant.
2. The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a then known-to-be government agent which the government intends to offer in evidence at trial.
3. Recorded grand jury testimony of the defendant relating to the offenses charged.
4. The defendant's arrest and conviction record.
5. Books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are material to the preparation of the defendant's defense, or which the government intends to use as evidence at trial to prove its case in chief, or which were obtained from or belonging to the defendant.
6. Results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with this case.

B. The defendant shall permit the government to inspect and copy the following items, or copies thereof, or supply copies thereof, which are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant:
1. Books, papers, documents, photographs or tangible objects which the defendant intends to introduce as evidence in chief at trial.
2. Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case which the defendant intends to introduce as evidence in chief at trial, or which were prepared by a defense witness who will testify concerning the contents thereof.
3. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, or intends to introduce expert testimony relating to a mental disease or defect or other mental condition bearing on guilt or, in a capital case, punishment, he shall give written notice thereof to the government.

C. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976).

D. The government shall disclose to the defendant the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States*, 405 U.S. 150 (1972) and *Napue v. Illinois*, 360 U.S. 264 (1959).

E. The government shall supply the defendant with a record of prior convictions of any alleged informant who will testify for the government at trial.

F. The government shall state whether defendant was identified in any lineup, showup, photospread or similar identification proceeding, and produce any pictures utilized or resulting therefrom.

G. The government shall advise its agents and officers involved in this case to preserve all rough notes.

H. The government shall advise the defendant of its intention to introduce during case in chief proof of evidence, pursuant to Rule 404(b), Federal Rules of Evidence.

I. The government shall state whether the defendant was an aggrieved person, as defined in Title 18, United States Code, Section 2510(11), of any electronic surveillance, and if so, shall set forth in detail the circumstances thereof.

J. The government shall have transcribed the grand jury testimony of all witnesses who will testify for the government at the trial of this cause, preparatory to a timely motion for discovery.

K. The government shall, upon request, deliver to any chemist selected by the defense, who is presently registered with the Attorney General in compliance with Title 21, United States Code, Sections 822 and 823, and 21 C.F.R. Section 101.22(8), a sufficient representative sample of any alleged contraband which is the subject of this indictment, to allow independent chemical analysis of such sample.

L. The government shall permit the defendant, his counsel and any experts selected by the defense to inspect any automobile, vessel, or aircraft allegedly utilized in the commission of any offenses charged. Government counsel shall, if necessary, assist defense counsel in arranging such inspection at a reasonable time and place, by advising the government authority having custody of the thing to be inspected that such inspection has been ordered by the court.

M. The government shall provide the defense, for independent expert examination, copies of all latent fingerprints or palm prints which have been identified by a government expert as those of the defendant.

N. The government shall, upon request of the defendant, disclose to the defendant a written summary of testimony the government reasonably expects to offer at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications. If the defendant seeks and obtains **discovery** under this paragraph, or if the defendant has given notice under Rule 12.2(b) of the Federal Rules of **Criminal** Procedure, of an intent to present expert testimony on the defendant's mental condition, the defendant shall, upon request by the government, disclose to the government a written summary of testimony the defendant reasonably expects to offer at trial under Rules 702, 703, 705 or 12.2(b), describing the witnesses' opinions, the bases and the reasons for these opinions, and the witnesses' qualifications.

O. The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite the trial.

P. The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference. No stipulations made by defense counsel at the conference shall be used against the defendant unless the stipulations are reduced to writing and signed by the defendant and his counsel. This statement, including any stipulations signed by the defendant and his counsel, shall be filed with the Court within five (5) days following the conference.

Q. Schedule of Discovery.

1. Discovery which is to be made in connection with a pre-trial hearing other than a bail or pre-trial detention hearing shall be made not later than 48 hours prior to the hearing. Discovery which is to be made in connection with a bail or pre-trial detention hearing shall be made not later than the commencement of the hearing.

2. Discovery which is to be made in connection with trial shall be made not later than fourteen (14) days after the arraignment, or such other time as ordered by the court.

3. Discovery which is to be made in connection with post-trial hearings (including, by way of example only, sentencing hearings) shall be made not later than seven (7) days prior to the hearing. This discovery rule shall not affect the provisions of S.D.Fla.L.R. 88.8 regarding pre-sentence investigation reports.
It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Rule.

Effective Dec. 1, 1994; amended effective April 15, 1996; April 15, 1998; April 15, 2003.

Authority

(1994) Former Standing Order on Criminal Discovery of the Southern District, as amended after public hearing in 1994.
(1996) A.5. revised to include provisions of Rule 16(a)(1)(C), Fed.R.Crim.P.
(1998) Section N is revised to conform to amendments to Rule 16(a)(1)(E) and (b)(1)(C)(ii), Fed.R.Crim.P. Section Q.2 is amended to effectuate discovery within 14 days or arraignment, without the entry of a Court order, or within such other time period as the Court may order.

Comment

(2000) With regard to discovery practices related to search warrants in criminal cases *see* September 7, 1999 letter from the then United States Attorney for the Southern District of Florida which has been posted at the U.S. Attorney's web site at http://www.usdoj.gov/usao/fls/Discovery_Practices.html.
(2003) B.3 amended to conform to 2002 amendment of Fed.R.Crim.P. 12.2.

U. S. Dist. Ct. Rules S.D.Fla.,# Gen Rule 88.10
FL R USDCTSD Gen Rule 88.10
END OF DOCUMENT

U.S.Dist.Ct.Rules N.D.Fla. Loc. R. 26.3

WEST'S FLORIDA RULES OF COURT
RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
GENERAL RULES

Current with amendments received through 2/1/2004

RULE 26.3 DISCOVERY--CRIMINAL

(A) Policy. It is the court's policy to rely on the standard discovery procedure as set forth in this rule as the sole means for the exchange of discovery in criminal cases except in extraordinary circumstances. This rule is intended to promote the efficient exchange of discovery without altering the rights and obligations of the parties, but at the same time eliminating the practice of routinely filing voluminous and duplicative discovery motions.

(B) Discovery Upon Defendant's Request. At the earliest opportunity and no later than five (5) working days after the date of arraignment, the defendant's attorney shall contact the government's attorney and make a good faith attempt to have all properly discoverable material and information promptly disclosed or provided for inspection or copying. In addition, upon request of the defendant, the government shall specifically provide the following within five (5) working days after the request:

(1) *Defendants Statements Under Fed.R.Crim.P. 16(a)(1)(A).* Any written or recorded statements made by the defendant; the substance of any oral statement made by the defendant before or after the defendant's arrest in response to interrogation by a then known-to-be government agent which the government intends to offer in evidence at trial; and any recorded grand jury testimony of the defendant relating to the offenses charged.

(2) *Defendant's Prior Record Under Fed.R.Crim.P. 16(a)(1)(B).* The defendant's complete arrest and conviction record, as known to the government.

(3) *Documents and Tangible Objects Under Fed.R.Crim.P. 16(a)(1)(C).* Books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which the government intends to use as evidence-in-chief at trial, which are material to the preparation of the defendant's defense, or which were obtained from or belong to the defendant.

(4) *Reports of Examinations and Tests Under Fed.R.Crim.P. 16(a)(1)(D).* Results or reports of physical or mental examinations and of scientific tests or experiments, or copies thereof, which are material to the preparation of the defendant's defense or are intended for use by the government as evidence-in-chief at trial.

(5) *Expert Witnesses Under Fed.R.Crim.P. 16(a)(1)(E).* A written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(C) Defendant's Discovery Obligations. If the defendant requests **disclosure** under subdivisions (a)(1)(C), (D), or (E) of Fed.R.Crim.P. 16, or if the defendant has given notice under Fed.R.Crim.P. 12.2 of an intent to present expert testimony on the defendant's mental condition, the government shall make its requests as allowed by Fed.R.Crim.P. 16 within three (3) working days after compliance with the defendant's request or after receipt of defendant's notice of intent to present expert testimony on the defendant's mental condition pursuant to Fed.R.Crim.P. 12.2, and the defendant shall provide the following within five (5) working days after the government's request:

(1) *Documents and Tangible Objects Under Fed.R.Crim.P. 16(b)(1)(A).* Books, papers,

documents, photographs, tangible objects, or copies or portions thereof, which the defendant intends to introduce as evidence-in-chief at trial.
(2) *Reports of Examinations and Tests Under Fed.R.Crim.P. 16(b)(1)(B).* Results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which the defendant intends to introduce as evidence-in-chief at trial, or which were prepared by a witness whom the defendant intends to call at trial and which relate to that witness's testimony.
(3) *Expert Witnesses Under Fed.R.Crim.P. 16(b)(1)(C).* A written summary of testimony the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(D) Other Disclosure Obligations of the Government. The government's attorney shall provide the following within five (5) days after the defendant's arraignment, or promptly after acquiring knowledge thereof:
(1) *Brady Material.* All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, that is within the scope of *Brady v. Maryland,* 373 U.S. 83 (1963) and *United States v. Agurs,* 427 U.S. 97 (1976).
(2) *Giglio Material.* The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio,* 405 U.S. 150 (1972) and *Napus v. Illinois,* 360 U.S. 264 (1959).
(3) *Testifying Informant's Convictions.* A record of prior convictions of any alleged informant who will testify for the government at trial.
(4) *Defendant's Identification.* If a lineup, showup, photo spread or similar procedure was used in attempting to identify the defendant, the exact procedure and participants shall be described and the results, together with any pictures and photographs, shall be disclosed.
(5) *Inspection of Vehicles, Vessels, or Aircraft.* If any vehicle, vessel, or aircraft was allegedly utilized in the commission of any offenses charged, the government shall permit the defendant's counsel and any experts selected by the defense to inspect it, if it is in the custody of any governmental authority.
(6) *Defendant's Latent Prints.* If latent fingerprints, or prints of any type, have been identified by a government expert as those of the defendant, copies thereof shall be provided.

(E) Obligations of the Government.
(1) The government shall advise all government agents and officers involved in the case to preserve all rough notes.
(2) The government shall advise the defendant of its intention to introduce evidence in its case-in-chief at trial, pursuant to Rule 404(b), Federal Rules of Evidence.
(3) If the defendant was an "aggrieved person" as defined in 18 U.S.C. § 2510(11), the government shall so advise the defendant and set forth the detailed circumstances thereof.
(4) The government shall anticipate the need for, and arrange for the transcription of, the grand jury testimony of all witnesses who will testify in the government's case-in-chief, if subject to Fed.R.Crim.P. 26.2 and to 18 U.S.C. § 3500. *Jencks* Act materials and witnesses' statements shall be provided as required by Fed.R.Crim.P. 26.2 and § 3500. However, the government, and where applicable, the defendant, is requested to make such materials and statements available to the other party sufficiently in advance so as to avoid any delays or interruptions at trial.

(F) Obligations of the Defendant.
(1) *Insanity.* If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, or intends to introduce expert testimony relating to a mental disease, defect, or other mental condition bearing upon the issue of guilt, the defendant shall give written notice thereof to the government within ten (10) working days after arraignment.

(2) *Alibi.* If the attorney for the government makes demand for notice of defendant's intent to offer a defense of an alibi, the defendant shall respond thereto within five (5) working days thereafter.
(3) *Entrapment.* If the defendant intends to rely upon the defense of entrapment, such intention shall be disclosed to the government's attorney prior to trial. *See* United States v. Webster, 649 F.2d 346 (5th Cir.1981).

(G) Joint Obligations of Attorneys.

(1) *Conference and Joint Report.* The attorneys for the government and the defendant shall confer at least five (5) working days prior to the scheduled date for jury selection and shall discuss all discovery requested and provided. They shall also make every possible effort in good faith to stipulate to facts, to points of law, and to the authenticity of exhibits (particularly regarding those exhibits for which records custodian witnesses may be avoided). A joint written statement, signed by the attorney for each defendant and the government, shall be prepared and filed prior to commencement of trial. It shall generally describe all discovery material exchanged and shall set forth all stipulations. No stipulation made shall be used against a defendant unless the stipulation is in writing and signed by both the defendant and the defendant's attorney.
(2) *Newly Discovered Evidence.* It shall be the duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information, evidence, or other material within the scope of this rule, and there is a continuing duty upon each attorney to disclose by the speediest means available.
(3) *Discovery Motions Prohibited.* No attorney shall file a discovery motion without first conferring with opposing counsel, and no motion will be considered by the court unless it is accompanied by a certification of such conference and a statement of the moving party's good faith efforts to resolve the subject matter of the motion by agreement with opposing counsel. No discovery motions should be filed for information or material within the scope of this rule.
(4) *Filing of Requests.* Discovery requests made pursuant to Fed.R.Crim.P. 16 and this local rule require no action on the part of this court and should not be filed with the court, unless the party making the request desires to preserve a discovery matter for appeal.

Adopted effective April 1, 1995. Amended effective October 1, 1999.

U. S. Dist. Ct. Rules N.D.Fla. Loc. R. 26.3
FL R USDCTND Loc. R. 26.3
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Crim. L.R. 16-1

WEST'S CALIFORNIA LOCAL COURT RULES PAMPHLETS AND WEST'S CALIFORNIA RULES
OF
COURT
LOCAL RULES FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT
OF CALIFORNIA
CRIMINAL LOCAL RULES
IV. PREPARATION FOR DISPOSITION BY TRIAL OR SETTLEMENT

Current with amendments received through December 1, 2003

(a) Meeting of Counsel. Within 10 days after a defendant's plea of not guilty, the attorney for the government and the defendant's attorney shall confer with respect to a schedule for **disclosure** of the information as required by FRCrimP 16 or any other applicable rule, statute or case authority. The date for holding the conference can be extended to a day within 20 days after entry of plea upon stipulation of the parties. Any further stipulated delay requires the agreement of the assigned Judge pursuant to Civil L.R. 7-12.

(b) Order Setting Date for Disclosure. In the absence of a stipulation by the parties, a schedule for **disclosure** of information as required by FRCrimP 16 or any other applicable rule, statute or case authority may be set sua sponte by the assigned Judge or Magistrate Judge. If a party has conferred with opposing counsel as required by Crim. L.R. 16-1(a), the party may make an motion pursuant to Crim. L.R. 47-4 to impose a schedule for such **disclosure**.

(c) Supplemental Disclosure. In addition to the information required by FRCrimP 16, in order to expedite the trial of the case, in accordance with a schedule established by the parties at the conference held pursuant to Crim. L.R. 16-1(a) or by the assigned Judge pursuant to Crim. L.R. 16-1(b), the government shall disclose the following:

(1) *Electronic Surveillance*. A statement of the existence or non-existence of any evidence obtained as a result of electronic surveillance;

(2) *Informers*. A statement of the government's intent to use as a witness an informant, i.e., a person who has or will receive some benefit from assisting the government;

(3) *Evidence of Other Crimes, Wrongs or Acts*. A summary of any evidence of other crimes, wrongs or acts which the government intends to offer under FREvid 404(b), and which is supported by documentary evidence or witness statements in sufficient detail that the Court may rule on the admissibility of the proffered evidence; and

(4) *Co-conspirator's Statements*. A summary of any statement the government intends to offer under FREvid 801(d)(2)(E) in sufficient detail that the Court may rule on the admissibility of the statement.

Adopted, eff. Sept. 1, 1996.

U. S. Dist. Ct. Rules N.D.Cal., Crim. L.R. 16-1
CA R USDCTND Crim. L.R. 16-1
END OF DOCUMENT

Crim. L.R. 17.1-1

WEST'S CALIFORNIA LOCAL COURT RULES PAMPHLETS AND WEST'S CALIFORNIA RULES
OF
COURT
LOCAL RULES FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT
OF CALIFORNIA
CRIMINAL LOCAL RULES
IV. PREPARATION FOR DISPOSITION BY TRIAL OR SETTLEMENT

Current with amendments received through December 1, 2003

(a) Time for Pretrial Conference. On request of any party or on the Judge's own motion, the assigned Judge may hold one or more **pretrial conferences** in any criminal action or proceeding.

(b) Pretrial Conference Statement. Unless otherwise ordered, not less than 4 days prior to the **pretrial conference**, the parties shall file a **pretrial conference** statement addressing the matters set forth below, if pertinent to the case:

(1) Disclosure and contemplated use of statements or reports of witnesses under the Jencks Act, 18 U.S.C. § 3500, or FRCrimP 26.2;

(2) Disclosure and contemplated use of grand jury testimony of witnesses intended to be called at the trial;

(3) Disclosure of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment;

(4) Stipulation of facts which may be deemed proved at the trial without further proof by either party and limitation of witnesses;

(5) Appointment by the Court of interpreters under FRCrimP 28;

(6) Dismissal of counts and elimination from the case of certain issues, e.g., insanity, alibi and statute of limitations;

(7) Joinder pursuant to FRCrimP 13 or the severance of trial as to any co-defendant;

(8) Identification of informers, use of lineup or other identification evidence and evidence of prior convictions of defendant or any witness, etc.;

(9) **Pretrial** exchange of lists of witnesses intended to be called in person or by deposition to testify at trial, except those who may be called only for impeachment or rebuttal;

(10) **Pretrial** exchange of documents, exhibits, summaries, schedules, models or diagrams intended to be offered or used at trial, except materials that may be used only for impeachment or rebuttal;

(11) **Pretrial** resolution of objections to exhibits or testimony to be offered at trial;

(12) Preparation of trial briefs on controverted points of law likely to arise at trial;

(13) Scheduling of the trial and of witnesses;

(14) Request to submit questionnaire for prospective jurors pursuant to Crim. L.R. 24-1, voir dire questions, exercise of peremptory and cause challenges and jury instructions;

(15) Any other matter which may tend to promote a fair and expeditious trial.

Adopted, eff. Sept. 1, 1996. As amended, eff. Oct. 1, 2002.

U. S. Dist. Ct. Rules N.D.Cal., Crim. L.R. 17.1-1

D.Conn., L.Cr.R. App.

WEST'S CONNECTICUT RULES OF COURT
RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT LOCAL RULES OF CRIMINAL
PROCEDURE

Current with amendments received through 3/30/2004.

APPENDIX. STANDING ORDER ON DISCOVERY

In all criminal cases, it is Ordered:

(A) Disclosure by the Government. Within ten (10) days from the date of arraignment, government and defense counsel shall meet, at which time the attorney for the government shall furnish copies, or allow defense counsel to inspect or listen to and record items which are impractical to copy, of the following items in the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government or to the agents responsible for the investigation of the case:

(1) Written or recorded statements made by the defendant.

(2) The substance of any oral statement made by the defendant before or after his arrest in response to interrogation by a then known government agent which the government intends to offer in evidence at trial.

(3) Recorded grand jury testimony of the defendant relating to the offense charged.

(4) The defendant's prior criminal record.

(5) Books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the 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.

(6) Results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case. The government shall also disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703 or 705 of the Federal Rules of Evidence during its case in chief. This summary must describe the witness' opinions, the bases and reasons therefor, and the witness' qualifications.

(7) All warrants, applications, with supporting affidavits, testimony under oath, returns, and inventories for the arrest of the defendant and for the search and/or seizure of the defendant's person, property, things, or items with respect to which the defendant has standing to move to suppress.

(8) All authorizations, applications, orders, and returns obtained pursuant to Chapter 119 of Title 18 of the United States Code with respect to which the defendant has standing to move to suppress, and if requested by the defendant and at reasonable cost to the defendant, all inventories, logs, transcripts and recordings obtained pursuant to Chapter 119 of Title 18 of the United States Code with respect to which the defendant has standing to move to suppress.

(9) Unless otherwise ordered by the presiding Judge pursuant to paragraph F of this Standing Order, a list of the names and addresses of all witnesses whom the government intends to call in the presentation of its case-in-chief, together with any record of prior felony convictions and of prior misdemeanor convictions which reflect on the credibility of any such witness.

(10) All information concerning the existence and substance of any payments, promises

of immunity, leniency, or preferential treatment, made to prospective government witnesses, within the scope of United States v. Giglio, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959).

(11) All information known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady v. Maryland, 373 U.S. 83 (1963).

(12) All information concerning the defendant's identification in any lineup, showup, photospread or similar identification proceedings.

(13) All information relating to other crimes, wrongs or acts of the defendant that will be offered as evidence by the government at trial pursuant to Federal Rule of Evidence 404(b).

(B) Disclosure by the Defendant. Within fourteen (14) days after the meeting required by Section A is held, defense counsel shall:

(1) Inform the attorney for the government in writing whether the nature of the defense is entrapment, insanity, duress or coercion, or acting under public authority at the time of the offense.

(2) Permit the government to inspect and copy the following items that are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant: (a) books, papers, documents, photographs or tangible objects that the defendant intends to introduce as evidence in his case-in-chief at trial; (b) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case that the defendant intends to offer as evidence at trial or which were prepared by a defense witness who will testify concerning the contents thereof. The defendant shall also disclose to the government a written summary of testimony the defendant intends to use as evidence at trial under Rules 702, 703 or 705 of the Federal Rules of Evidence. This summary must describe the witness' opinions, the bases and reasons therefor, and the witness' qualifications.

(C) Other Discovery Motions. Within twenty (20) days of arraignment, all motions concerning materials or information not covered by this **Standing Order** must be filed, with supporting papers and a memorandum of law. The party opposing such motion shall file its response within ten (10) days of the filing of the motion. The Court shall refuse to consider any such motions unless the supporting papers contain a certification that counsel have met and that, after good faith efforts to resolve their differences on discovery, they were unable to reach an accord. Unless otherwise directed by the Court, compliance with discovery ordered by the Court shall be made within ten (10) days of the entry of the Court's order.

(D) Continuing Duty. It shall be the continuing duty of counsel for both sides to reveal immediately to opposing counsel all newly-discovered information or other material within the scope of this **Standing Order**.

(E) Exhibits. Not less than ten (10) days prior to trial, the parties shall meet, inspect and premark, either for identification or as full exhibits, all exhibits which they reasonably anticipate will be offered into evidence at trial.

(F) Compliance. At the time of arraignment or upon motion promptly filed thereafter with supporting moving papers, the Court may, upon a showing of sufficient cause, order the **discovery** provided under this **Standing Order** be denied, restricted or deferred, or make such other order as is appropriate.

(G) Disclosure of Statements of Witnesses. After a witness other than the defendant has testified on direct examination at a suppression hearing, a sentencing hearing, a hearing to revoke or modify probation or supervised release, or a detention hearing, the party calling said witness shall produce, for examination and use by the other party, any of the statements in its possession and that relates to the subject matter of the witness' testimony. Any party intending to call a witness at any such proceeding shall ensure that all statements of the witness are available for disclosure at the hearing.

U.S.Dist.Ct.Rules S.D.Ala., LR 16.13

WEST'S ALABAMA RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF
ALABAMA
III. PLEADINGS AND MOTIONS

Current with amendments received through 5-1-2004

LR 16.13 CRIMINAL DISCOVERY

(a) Policy. It is the Court's policy to rely on the standard discovery procedure as set forth in this Rule as the sole means of the exchange of discovery in criminal actions except in extraordinary circumstances. This Rule is intended to promote the efficient exchange of discovery without altering the rights and obligations of the parties, while at the same time eliminating the practice of routinely filing perfunctory and duplicative discovery motions.

(b) Initial Disclosures.

(1) *Disclosure by the Government.* At arraignment, or on a date otherwise set by the Court for good cause shown, the government shall tender to defendant the following:

(A) Fed.R.Crim.P. 16(a) Information. All discoverable information within the scope of Rule 16(a) of the Federal Rules of Criminal Procedure, *together with a notice pursuant to Fed.R.Crim.P. 12(d) of the government's intent to use this evidence.*

(B) *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

(C) *Giglio* Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972).

(D) Testifying Informant's Convictions. A record of prior convictions of any alleged informant who will testify for the government at trial.

(E) Defendant's Identification. If a line-up, show-up, photo spread or similar procedure was used in attempting to identify the defendant, the exact procedure and participants shall be described and the results, together with any pictures and photographs, shall be disclosed.

(F) Inspection of Vehicles, Vessels, or Aircraft. If any vehicle, vessel, or aircraft was allegedly utilized in the commission of any offenses charged, the government shall permit the defendant's counsel and an expert selected by the defense to inspect it, if it is in the custody of any governmental authority.

(G) Defendant's Latent Prints. If latent fingerprints, or prints of any type, have been identified by a government expert as those of the defendant, copies thereof shall be provided.

(H) Fed.R.Evid. 404(b). The government shall advise the defendant of its intention to introduce evidence in its case in chief at trial, pursuant to Rule 404(b) of the Federal Rules of Evidence.

(I) Electronic Surveillance Information. If the defendant was an "aggrieved person" as defined in 18 U.S.C. § 2510(11), the government shall so advise the defendant and set forth the detailed circumstances thereof.

(2) *Obligations of the Government.*

(A) The government shall anticipate the need for, and arrange for the transcription of, the grand jury testimony of all witnesses who will testify in the government's case in chief, if subject to Fed.R.Crim.P. 26.2 and 18 U.S.C. § 3500. Jencks Act materials and

witnesses' statements shall be provided as required by Fed.R.Crim.P. 26.2 and 18 U.S.C. § 3500. However, the government, and where applicable, the defendant, are requested to make such materials and statements available to the other party sufficiently in advance as to avoid any delays or interruptions at trial.
(B) The government shall advise all government agents and officers involved in the action to preserve all rough notes.
(C) The identification and production of all discoverable evidence or information is the personal responsibility of the Assistant United States Attorney assigned to the action and may not be delegated without the express permission of the Court.
(3) *Disclosures to U.S. Probation.* At arraignment, or on a date otherwise set by the Court upon good cause shown, the government shall tender to the U.S. Probation Office all essential information needed by U.S. Probation to accurately calculate the sentencing guideline range for the defendant, including, but not limited to, information regarding the nature of the offense (offense level), the nature of the victim and the injury sustained by the victim, defendant's role in the offense, whether defendant obstructed justice in the commission of the crime, defendant's criminal history, and any information regarding defendant's status as a career offender/armed career criminal. In addition, in order to comply with the requirements of the Anti-Terrorism Act, the government shall produce to the U.S. Probation Office information regarding the victims of defendant's alleged criminal activity, including, but not limited to, the identity of the victim by name, address, and phone number, and the nature and extent of the victim's loss or injury.
(4) *Disclosures by the Defendant.* If defendant accepts or requests disclosure of discoverable information pursuant to Fed.R.Crim.P. 16(a)(1)(C), (D), or (E), defendant, on or before a date set by the Court, shall provide to the government all discoverable information within the scope of Fed.R.Crim.P. 16(b).
(c) Supplementation. The provisions of Fed.R.Crim.P. 16(c) are applicable. It shall be the duty of counsel for all parties to immediately reveal to opposing counsel all newly discovered information, evidence, or other material within the scope of this Rule, and there is a continuing duty upon each attorney to disclose expeditiously.
(d) Motions for Discovery. No attorney shall file a **discovery** motion without first conferring with opposing counsel, and no motion will be considered by the Court unless it is accompanied by a certification of such conference and a statement of the moving party's good faith efforts to resolve the subject matter of the motion by agreement with opposing counsel. No **discovery** motions shall be filed for information or material within the scope of this Rule unless it is a motion to compel, a motion for protective order or a motion for an order modifying **discovery**. *See* Fed.R.Crim.P. 16(d). **Discovery** requests made pursuant to Fed.R.Crim.P. 16 and this Local Rule require no action on the part of this Court and should not be filed with the Court, unless the party making the request desires to preserve the **discovery** matter for appeal.

[Adopted effective June 1, 1997.]

U. S. Dist. Ct. Rules S.D.Ala., **LR** 16.13
AL R USDCTSD **LR** 16.13
END OF DOCUMENT

LCrR 16.1

West's Code of Georgia Annotated Currentness

Federal Court Rules
Local Court Rules for the United States District Court for the Northern District of Georgia
Criminal Local Rules (Refs & Annos)
IV. Arraignment and Preparation for Trial
Lcrr 16. Discovery and Inspection

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

LCrR 16.1 PRETRIAL DISCOVERY AND INSPECTION

The government shall make available to the defendant at the time of arraignment for inspection and copying all materials or copies of materials requested by the defendant which are discoverable under Fed.R.Crim.P. 16. The government shall also provide the defendant at arraignment with an inventory of all items seized from the defendant by law enforcement officials which the government expects to introduce at trial. Unless otherwise ordered by the court, the defendant shall be required to make discoverable materials requested by the government available for inspection and copying no later than twenty-one (21) days prior to trial. The failure of any party to produce requested discoverable evidence in a timely manner may result in the evidence being ruled inadmissible at trial.

While extensions of time shall not be routinely granted, the magistrate judge may for good cause shown grant a party additional time in which to produce requested evidence. Motions for extensions of time must contain a schedule upon which the requested discoverable evidence will be available. If a party requests discoverable evidence which is not at that time in the possession of the custodial party, such as medical reports, results of tests which have been performed, etc., the custodial party must inform the court of the earliest date on which such materials can be in the party's possession for inspection and copying by the requesting party.

Unless otherwise ordered by the court, a party shall have no obligation to reproduce copies of requested materials (except the government must provide the defendant a copy of the defendant's prior criminal record) for another party's possession until the requesting party has remitted payment for the duplicating expenses. Defendants represented under this court's Criminal Justice Plan are exempted from this requirement to pay duplicating expenses. Whenever duplication of the requested materials is unduly burdensome for a party, the party may by motion at the appropriate time request the court to relieve the party from the duty to provide copies.

Effective April 15, 1997.

<<LOCAL COURT RULES FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN

U.S.Dist.Ct.Rules D.Vt., LCrR 16.1

WEST'S VERMONT RULES OF COURT
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT LOCAL RULES OF PROCEDURE
XII. CRIMINAL RULES

Current with amendments received through 1/1/2004

CRIMINAL RULE 16.1 DISCOVERY

(a) Discovery From Government. Within 14 days of arraignment, or on a date otherwise set by the court for good cause shown, the government will make available to the defendant for inspection and copying the following:
(1) *Fed. R. Crim. P. 16(a) and Fed. R. Crim. P. 12(d) Information.* All discoverable information within the scope of Rule 16(a) of the Federal Rules of Criminal Procedure and a notice pursuant to Fed. R. Crim. P. 12(d) of the government's intent to use this evidence, in order to afford the defendant an opportunity to file motions to suppress evidence.
(2) *Brady Material.* All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).
(3) *Names and Addresses of Witnesses.* A list of the names and addresses of all witnesses the government intends to call in its case in chief at trial. If the government has substantial concerns about witness safety or intimidation, it may withhold the names and addresses of those witnesses about whom it has substantial concerns. In the event names and/or addresses are withheld, the government must provide the defense with notice of the number of witnesses' names and/or addresses that are so withheld.
(4) *Search Warrant Documents and Things.* All warrants, applications with supporting affidavits, testimony under oath, returns and inventories for search and/or seizure of the defendant's person, property, or items with respect to which the defendant may have standing to move to suppress.
(5) *Electronic Surveillance Documents and Things.* Notice of any electronic surveillance conducted pursuant to 18 U.S.C. Chapter 119 that the defendant may have standing to move to suppress; all authorizations, applications, orders, returns, inventories, logs, transcripts, and recordings obtained pursuant to such surveillance.
(b) Discovery from Defendant. Unless a defendant, in writing within five days of arraignment, affirmatively refuses discoverable materials under Fed. R. Crim. P. 16(a)(1)(C), (D), or (E), the defendant, within 21 days of arraignment, shall make available to the government all discoverable information within the scope of Fed. R. Crim. P. 16(b). The defendant shall also make available to the government the names, addresses and dates of birth of all witnesses it plans to call in its case in chief.
(c) Notice Required of Defendant. Within 21 days of arraignment, the defendant shall provide written notice as required pursuant to Fed. R. Crim. P. 12.1, 12.2, and 12.3.
(d) Government Pretrial Disclosures. Not less than 14 days prior to the start of jury selection, or on a date otherwise set by the court for good cause shown, the government shall provide to the defendant:
(1) *Giglio Material.* All material within the scope of *United States v. Giglio*, 405 U.S. 150 (1972), including but not limited to the following:
(A) the existence and substance of any payments, promises of immunity, leniency, preferential treatment or other inducements made to any witness who will be testifying;
(B) the substance of substantially inconsistent statements that a witness has made

concerning issues material to guilt or punishment; and
(C) any criminal convictions of a witness or other instances of misconduct, of which the government has knowledge and which may be used to impeach a witness pursuant to Fed. R. Evid. 608 and 609.
(2) *Federal Rule of Evidence 404(b) Notice.* The government shall advise the defendant of its intention to introduce Rule 404(b) evidence in its case in chief at trial. This requirement shall replace the defendant's duty to demand such notice.
(e) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or **material** required to be provided or disclosed pursuant to this Rule, such party shall promptly notify opposing counsel of the existence of the additional evidence or **material** and provide access to the evidence or **material** for inspection and copying.
(f) Discovery Motions. No attorney shall file a discovery motion or a request for a bill of particulars (except a motion pursuant to Fed. R. Crim. P. 16(d)(1)) without first conferring with opposing counsel, and no motion will be considered by the court unless it is accompanied by a certification of such conference stating the date, time and place of the conference and the names of all participating parties.
(g) Motions to Continue. No continuance or extension will be granted under the Speedy Trial Act unless a motion or stipulation is submitted which recites the appropriate exclusionary provision of the Speedy Trial Act, 18 U.S.C. § 3161. In addition, the motion or stipulation must set forth the following:
(1) the facts upon which the court can make a finding which would warrant the granting of the relief requested; and
(2) a statement that defendant recognizes that any additional time granted will be excluded from computation under the Speedy Trial Act.

Counsel must also submit a proposed order setting forth the time to be excluded and the basis for the exclusion. If the exclusion affects the trial date of the action, the stipulation or proposed order must have a space for the court to enter a new trial date in accordance with the excludable time period. Requests for continuance or extension which do not comply with this rule will be disallowed by the court.
(h) Pretrial Filing and Stipulation Requirements. Within three days of the date fixed for trial, counsel for each party shall:
(1) exchange and file with the court voir dire requests;
(2) exchange and file with the court requests to charge without prejudice to the parties' right to submit additional requests at the conclusion of the evidence, the need for which was not apparent prior to trial;
(3) make every effort to enter into stipulations of fact, including stipulations as to the admissibility of evidence, thereby limiting the matters which are required to be tried; and
(4) exchange and file with the court a proposed exhibit list (government to label exhibits numerically, i.e., Govt. 1, 2, 3 etc.; defendant to label exhibits alphabetically, i.e., Deft. A, B, C, etc.).
(i) Sentencing Discovery. On the day objections to the draft presentence report are to be submitted, the government and defendant shall exchange:
(1) the names and addresses of witnesses who have not previously been disclosed and who will be called at the sentencing hearing, including the names and addresses of experts. The defendant shall provide the dates of birth of such witnesses. The government shall provide the criminal records, if any, of such witnesses.
(2) all information within the scope of Fed. R. Crim. P. 16(a) and (b) which has not previously been disclosed and which relates to issues to be raised at the sentencing hearing.

FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	Case No .
	)	
	)	
DEFENDANT	)	

CRIMINAL PRETRIAL ORDER

I. NOTICE TO ALL COUNSEL:
Counsel for the defendant is directed to file a notice of appearance with the Clerk of the Court stating his/her mailing address and telephone number.

II. DISCOVERY:

A. *Discovery From Government.* Within 14 days of arraignment, or on a date otherwise set by the Court for good cause shown, the government shall make available to the defendant for inspection and copying the following:

1. Fed. R. Crim. P. 16(a) and Fed. R. Crim. P. 12(d) Information. All discoverable information within the scope of Fed. R. Crim. P. 16(a), and a notice pursuant to Fed. R. Crim. P. 12(d) of the government's intent to use this evidence, in order to afford the defendant an opportunity to file motions to suppress evidence.

2. *Brady* Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).

3. Names and Addresses of Witnesses. A list of the names and addresses of all witnesses the government intends to call in its case in chief at trial. If the government has substantial concerns about witness safety or intimidation, it may withhold the names and addresses of those witnesses about whom it has substantial concerns. In the event names and/or addresses are withheld, the government must provide the defense with notice of the number of witnesses' names and/or addresses that are so withheld.

4. Search Warrant Documents and Things. All warrants, applications with supporting affidavits, testimony under oath, returns and inventories for search and/or seizure of the defendant's person, property, or items with respect to which the defendant may have standing to move to suppress.

5. Electronic Surveillance Documents and Things. Notice of any electronic surveillance conducted pursuant to 18 U.S.C. Chapter 119 that the defendant may have standing to move to suppress; all authorizations, applications, orders, returns, inventories, logs, transcripts, and recordings obtained pursuant to such surveillance.

B. *Discovery From Defendant.* Unless a defendant, in writing within five days of arraignment, affirmatively refuses discoverable materials under Fed. R. Crim. P. 16(a)(1)(C), (D), or (E), the defendant, within 21 days of arraignment, shall make

available to the government all discoverable information within the scope of Fed. R. Crim. P. 16(b). The defendant shall also make available to the government the names, addresses and dates of birth of all witnesses it plans to call in its case in chief.

C. *Notice Required of Defendant.* Within 21 days of arraignment, the defendant shall provide written notice as required pursuant to Fed. R. Crim. P. 1 2.1, 12.2 , and 12.3.

D. *Government Pretrial Disclosures.* Not less than 14 days prior to the start of jury selection, or on a date otherwise set by the Court for good cause shown, the government shall provide to the defendant:

1. *Giglio* **Material**. All **material** within the scope of *United States v. Giglio*, 405 U.S. 150 (1972), including but not limited to the following:
a. The existence and substance of any payments, promises of immunity, leniency, preferential treatment or other inducements made to any witness who will be testifying;
b. The substance of substantially inconsistent statements that a witness has made concerning issues material to guilt or punishment;
c. Any criminal convictions of a witness or other instances of misconduct, of which the government has knowledge and which may be used to impeach a witness pursuant to Fed. R. Evid. 608 and 609.

2. Federal Rule of Evidence 404(b) Notice. The government shall advise the defendant of its intention to introduce evidence in its case in chief at trial, pursuant to Rule 40 4(b) of the Federal Rules of Evidence. This requirement shall replace the defendant's duty to demand such notice.

E. *Continuing Duty to Disclose.* If, prior to or during trial, a party discovers additional evidence or **material** required to be provided or disclosed pursuant to this Order, such party shall promptly notify opposing counsel of the existence of the additional evidence or **material** and provide access to the evidence or **material** for inspection and copying.

F. *Discovery Motions.* No attorney shall file a discovery motion or a request for a bill of particulars (except a motion pursuant to Fed. R. Crim. P. 16(d)(1)) without first conferring with opposing counsel, and no motion will be considered by the Court unless it is accompanied by a certification of such conference stating the date, time and place of the conference and the names of all participating parties.

III. MOTIONS:
Motions are to be filed by _____.

IV. SPEEDY TRIAL REQUIREMENTS:
The United States Attorney and defense counsel are hereby notified that no continuance or extension will be granted under the Speedy Trial Act unless a motion or stipulation is submitted which recites the appropriate exclusionary provision of the Speedy Trial Act, 18 U.S.C. § 3161. In addition, the motion or stipulation must set forth the following:

A. The facts upon which the Court can make a finding which would warrant the granting of the relief requested; and

B. A statement that defendant recognizes that any additional time granted will be excluded from computation under the Speedy Trial Act.

Counsel must also submit a proposed order setting forth the time to be excluded and the basis for the exclusion. If the exclusion affects the trial date of the action, the stipulation

or proposed order must have a space for the Court to enter a new trial date in accordance with the excludable time period. Requests for continuance or extension which do not comply with this Order will be disallowed by the Court.

V. TRIAL DATE:

Trial of the above-entitled action is hereby set for the _____ day of _____, 2____, at _____ a.m., at _____, Vermont before the Honorable _____.

VI. SUBMISSIONS REQUIRED:

Within three days of the date fixed for trial, counsel for each party shall:
A. Exchange and file with the Court voir dire requests;
B. Exchange and file with the Court requests to charge, without prejudice to the parties' right to submit additional requests at the conclusion of the taking of evidence, the need for which was not apparent prior to trial;
C. Make every effort to enter into stipulations of fact, including stipulations as to the admissibility of evidence, thereby limiting the matters which are required to be tried; and
D. Exchange and file with the Court a proposed exhibit list (government to label exhibits numerically i.e., Govt. 1, 2, 3 etc.; defendant to label exhibits alphabetically, i.e., Deft. A, B, C, etc.).

VII. SENTENCING DISCOVERY:

On the day objections to the draft presentence report are to be submitted, the government and the defendant shall turn over:

A. The names and addresses of witnesses who have not previously been disclosed and who w ill be called at the sentencing hearing, including the names and addresses of experts. The defendant shall provide the dates of birth of such witnesses. The government shall provide the criminal records, if any, of such witnesses.

B. All information within the scope of Fed. R. Crim. P. 16(a) and (b) which has not previously been disclosed and which relates to issues to be raised at the sentencing hearing.

SO ORDERED.
Dated at _____, in the District of Vermont, this _____ day of _____, 2____.

_____
U.S. District/Magistrate Judge

[Effective December 1, 2000; amended effective January 1, 2001.]

U. S. Dist. Ct. Rules D.Vt., LCrR 16.1
VT R USDCT LCrR 16.1
END OF DOCUMENT

Local Rules W.D.Wash.,CrR 16

WEST'S WASHINGTON LOCAL RULES OF COURT AND WEST'S WASHINGTON COURT RULES
RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
CRIMINAL RULES

Current with amendments received through January 1, 2004

CrR 16. DISCOVERY AND INSPECTION

The purposes of this Rule are to expedite the transfer of discoverable material contemplated by the Federal Rules of Criminal Procedure between opposing parties in criminal cases and to ensure that pretrial discovery motions to the court are filed only when the discovery procedures outlined herein have failed to result in the exchange of all legitimately discoverable material. It is the intent of the court to encourage complete and open discovery consistent with applicable statutes, case law, and rules of the court at the earliest practicable time. Nothing in this rule should be construed as a limitation on the court's authority to order additional discovery.

(a) Discovery Conference. At every arraignment at which the defendant enters a plea of not guilty, or other time set by the court, the attorney for the defendant shall notify the court and the attorney for the United States, on the record, or thereafter in writing, whether discovery by the defendant is requested. If so requested, within fourteen days after said attorney for the defendant and the attorney for the government shall confer in order to comply with Rule 16, Fed.R.Crim.P., and make available to the opposing party the items in their custody or control or which by due diligence may become known to them. This conference shall be in person. If, however, it is impractical to meet in person, the conference may be conducted via telephone.

(1) ***Discovery From the Government.*** At the discovery conference the attorney for the government shall comply with the government's obligations under Rule 16 including, but not limited to, the following:

(A) Permit defendant's attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody, or control of the government.

(B) With respect to oral statements made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent:

(i) Provide that portion of any written record containing the substance of any such relevant oral statement made by the defendant; and

(ii) Provide the substance of any other such relevant oral statement made by the defendant which the government intends to offer in evidence at the trial.

(C) Permit defendant's attorney to inspect and copy or photograph the defendant's Federal Bureau of Investigation Identification Sheet, and any other state, county, or local criminal record information concerning the defendant;

(D) Permit defendant's attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies of portions thereof, which are within the possession, custody, or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant;

(E) Permit defendant's attorney to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are material to the preparation of the defense or are intended for use by the government as evidence in chief at trial;
(F) Permit defendant's attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before the Grand Jury which relates to the offense charged;
(G) Permit defendant's attorney to inspect and copy or photograph any photographs used in any photograph lineup, show up, photo spread, or any other identification proceedings or, if no such photographs can be produced, the government shall notify the defendant's attorney whether any such identification proceeding has taken place and the results thereof;
(H) Permit defendant's attorney to inspect and copy or photograph any search warrants and supporting affidavits which resulted in the seizure of evidence which is intended for use by the government as evidence in chief at trial or which was obtained from, or belongs to, the defendant;
(I) Inform the defendant's attorney whether any physical evidence intended to be offered in the government's case-in-chief, the admissibility of which the defendant may have standing to challenge, was seized by the government pursuant to any exception to the warrant requirement;
(J) Advise whether the defendant was a subject of any electronic eavesdrop, wire tap, or any other interception of wire or oral communications as defined by Title 18, United States Code, Section 2510, et seq., during the course of the investigation of the case;
(K) Advise the attorney for the defendant and provide, if requested, evidence favorable to the defendant and material to the defendant's guilt or punishment to which he is entitled pursuant to *Brady v. Maryland* and *United States v. Agurs;* and
(L) Advise the attorney for the defendant whether or not the government will provide a list of the names and addresses of the witnesses whom it intends to call in its case-in-chief at trial.
The attorney for the government is not required, however, to produce any statements of witnesses which fall within the purview of Section 3500 of Title 18, United States Code and Rule 26.2, Fed.R.Crim.P., until such time as required under those provisions.
(2) ***Discovery*** *From Defendant.* At the discovery conference, the defendant's attorney shall:
(A) Permit the attorney for the government to inspect and copy or photograph all books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial;
(B) Permit the attorney for the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony;
(C) Inform the attorney for the government, in writing, if requested, whether the nature of the defense is alibi. If a defendant intends to rely on the defense of alibi, and the attorney for the government has made the demand outlined in Rule 12.1(a), Fed.R.Crim.P., at least ten days before the pretrial conference, the attorney for the defendant shall disclose the substance of any alibi intended to be presented by the defendant and state the specific place or places at which the defendant claims to have been at the time of the alleged offense, and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi as required by Rule 12.1, within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs. The attorney for the government shall serve upon the defendant's attorney a written notice stating the names and addresses of the witnesses

upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.
(D) Inform the attorney for the government whether the nature of the defense is insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime or intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall give written notice thereof to the **government** and file a copy of such notice with the clerk.
(E) Advise the attorney for the **government** whether or not the defendant will provide the names and addresses of the witnesses whom the defense intends to call in its case-in-chief at trial.
(b) Entrapment Defenses and the Discovery of Other Crimes, Wrongs, or Acts Admissible Pursuant to Rule 404(b), Fed.R.Evid. In addition to the requirements of FRE 404(b), if, during the **discovery** conference or thereafter, the attorney for the defendant advises the attorney for the **government** that the defense is one of entrapment and provides a synopsis of the evidence of that defense, the attorney for the **government** shall, within five days or two weeks prior to trial, whichever is later, disclose a synopsis of any other crimes, wrongs, or acts about which the **government** has information and which is relevant to said defense and intended for use by the **government** in its case-in-chief or in rebuttal.
(c) Items Not Subject to Disclosure. This rule does not authorize the **discovery** or inspection of reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorney or agents in connection with the investigation or defense of the case, or of statements made by prospective **government** or defense witnesses, to the defendant, the defendant's agents, or attorneys.
(d) Continuing Duty to Disclose. If, prior to or during trial, any party discovers additional evidence not previously disclosed which is subject to **discovery** or inspection under this rule, such party shall promptly notify that other party's attorney of the existence of additional evidence or material.
(e) Declination of Disclosure. If, in the judgment of the attorney for the **government** or of the defendant's attorney, it would not be in the interest of justice to make any one or more of the disclosures set forth in the subsections of this rule, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to opposing counsel. In the event either the attorney for the government or attorney for the defendant declines to provide the names and addresses of witnesses, such a declination shall, in addition, state the particular reasons for the declination. The declination shall be served on opposing counsel and a copy filed with the court at least five days before the pretrial motions deadline.
(f) Statements of Witnesses. Statements of witnesses, including material covered by Rule 26.2, Fed.R.Crim.P., Title 18, United States Code, Section 3500, and Rule 6 of the Federal Rules of Criminal Procedure, are to be exchanged:
1. During the time of trial as provided by Rule 26.2, Fed.R.Crim.P., and 18 U.S.C. § 3500; or
2. At any time if the parties agree; and
3. Production of statements of witnesses at a hearing on a motion to suppress evidence will be governed by Rule 12(i), Fed.R.Crim.P.
(g) Exchange of Exhibit Lists. No later than seven days before trial, the parties shall exchange a list of exhibits which they intend to introduce during the presentation of their respective cases-in-chief.
(h) Further Discovery or Inspection. If **discovery** or inspection beyond that provided for above is sought by either counsel, the attorney for the **government** and the defendant's attorney shall confer with a view toward satisfying these requests in a cooperative atmosphere without recourse to the court. The request for further **discovery**

may be oral or written and the response shall be a like manner. Only in the event that either party's request for any **discovery** or inspection cannot be satisfied without recourse to the court may either party move for additional **discovery** or inspection. Any motion for further **discovery** or inspection shall be filed in compliance with these Local Criminal Rules.

(i) Certification of Compliance With This Rule. All motions for **discovery** or inspection shall contain a certification that counsel have engaged in a **discovery** conference and discussed the subject matter of each motion and have been unable to reach agreement of the resolution of the issues. The certification for the motion shall set forth: (1) The statement that the prescribed conference was held; (2) the date of the conference; (3) the names of the parties who attended the conference; and (4) the matters which are in dispute and which require the determination of the court.
The filing of any such motion for further discovery or inspection which does not include the required certification may result in summary denial of the motion or other sanctions in the discretion of the court.

(j) Modification of Time Periods. All time periods set forth in this Rule may be modified by written agreement by the defendant's attorney and the attorney for the government or by order of the court.

(k) Other Pretrial Motions. Except for discovery motions covered by this order, all other pretrial motions shall be filed in accordance with the Fed.R.Crim.P. and the Local Rules W.D.Wash. which are in effect at the time the pretrial motions are filed.

[Effective May 1, 1992; amended effective July 1, 1997.]

U. S. Dist. Ct. Rules W.D.Wash., CrR 16
WA R USDCTWD CrR 16
END OF DOCUMENT

U.S.Dist.Ct.Rules N.D.W.Va., LR Cr P 16.05

WEST'S ANNOTATED CODE OF WEST VIRGINIA
FEDERAL COURT RULES
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
III. LOCAL RULES OF CRIMINAL PROCEDURE
DISCOVERY

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

LR Cr P **16.05 EXCULPATORY EVIDENCE**

Exculpatory **evidence** as defined in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), as amplified by United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985), shall be disclosed at the time the disclosures described in LR Cr P 16.01 are made. Additional Brady material not known to the government at the time of disclosure of other discovery material, as described above, shall be disclosed immediately in writing setting forth the material in detail.

[Former LR Cr P 4.08 effective March 1, 1996; renumbered LR Cr P 16.05 and amended effective May 1, 2003.]

<<LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA>>

<Effective March 1, 1996>

<Uniform Renumbering Table Effective November 1, 1997>

<Including Amendments Received Through
January 1, 2003>

LIBRARY REFERENCES

Criminal Law k627.5.
Westlaw Key Number Search: 110k627.5.
C.J.S. Criminal Law §§ 486, 1210.

WV R USDCTND LR Cr P 16.05
END OF DOCUMENT

U.S.Dist.Ct.Rules N.D.W.Va., **LR Cr P 16.06**

WEST'S ANNOTATED CODE OF WEST VIRGINIA
FEDERAL COURT **RULES**
LOCAL **RULES** OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
III. LOCAL **RULES** OF CRIMINAL PROCEDURE
DISCOVERY

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

LR Cr P 16.06 RULE 404(b), GIGLIO AND ROVIARO EVIDENCE

Notice of Federal **Rule** of Evidence **404(b)** evidence, Giglio material and any Roviaro witness not included in the government's witness list shall be disclosed fourteen days before trial. See Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L.Ed.2d 639 (1957).

[Former **LR Cr P** 4.09 effective March 1, 1996; renumbered **LR Cr P 16.06** and amended effective May 1, 2003.]

<<LOCAL **RULES** OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA>>

<Effective March 1, 1996>

<Uniform Renumbering Table Effective November 1, 1997>

<Including Amendments Received Through
January 1, 2003>

LIBRARY REFERENCES

Criminal Law ⇐627.8(2).
Westlaw Key Number Search: 110k627.8(2).
Current with Amendments received through February 15, 2004

WV R USDCTND **LR Cr P 16.06**
END OF DOCUMENT

U.S.Dist.Ct.Rules N.D.W.Va., LR Cr P 16.11

WEST'S ANNOTATED CODE OF WEST VIRGINIA
FEDERAL COURT RULES
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
III. LOCAL RULES OF CRIMINAL PROCEDURE
DISCOVERY

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

LR Cr P 16.11 FAILURE TO COMPLY WITH DISCOVERY

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 LR Cr P 16, 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 other order as it deems just under the circumstances up to and including dismissal of the indictment with prejudice. The Court may specify the time, place and manner of making the discovery, inspection or disclosure and may prescribe such terms and conditions as are just.

[Former LR Cr P 4.16 effective March 1, 1996; renumbered LR Cr P 16.11 and amended effective May 1, 2003.]

<<LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA>>

<Effective March 1, 1996>

<Uniform Renumbering Table Effective November 1, 1997>

<Including Amendments Received Through
January 1, 2003>

LIBRARY REFERENCES

Criminal Law ⇐627.8(6).
Westlaw Key Number Search: 110k627.8(6).
C.J.S. Criminal Law §§ 520 to 523.

WV R USDCTND LR Cr P 16.11
END OF DOCUMENT

U.S.Dist.Ct.Rules M.D.Tenn., **Rule** 10

WEST'S TENNESSEE **RULES** OF COURT
LOCAL **RULES** OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
LOCAL **RULES** OF COURT

Current with amendments received through 07/1/03

RULE 10. DISCOVERY, MOTIONS AND SENTENCING IN CRIMINAL CASES

(a) Discovery in Criminal Cases.
(1) *Speedy Trial Plan Trial Plan.* Discovery matters in criminal cases shall be governed by the procedures set forth in the plan adopted by this District pursuant to the Speedy Trial Act of 1974, which is made an Appendix hereto, except as otherwise provided in these **Rules** or order of the Court.
(2) *Standing Discovery **Rule**.* On or before fourteen (14) days from the date of the arraignment of a defendant, the parties shall confer and the following shall be accomplished:
a. The government shall permit the defendant to inspect and copy, or shall supply copies of, all items listed below that are within the possession, custody, or control of the government, or the existence of which is known or by the exercise of due diligence may become known to the government:
1. Written or recorded statements made by the defendant.
2. The substance of any oral statement that the government intends to offer in evidence at trial made by the defendant before or after his arrest in response to interrogation by a then known to be government agent.
3. Recorded grand jury testimony of the defendant relating to the offenses charged.
4. The defendant's arrest and conviction record.
5. Books, papers, documents, photographs, tangible objects, buildings, or places which the government intends to use as evidence at trial to prove its case in chief, or were obtained from or belonging to the defendant.
6. Results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.
b. Upon receipt by the defendant of materials in a.5 and a.6 from the government, the defendant shall permit the government to inspect and copy the following items, or copies thereof, or supply copies thereof, which are within the possession, custody, or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant:
1. Books, papers, documents, photographs, or tangible objects which the defendant intends to introduce as evidence in chief at trial; and
2. Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case which the defendant intends to introduce as evidence in chief at trial, or which were prepared by a defense witness who will testify concerning the contents thereof.
c. If the defendant intends to rely upon the defense of insanity at the time of the alleged crime, or intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he/she had the mental state required

for the offense charged, he/she shall give written notice thereof to the government.
d. The government shall reveal to the defendant and permit inspection and copying of all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).
e. The government shall obtain the record of prior convictions of any alleged informant who will testify for the government at trial so that the record will be available to the defendant at trial.
f. The government shall state whether defendant was identified in any lineup, showup, photo spread, or similar identification proceeding, and produce any pictures utilized or resulting therefrom.
g. The government shall advise its agents and officers involved in this case to preserve all rough notes.
h. The government shall advise the defendant of its intention to introduce during its case in chief evidence pursuant to Fed. R. Evid. 404(b).
i. The government shall state whether the defendant was an aggrieved person, as defined in 18 U.S.C. § 2510(11), of any electronic surveillance, and if so, shall set forth in detail the circumstances thereof.
j. The government shall, upon request, deliver to any chemist selected by the defense, who is presently registered with the Attorney General in compliance with 21 U.S.C. §§ 822 and 823, and 21 C.F.R. § 3101, a sufficient representative sample of any alleged contraband which is the subject of the indictment, to allow independent chemical analysis of such sample with appropriate safeguards for the preservation of evidence.
k. Upon request, the government shall permit the defendant, his counsel, and any experts selected by the defense to inspect any automobile, vessel, or aircraft allegedly utilized in the commission of any offenses charged. Government counsel shall, if necessary, assist defense counsel in arranging such inspection at a reasonable time and place, by advising the government authority having custody of the thing to be inspected that such inspection has been ordered by the Court.
l. Upon request, the government shall provide the defense, for independent expert examination, copies of all latent fingerprints or palm prints which have been identified by a government expert as those of the defendant.
m. The parties shall make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite the trial.
n. The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference. No stipulation made by defense counsel at the conference shall be used against the defendant unless the stipulation is reduced to writing and signed by the defendant and his/her counsel.
It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this Rule. Upon a sufficient showing, the Court may at any time, upon motion properly filed, order that the discovery or inspection provided for by this Rule be denied, restricted, or deferred, or make such other order as is appropriate. 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**.

10(a)(2)(n),

(b) Motions in Criminal Cases. Reference is made to the Speedy Trial Plan adopted by this Court and made an Appendix to these **Rules**. The procedures specified therein shall be followed, except as otherwise provided in these **Rules** or order of the Court. In addition, no discovery motion, or motions for disclosure of impeaching information, favorable evidence, existence and substance of promises of immunity, leniency, or preferential treatment, Brady material and/or Giglio material shall be filed in any criminal

case unless accompanied by a written statement of counsel certifying that counsel for the moving party, or the moving party if not represented by counsel, has conferred with opposing counsel or party, as the case may be, in an effort in good faith to resolve by agreement the subject matter of the motion, but has not been able to do so. In addition, the written statement shall specify the information that has been made available by the moving party to opposing counsel or party and by the opposing party to the moving party or counsel prior to the filing of the motion. The motion and response may, at the election of the parties, be filed under seal.

(1) *Discovery Motions.* Motions regarding discovery under Fed. R. Crim. P. 16, or **Rule 10(a)(2)**, shall be filed within ten (10) days after a discovery request is denied or the discovery is otherwise due pursuant to **Rule** 10, Fed. R. Crim. P. 16 or order of the Court. Each discovery motion shall be accompanied by a memorandum and shall include the certification required by **Rule** 10(b). A memorandum in response shall be filed within ten (10) days after the motion is filed and served, unless the Court orders otherwise. See also **Rule** 8.

(2) *Pretrial Motions.* All pretrial motions, except motions regarding discovery under Fed. R. Crim. P. 16 or **Rule 10(a)(2)**, shall be filed within twenty-eight (28) days of arraignment, absent leave of Court. Each such pretrial motion shall be accompanied by a memorandum and shall include the certification required by **Rule** 10(b). A memorandum in response shall be filed within ten (10) days after the motion is filed and served, unless the Court orders otherwise. See also **Rule** 8.

(c) Sentencing.

(1) *Initial Disclosure.* Upon a finding of guilt or at the conclusion of the hearing on the petition to enter a plea, a sentencing hearing date shall be set at least eighty (80) days from the finding of guilt or hearing on the petition to enter a plea. Should the Probation Officer not be able to complete the Presentence Report within the allotted time, the Chief United States Probation Officer or designee shall request additional time from the Court in writing and shall serve such written request on all attorneys of record.

(2) *Presentence Interview.* After a finding of guilt, the Probation Officer shall give notice and a reasonable opportunity to the defense counsel to attend any interview initiated by the Probation Office with the defendant. If undue delay is caused by counsel's unavailability, the Probation Officer shall proceed with the interview after giving notice to defense counsel.

The attorneys shall confer with the Probation Officer during the presentence investigation process with a view toward resolving any disputed facts or factors. All parties shall communicate in a timely manner so that errors can be corrected and disputed issues fairly addressed.

Counsel shall schedule a time to meet with the Probation Officer to discuss the Presentence Report, giving adequate time for counsel and the United States Probation Office to investigate and make preliminary calculations. It shall be the responsibility of counsel for each party to schedule a meeting with the Probation Officer or, at the election of the parties, a joint meeting with counsel for both sides and the Probation Officer. When the Presentence Report is completed, the United States Probation Office shall furnish a copy of the report to the attorneys of record. The defendant's attorney shall deliver a copy of the Presentence Report to the defendant and conduct an in-person review of the Presentence Report with his client.

(3) *Objections.* Within 14 days after receiving the Presentence Report, the defendant's attorney and the attorney for the government shall communicate in writing to the Probation Office, and to each other, any objections to material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the Presentence Report.

After receiving objections, the Probation Officer may meet with the defendant, defense counsel, and attorney for the government to discuss the objections. The Probation Officer may also conduct a further investigation and revise the Presentence Report as

appropriate. Within seven (7) calendar days of receiving the objections, the Probation Officer shall disclose to all parties any changes or unresolved factual disputes or objections in the report. At least seven (7) calendar days prior to sentencing, the defendant's attorney and the attorney for the government shall file (not under seal unless ordered by the Court upon motion) with the Clerk, with a copy to the United States Probation Office and opposing counsel, a pleading entitled, "Position of the(Government or Defendant) With Respect to Sentencing Factors" containing only unresolved matters previously raised with all parties in writing.

(4) *Final Disclosure.* The United States Probation Office shall transmit to the sentencing Judge at least seven (7) calendar days before the sentencing date the Presentence Report with guideline computations, an addendum indicating any unresolved factual disputes or objections by the parties with respect to the application of the guidelines, the Probation Officer's recommendations on disputed matters, and such material shall also be furnished to the defense counsel and the attorney for the government.

(5) *Sentencing Hearing.* The Judge, before imposing sentence, shall conduct such hearing as may be deemed necessary to resolve any disputed factors or facts and shall allow the attorney for the government and the defense attorney reasonable opportunity to comment either orally or in writing upon the Probation Officer's determination and on other matters relating to the appropriate sentence. Pleadings alleging that facts are reasonably in dispute shall not be raised unless the parties have conferred with each other and with the United States Probation Office in a good faith effort to resolve such disputed matters.

The Court shall announce its findings concerning factors or facts relating to the appropriate sentence. Following such announcement, unless counsel for either party requests additional time or the Court upon its own motion decides additional time is necessary, the Court shall in accordance with Fed. R. Crim. P. 32(A)(1) afford the attorney for the government and the attorney for the defendant, as well as the defendant, an opportunity to address the Court concerning the appropriate sentence. The Court, following the imposition of any sentence, shall notify the defendant of his right to appeal in accordance with Fed. R. Crim. P. 32(A)(2).

Absent a motion by either attorney granted by the Court or an order by the Court on its own motion, Presentence Reports provided to the attorneys may be retained by them. The Court, with the consent of the parties or when the interest of justice requires, may modify this Rule on a case-by-case basis in order to carry out prompt and fair sentencing under the Sentencing Reform Act and in compliance with Fed. R. Crim. P. 32.

[Amended effective January 1, 2001.]

U. S. Dist. Ct. Rules M.D.Tenn., Rule 10
TN R USDCTMD Rule 10
END OF DOCUMENT

U.S.Dist.Ct.Rules M.D.Tenn., Rule 12

WEST'S TENNESSEE RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
LOCAL RULES OF COURT

Current with amendments received through 07/1/03

RULE 12. TRIAL PROCEDURES

(a) Presence of Counsel.
(1) *Duty of Counsel.* In all jury cases, all counsel shall be present at all portions and phases of trial including the time during which the jury is considering its verdict unless excused by the Court.
(2) *Presumed Present.* Unless the contrary affirmatively appears of record, it will be presumed that the parties and their counsel are present at all stages of the trial, or if absent, that their absence was voluntary and constituted a waiver of their presence.
(3) If an unanticipated situation arises during the course of a proceeding requiring that an attorney for any party be examined as a witness and give testimony on the merits, that attorney shall not argue the merits of the case or proceeding, either to the Court or jury, except with the permission of the Court. This provision is not to be construed as in any way restricting the scope or effect of Disciplinary Rules 5-101 or 5-102 of the current Tennessee Code of Professional Responsibility, Tenn. Sup. Ct. R.8.
(4) Only one (1) attorney representing each interest in the litigation shall examine or cross-examine an individual witness, and not more than two (2) attorneys for each interest in the litigation shall argue the merits of an action or proceeding, unless the Court shall otherwise permit.
(5) *Decorum.*
a. During Court proceedings all attorneys shall stand when speaking. All objections and comments thereon shall be addressed to the Court. There shall be no oral confrontation between opposing counsel.
b. During Court proceedings neither counsel nor parties may leave the courtroom without prior approval of the Trial Judge.
(b) Presence of Parties. All parties, plaintiffs and defendants, shall be present at any trial unless prior approval of the absence of a party is obtained from the Trial Judge.
(c) Witnesses.
(1) At the beginning of the trial, counsel shall deliver to the Courtroom Deputy Clerk a list in triplicate of all witnesses expected to testify in the case. In civil cases a copy of the list shall be furnished to opposing counsel. In protracted litigation when many witnesses are expected to testify, the list shall contain an abbreviated statement of the connection of the witness to the litigation.
(2) When a witness takes the stand, the examining attorney shall read such background information as he desires to give concerning the witness and the connection of the witness to the litigation, and then shall solicit a response from the witness as to the correctness thereof. The second question should address the issues in litigation.
(3) During the testimony of a witness, the attorney may not approach the witness box without the Court's approval. All documents and objects to be shown to the witness shall be passed to the witness by the court officer.
(4) When practical, all documentary exhibits shall be prepared in quadruplicate, one each for the witness, the Court, opposing counsel, and the examining attorney.
(5) When a witness is to be examined at length and in detail about an exhibit, duplicate

copies may be passed, with Court approval, to each member of the jury for use during the interrogation.

(6) *Expert and Character Witnesses.*

a. No more than three (3) witnesses shall be called in any **case** to give expert testimony as to any matter, or to impeach or sustain the character of a witness, absent prior approval of the Trial Judge.

b. When possible, opposing counsel shall stipulate prior to trial that an individual who is to testify as an expert witness qualifies as an expert, thereby obviating the necessity for qualification of the witness at trial.

c. As appropriate to the **case** and as included as part of customized **case** management under Local **Rule** 11, if applicable, or as otherwise ordered, the **case** management judge or the Judge before whom the trial is scheduled may require that the direct testimony of an expert witness, other than a medical expert, be reduced to writing and a copy thereof filed and served upon opposing counsel at least five (5) days before trial or as otherwise provided by the Court. If so ordered, such written statement shall contain every material fact and/or opinion to which the witness would testify on direct examination if the witness were asked the appropriate questions. When the witness is called to testify at trial, he or she shall be sworn in the usual fashion. The qualifications as an expert shall be recited by the attorney who has called the expert witness. Thereafter, the attorney may interrogate the witness as to the specific qualifications of expertise that have direct bearing on the subject matter of the case. If objection to the witness' qualifications is raised, the objecting party may conduct a voir dire as to qualifications outside the presence of a jury. Unless objection is raised to the qualifications of the witness as an expert, the witness shall then read the written statement aloud to the trier of facts. During the reading of the statement, the witness may refer to a mechanical device, drawing, chart, photograph, or other exhibit in order to explain his or her testimony. After the witness has read the prepared statement, the attorney who called the witness may ask additional questions to further explain his opinion. However, the witness may not proffer any opinion not encompassed in the written statement. At the conclusion of the witness' direct examination in the manner described above, opposing counsel shall be given the opportunity to cross-examine the witness in the usual fashion.

d. Expert witness disclosures shall be made timely in accordance with any order of the Court, or if none, in accordance with Fed. R. Civ. P. 26(a)(2). Expert witness disclosure statements shall not be supplemented after the applicable disclosure deadline, absent leave of Court. No expert witness shall testify beyond the scope of his or her expert witness disclosure statement. The Court may exclude the testimony of an expert witness, or order other sanctions provided by law, for violation of expert witness disclosure requirements or deadlines. There shall be no rebuttal expert witnesses, absent timely disclosure in accordance with these Rules and leave of Court.

(d) Objections to Proffered Evidence.

(1) Objections to portions of testimony contained in a deposition to be read or played on video at trial in accordance with Rule 9(d)(4) shall be filed no later than five (5) days before trial. All such objections shall be accompanied by a statement certifying that all counsel have conferred in a good faith effort to resolve by agreement the objections and that counsel have not been able to do so. If certain objections have been resolved by agreement, the statement shall specify the objections remaining unresolved.

(2) Objections made in open court in the presence of a jury shall be concisely stated as being "hearsay," "a conclusion," etc., without argument. However, a bench conference may be requested. When an objection is sustained, the aggrieved party may make a proffer of evidence out of the presence of the jury.

(e) Closing Arguments. In the argument before a jury in civil or criminal cases not more than two (2) counsel may be heard on behalf of each interest involved in the lawsuit. Where two (2) counsel participate for one interest, the time allotted to that interest may be apportioned between them at their discretion, provided that the initial

portion of the argument for the plaintiff or prosecution shall include a full summation of all issues.

(f) Requests for Jury Instructions. All requests for jury instructions shall be filed in accordance with the deadlines established in the case management order or by the Trial Judge. If no such deadline has been set, jury instructions shall be filed no later than 9:00 a.m. on the trial date. The requests must contain citations of supporting authorities made in conformance with Rule 8(c). Supplemental and additional instructions may be submitted to the Court prior to final argument by counsel.

(g) Relations With a Jury. All attempts to curry favor with juries are unprofessional. Suggestions of counsel regarding the comfort or convenience of jurors, and propositions to dispense with argument or peremptory challenges, shall be made to the Court out of the jury's hearing. Before and during the trial, an attorney shall avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not.

(h) Post-Verdict Interrogation of Jurors. No attorney, party, or representative of either may interrogate a juror after the verdict has been returned without prior approval of the court. Approval of the Court shall be sought only by an application made by counsel orally in open court, or upon written motion which states the grounds and the purpose of the interrogation. If a post-verdict interrogation of one or more members of the jury should be approved, the scope of the interrogation and other appropriate limitations upon the interrogation will be determined by the Judge prior to the interrogation.

(i) Proposed Findings of Fact and Conclusions of Law--Non-Jury Cases. Findings of Fact and Conclusions of Law--Non-Jury Cases. Findings of Fact and Conclusions of Law--Non-Jury Cases. The Trial Judge may require that prior to trial there be submitted proposed findings of fact and conclusions of law. Absent an order so requiring, each party shall submit proposed findings of fact and conclusions of law fifteen (15) days after a trial is concluded, or the trial transcript is complete, whichever is later. For good cause the time period may be lengthened or shortened.

(j) Challenging Jurors During Selection and Composition of Juries. In the course of jury selection during a criminal or civil trial, a juror or jurors once passed and not challenged may not later be challenged by any party prior to the completion of the impaneling of the jury. All civil juries shall be composed of at least six (6) persons.

(k) Disposition of Materials--Criminal Cases. In all criminal cases all materials (including grand jury transcripts) produced and furnished to the defense pursuant to the provisions of the Jencks Act, 18 U.S.C. § 3500, or Brady v. Maryland, 373 U.S. 83 (1963), shall be returned to the United States Government or destroyed following the completion of the trial, sentencing of the defendant, or completion of the direct appellate process, whichever occurs last. If the materials are destroyed, a letter so certifying shall be furnished to the United States Government.

[Amended effective June 1, 1994; January 1, 2001.]

U. S. Dist. Ct. Rules M.D.Tenn., Rule 12
TN R USDCTMD Rule 12
END OF DOCUMENT

W.D.PA.LCrR 16.1

WEST'S PENNSYLVANIA RULES OF COURT
FEDERAL LOCAL COURT RULES
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
LOCAL CRIMINAL RULES OF COURT

Current with amendments received through July 1, 2004

LCrR 16.1 DISCOVERY AND INSPECTION

A. Within five (5) days after the arraignment, the United States attorney and the defendant's counsel shall confer and the parties shall comply with the requirements of Fed.R.Crim.P. 16. Unless the defendant or counsel for the defendant, at the arraignment, shall specifically decline to participate in discovery, the defendant shall comply with the reciprocal discovery required by Fed.R.Crim.P. 16(b).
B. If, in the judgment of counsel for the government or the defendant, it would not be in the interest of either party to make any one or more disclosures required by Fed.R.Crim.P. 16, disclosure may be declined. A declination of any required disclosure shall be in writing, directed to opposing counsel, and signed. It shall specify the types of disclosures that are declined. If opposing counsel seeks to challenge the declination, he or she shall proceed pursuant to subsection C below.
C. Additional Discovery or Inspection. If additional discovery or inspection is sought, requesting counsel shall confer with opposing counsel within ten (10) days of the arraignment with a view to satisfying these requests in a cooperative atmosphere without recourse to the court. The request may be oral or written and the response shall be in like manner.
D. In the event an agreement cannot be reached, any motion for additional discovery or inspection shall be filed within the time set by the court for the filing of pretrial motions. It shall contain either a statement that the prescribed conference could not be held and the reasons, or the following information:
1. the statement that the prescribed conference was held;
2. the date of said conference;
3. the names of the parties participating; and
4. the statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion.

E. Any disclosure granted by the government pursuant to this rule of material within the purview of Fed.R.Crim.P. 16(a)(1)(C) and (D) shall trigger the reciprocal discovery obligations of the defendant under those provisions.
F. Within five (5) days after the arraignment, the United States attorney shall permit the defendant or defendant's attorney to inspect, copy or photocopy any evidence favorable to the defendant.

Effective August 1, 2001; re-enacted January 11, 2003.

U. S. Dist. Ct. Rules W.D.Pa., LCrR 16.1
PA R USDCTWD LCrR 16.1
END OF DOCUMENT

D.N.M.LR-Cr Rule 16

West's New Mexico Rules Annotated Currentness

Federal Court Rules
United States District Court for the District of New Mexico
Local Criminal Rules of the United States District Court for the District of New Mexico
IV. Arraignment and Preparation for Trial

(Information regarding effective dates, repeals, etc. is provided subsequently in this document.)

➡RULE 16. DISCOVERY AND INSPECTION

16.1 Disclosure of Evidence by the Government. (Rule 16, *Brady*, *Jencks* Material). Before filing a motion for discovery or inspection under Federal Rule of Criminal Procedure 16, defense counsel and the assigned prosecutor shall hold a good faith discussion of the immediate availability of Rule 16 and *Brady* material and when *Jencks* material will be available. The moving party shall file a certificate of compliance with this Rule with any motion made under the Rule. 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. Motions to enforce the continuing duty of the U.S. Attorney's Office to disclose any such material should not be necessary. The provisions of D.N.M.LR-Cv 7.1, 7.2, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10 and D.N.M.LR-Cv 10 shall apply to motions which are the subject of this paragraph.

16.2 Disclosure of Evidence by the Defendant. If the Government complies with Rule 16(a) of the Federal Rules of Criminal Procedure, the defendant shall have an obligation to comply with Rule 16(b) of the Federal Rules of Criminal Procedure.

16.3 Other Motions. The provisions of D.N.M.LR-Cv 7.1, 7.2, 7.3, 7.5, 7.6, 7.7, 7.8, 7.9, 7.10 and D.N.M.LR-Cv 10 shall apply to all other motions filed in criminal cases, including motions for discovery that are not covered by D.N.M.LR-Cr 16.1.

<<LOCAL CRIMINAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO>>

<Effective July 28, 1992>

LIBRARY REFERENCES

Criminal Law ⇐627, 627.5.
Westlaw Key Number Searches: 110k627; 110k627.5.
C.J.S. Criminal Law §§ 446, 486, 1210.

UNITED STATES SUPREME COURT

U.S.Dist.Ct.Rules N.D.N.Y., L.R.Cr.P. 14.1

MCKINNEY'S NEW YORK RULES OF COURT
RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW
YORK
LOCAL RULES OF PRACTICE
SECTION XI. LOCAL RULES OF CRIMINAL PROCEDURE

Current with amendments received through 7/1/2003

(a) It is the Court's policy to rely on the discovery procedure as set forth in this Rule as the sole means of the exchange of discovery in criminal actions except in extraordinary circumstances. This Rule is intended to promote the efficient exchange of discovery without altering the rights and obligations of the parties, while at the same time eliminating the practice of routinely filling perfunctory and duplicative discovery motions.
(b) Fourteen (14) days after arraignment, or on a date otherwise set by the Court for good cause shown, the government shall make available for inspection and copying to the defendant the following:
1. *Fed.R.Crim.P. 16(a) & Fed.R.Crim.P. 12(d) Information.* All discoverable information within the scope of Rule 16(a) of the Federal Rules of Criminal Procedure, together with a notice pursuant to Fed.R.Crim.P. 12(d) of the government's intent to use this evidence, in order to afford the defendant an opportunity to file motions to suppress evidence.
2. *Brady Material.* All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, within the scope of *Brady v. Maryland,* 373 U.S. 83 (1963).
3. *Federal Rule of Evidence 404(b).* The government shall advise the defendant of its intention to introduce evidence in its case in chief at trial, pursuant to Rule 404(b) of the Federal Rules of Evidence. This requirement shall replace the defendant's duty to demand such notice.
(c) Unless a defendant, in writing, affirmatively refuses discoverable materials under Fed.R.Crim.P. 16(a)(1)(C), (D), or (E), the defendant shall make available to the government all discoverable information within the scope of Fed.R.Crim.P. 16(b), within twenty-one (21) days of arraignment.
(d) No less than fourteen (14) days prior to the start of jury selection, or on a date otherwise set by the Court for good cause shown, the government shall tender to the defendant the following:
1. *Giglio Material.* The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio,* 405 U.S. 150 (1972).
2. *Testifying Informant's Convictions.* A record of prior convictions of any alleged informant who will testify for the government at trial.
(e) The government shall anticipate the need for, and arrange for the transcription of, the grand jury testimony of all witnesses who will testify in the government's case in chief, if subject to Fed.R.Crim.P. 26.2 and 18 U.S.C. § 3500. The government, and where applicable, the defendant, are requested to make materials and statements subject to Fed.R.Crim.P. 26.2 and 18 U.S.C. § 3500 available to the other party at a time earlier than required by rule or law, so as toe avoid undue delay at trial or hearings.
(f) It shall be the duty of counsel for all parties to immediately reveal to opposing counsel all newly discovered information, evidence, or other material within the scope of this Rule, and there is a continuing duty upon each attorney to disclose expeditiously. The government shall advise all government agents and officers involved in the action to preserve all rough notes.

(g) No attorney shall file a discovery motion without first conferring with opposing counsel, and no motion will be considered by the Court unless it is accompanied by a certification of such conference and a statement of the moving party's good faith efforts to resolve the subject matter of the motion by agreement with opposing counsel. No discovery motions shall be filed for information or material within the scope of this Rule unless it is a motion to compel, a motion for protective order or a motion for an order modifying discovery. See Fed.R.Crim.P. 16(d). Discovery requests made pursuant to Fed.R.Crim.P. 16 and this Rule require no action on the part of this Court and should not be filed with the Court, unless the party making the request desires to preserve the discovery matter for appeal.

[Effective January 1, 2003.]

U. S. Dist. Ct. Rules N.D.N.Y., L.R.Cr.P. 14.1
NY R USDCTND CR L.R.Cr.P. 14.1
END OF DOCUMENT

U.S.Dist.Ct.Rules N.D.N.Y., L.R.Cr.P. 17.1.1

MCKINNEY'S NEW YORK RULES OF COURT
RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW
YORK
LOCAL RULES OF PRACTICE
SECTION XI. LOCAL RULES OF CRIMINAL PROCEDURE

Current with amendments received through 7/1/2003

At the request of any party or upon the court's own motion, the assigned judge may hold one or more pretrial **conferences** in any criminal action or proceeding. The agenda at the pretrial **conference** shall consist of any of the following items, so far as applicable, and such other matters designated by the judge as may tend to promote the fair and expeditious trial of the action or proceeding:
(a) Production of witness statements under the Jenks Act, Title 18 U.S.C. § 3500 or Fed.R.Crim.P. 26.2;
(b) Production of grand jury testimony of witnesses intended to be called at trial;
(c) Production of exculpatory or other evidence favorable to the defendant on the issue of guilt or punishment;
(d) Stipulation of facts which may be deemed proved at the trial without further proof by either party, and limitation of witnesses;
(e) Appointment by the court of interpreters under Fed.R.Crim.P. 28;
(f) Dismissal of certain counts and elimination from the case of certain issues; e.g., insanity, alibi, and statute of limitations;
(g) Severance of trial as to any co-defendant or joinder of any related case;
(h) Identification of informers, use of lineup or other identification evidence, use of evidence of prior convictions of defendant or any witness, etc.;
(i) Pretrial exchange of lists of witnesses intended to be called in person or by deposition to testify at trial, except those who may be called only for impeachment or rebuttal;
(j) Pretrial exchange of documents, exhibits, summaries, schedules, models or diagrams intended to be offered or used at trial;
(k) Pretrial resolution of objections to exhibits or testimony to be offered at trial;
(l) Preparation of trial briefs on controversial points of law likely to arise at trial;
(m) Scheduling of the trial and of witnesses;
(n) Settlement of jury instructions, voir dire questions, and challenges to the jury; and
(o) Any other matter which may tend to promote a fair and expeditious trial.

U. S. Dist. Ct. Rules N.D.N.Y., L.R.Cr.P. 17.1.1
NY R USDCTND CR L.R.Cr.P. 17.1.1
END OF DOCUMENT

U.S.Dist.Ct.Rules E.D.N.C., Local **Criminal** Rule 16.1

WEST'S NORTH CAROLINA RULES OF COURT
LOCAL RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
III. **CRIMINAL** RULES

Current with amendments received through July 1, 2004

RULE 16.1 MOTIONS RELATING TO DISCOVERY AND INSPECTION

(a) In General. A discovery motion in a criminal action (Fed. R. Crim. P.16) shall state that a request for discovery and inspection was made and denied. Counsel must also certify that there has been a good faith effort to resolve discovery disputes prior to the filing of any discovery motions.

(b) Criminal Pre-Trial Conference. Within 20 days after indictment or initial appearance, whichever comes later, the United States Attorney shall arrange and conduct a **pre-trial conference** with counsel for the defendant. At the **pretrial conference** and upon the request of counsel for the defendant, the Government shall permit counsel for the defendant to inspect and copy all discoverable evidence under Rule 16 of the Federal Rules of **Criminal** Procedure. Additionally, the Government shall provide the right to inspect, copy or photograph any exculpatory evidence.

At the **pre-trial conference** and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

(1) to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(2) to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(3) to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(4) to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which are the property of the defendant and which are within the possession, custody or control of the government;

(5) to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record; and

(6) to inspect, copy or photograph any exculpatory evidence.

(c) Discovery From Defendant. After discovery has been provided by the Government, and upon request of the Government, counsel for the defendant shall permit the Government to inspect any copy all discoverable evidence under Rule 16(b) of the Federal Rules of **Criminal** Procedure.

(d) Exchange of Discovery by Mail. The United States Attorney and counsel for the defendant, in lieu of the **conference**, may agree to the exchange of discovery material by mail.

(e) Duty of Disclosure. Any duty of disclosure and discovery set forth in Local Rule 16.1 is a continuing one and the United States Attorney and counsel for the defendant shall produce voluntarily any additional relevant information gained by either of them.

U.S.Dist.Ct.Rules W.D.Okl., LCrR16.1

WEST'S OKLAHOMA COURT RULES AND PROCEDURE
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT
OF
OKLAHOMA
B. LOCAL CRIMINAL RULES
IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Current with amendments received through 11/1/2003

LCrR16.1 DISCOVERY CONFERENCE

(a) Time for Discovery Conference. Counsel for the parties shall meet and confer at a discovery conference within ten (10) days after a plea of not guilty is entered.
(b) Joint Statement. Within three (3) days following completion of the required discovery conference, the parties shall file with the Court Clerk a joint statement memorializing the discovery conference. (The Joint Statement of Discovery Conference shall conform to the form provided herein as Appendix V.)
(c) Discovery Material Not to Be Filed. Depositions, requests for documents, and answers and responses thereto, shall not be filed with the Clerk unless on order of the Court or unless they are attached to a motion, response thereto, or are needed for use in a trial or hearing.

[Effective May 1, 1998; amended effective October 14, 2003.]

U. S. Dist. Ct. Rules W.D.Okl., LCrR16.1
OK R USDCTWD LCrR16.1
END OF DOCUMENT

WEST'S OKLAHOMA COURT RULES AND PROCEDURE
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT
OF
OKLAHOMA
APPENDICES

APPENDIX V. JOINT STATEMENT OF DISCOVERY CONFERENCE

[Reference LCrR16.1(b)]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	CR-_____
v.	)	
	)	
Defendant(s).	)	

JOINT STATEMENT OF DISCOVERY CONFERENCE

This joint statement is submitted pursuant to LCrR16.1(b).

1. Date Conference Held: _____, within ten (10) days of the appearance before Magistrate Judge _____ where a plea of not guilty was entered.

2. Names of the attorneys who attended the conference:

U.S. Attorney/AUSA

_____

_____

_____

Defense Attorney

_____

_____

_____

Retained _____; Appointed: Federal Public Defender/Assistant FPD _____ or Panel Member

_____

Counsel met for purposes of exchanging discovery materials in accordance with the Federal Rules of Criminal Procedure as supplemented by the Local Criminal Court Rules and any orders of this Court and, as a result of the conference, the undersigned counsel report the following:

3. The specific time, date and place at which the offense(s) charged is/are alleged to have been committed:

4. (a)(1) Any contested issues of discovery and inspection raised by counsel for plaintiff:

(2) Any contested issues of discovery and inspection raised by counsel for defendant:

(b) Any additional discovery or inspection desired by either party:

5. The fact of disclosure of all materials favorable to the defendant or the absence thereof within the meaning of *Brady v. Maryland* and related cases:

Counsel for plaintiff expressly acknowledges continuing responsibility to disclose any material favorable to defendant within the meaning of *Brady* that becomes known to the Government during the course of these proceedings.

6. The fact of disclosure of the existence or nonexistence of any evidence obtained through electronic surveillance or wiretap:

7. The fact of disclosure of the contemplated use of the testimony of an informer. (Include only the fact an informer exists and not the name or testimony thereof):

8. The fact of disclosure of the general nature of any evidence of other crimes, wrongs, or acts the government intends to introduce at trial pursuant to Fed.R.Evid. 404(b):

9. The fact of disclosure of the prior felony convictions of any witness the government intends to call in its case-in-chief:

10. The resolution, if any, of foundational objections to documentary evidence to be used by both parties (except for the purpose of impeachment):

11. The resolution, if any, of chain-of-custody matters (where at issue):

12. The resolution, if any, of the admissibility of any reports containing scientific analysis without requiring the expert's attendance at trial:

13. The parties will provide each other with the opportunity to inspect any demonstrative evidence, representational exhibits or charts.
Counsel for both parties state that presently there are no additional matters of discovery presently known.
Counsel expressly acknowledges the obligation to produce these item(s) as soon as practicable, but in no event later than ten (10) days prior to the trial of this cause.
Counsel also expressly acknowledges continuing obligation to disclose any materials that become known to counsel during the course of the pretrial investigation of this cause.

14. Notice of Alibi:

15. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition:

16. Notice of Defense Based on Public Authority:

At the conclusion of this conference, counsel conferred concerning the contents of this joint statement.
Respectfully submitted,
United States Attorney

_____
Assistant U.S. Attorney (address) (telephone number)

_____
Counsel for Defendant (address) (telephone number)

[Effective May 1, 1998.]

U.S.Dist.Ct.Rules W.D.Okl., LCrR16.2

WEST'S OKLAHOMA COURT RULES AND PROCEDURE
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT
OF
OKLAHOMA
B. LOCAL CRIMINAL RULES
IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Current with amendments received through 11/1/2003

LCrR16.2 **DISPUTED DISCOVERY MATTERS**

Under Rule 16 of the Federal Rules of Criminal Procedure, it is expected the parties will complete **discovery** themselves, and that the necessity of filing **discovery** motions is eliminated except when **disputes** arise. **Discovery** orders are hereby eliminated except when irreconcilable **disputes** arise. The Court shall not hear any such motion unless counsel for the movant certifies in writing to the Court that the opposing attorneys have conferred in good faith and have been unable to resolve the **dispute**.

[Effective May 1, 1998.]

U. S. Dist. Ct. Rules W.D.Okl., LCrR16.2
OK R USDCTWD LCrR16.2
END OF DOCUMENT

U.S.Dist.Ct. Rules D.N.H., LCrR 16.1

WEST'S NEW HAMPSHIRE RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
XII. CRIMINAL RULES

LCrR 16.1 ROUTINE DISCOVERY

The parties shall disclose the following information without waiting for a demand from the opposing party.

(a) Material Discoverable Pursuant to Fed.R.Crim.P. 16.

(1) *By the Government.* The government shall disclose information described in Fed. R. Crim. P. 16(a)(1) within fourteen (14) days after the arraignment unless the parties agree on a different date or unless the defendant notifies the government within that time period and prior to receipt of such information that the defendant declines to receive that information.

(2) *By the Defendant.* The defendant shall disclose the information described in Fed.R.Crim.P. 16(b) within thirty (30) days after the arraignment unless the parties agree on a different date or unless the defendant has timely notified the government pursuant to LCrR 16.1(a)(1) that the defendant declines reciprocal discovery.

(b) Electronic Communications. The government shall disclose any evidence suggesting that the government has intercepted the defendant's wire or electronic communications, as defined in 18 U.S.C. § 2510, within fourteen (14) days after the arraignment.

(c) Exculpatory and Impeachment Material. The government shall disclose any evidence material to issues of guilt or punishment within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and related cases, and any impeachment material as defined in *Giglio v. United States*, 405 U.S. 150 (1972), and related cases, at least twenty (20) days before trial. For good cause shown, the government may seek approval to disclose said material at a later time.

(d) Witness Statements. The government shall disclose any witness statements, as defined in Fed.R.Crim.P. 26.2(f) and 18 U.S.C. § 3500, at least seven (7) days prior to the commencement of the proceeding at which the witness is expected to testify unless the government determines that circumstances call for later disclosure as allowed by Rule 26.2 and 18 U.S.C. § 3500.

(e) Fed. R. Evid. 404(b) Material. The government shall disclose the general nature of any evidence that it intends to introduce pursuant to Fed. R. Evid. 404(b) at least seven (7) days prior to trial.

(f) Exhibits. The parties shall exchange and file exhibit lists at least seven (7) days prior to trial. Objections to exhibit lists shall be filed on the day of trial.

(g) Witness Lists. The parties shall exchange and file witness lists at least seven (7) days prior to trial. For good cause shown, either party may seek court approval to exchange witness lists at a later date.

[Former LR 116.1 effective January 1, 1996; amended and redesignated as LCrR 16.1, effective January 1, 1997.]

U.S.Dist.Ct. Rules D.N.H., LCrR 16.2

WEST'S NEW HAMPSHIRE RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
XII. CRIMINAL RULES

LCrR 16.2 DUE DILIGENCE AND DUTY TO SUPPLEMENT

Parties shall exercise due diligence in attempting to comply with their disclosure obligations. Parties shall supplement their disclosures whenever responsive information is discovered after the deadlines established under these rules.

[Former LR 116.2 effective January 1, 1996; redesignated as LCrR 16.2 effective January 1, 1997.]

U. S. Dist. Ct. Rules D.N.H., LCrR 16.2
NH R USDCT LCrR 16.2
END OF DOCUMENT

U.S.Dist.Ct.Rules E.D.Wis., Crim L.R. 16.1

WEST'S WISCONSIN COURT RULES AND PROCEDURE
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN
PART C. CRIMINAL RULES
III. ARRAIGNMENT AND PREPARATION FOR TRIAL

Current with amendments received through 11/1/2003

CRIMINAL L.R. 16.1 OPEN FILE POLICY

(a) At arraignment, the government must state on the record to the presiding judicial officer whether it is following the **open file policy** as defined in **Criminal L.R. 16.1**(b). If the government states that it is following the **open file policy** and the defense accepts such discovery materials, then the defendant's discovery obligations under Fed.R.Crim.P. 16(b) must arise without further government motion or request. If the government is following the **open file policy**, the government need not respond to and the Court must not hear any motion for discovery under Fed.R.Crim.P. 16(a) or 16(b) unless the moving party provides in the motion a written statement affirming (i) that a conference with opposing counsel was conducted in person or by telephone, (ii) the date of such conference, (iii) the names of the government counsel and defense counsel or defendant between whom such conference was held, (iv) that agreement could not be reached concerning the discovery or disclosure that is the subject of the motion, and (v) the nature of the dispute.
(b) As defined by the United States Attorney's Office, "**open file policy**" means disclosure without defense motion of all information and materials listed in Fed.R.Crim.P. 16(a)(1)(A), (B), and (D); upon defense request, material listed in Fed.R.Crim.P. 16(a)(1)(C); material disclosable under 18 U.S.C. § 3500 other than grand jury transcripts; reports of interviews with witnesses the government intends to call in its case-in-chief relating to the subject matter of the testimony of the witness; relevant substantive investigative reports; and all exculpatory material. The government must retain the authority to redact from open file material anything (i) that is not exculpatory and (ii) that the government reasonably believes is not relevant to the prosecution, or would jeopardize the safety of a person other than the defendant, or would jeopardize an ongoing criminal investigation. The defendant retains the right to challenge such redactions by motion to the Court.
(c) Unless these items contain exculpatory material, "open file materials" do not ordinarily include material under Fed.R.Crim.P. 16(a)(1)(E), government attorney work product and opinions, materials subject to a claim of privilege, material identifying confidential informants, any Special Agent's Report (SAR) or similar investigative summary, reports of interviews with witnesses who will not be called in the government"s case-in-chief, rebuttal evidence, documents and tangible objects which will not be introduced in the government's case-in-chief, rough notes used to construct formal written reports, and transcripts of the grand jury testimony of witnesses who will be called in the government's case-in-chief.
(d) Unless otherwise ordered by the Court, upon defense request materials described in Fed.R.Crim.P. 16(a)(1)(E) must be disclosed to the defense not later than 15 days before commencement of the trial, unless the government shows good cause for later disclosure. Grand jury transcripts of any and all witnesses the government intends to

call at trial will be made available to the defense no later than one business day before commencement of the trial. The defense must disclose materials described in Fed.R.Crim.P. 16(b)(1)(C) as soon as reasonably practicable after the government's disclosure under Fed.R.Crim.P. 16(a)(1)(E), and in any event not later than two business days before a defense expert witness testifies at trial, unless the defense shows good cause for later disclosure.

(e) In a case in which the government is following the **open file policy**, the defense must disclose materials described in Fed.R.Crim.P. 16(b)(1)(A) and (B) as soon as reasonably practicable, and in any event not later than 15 days before commencement of the trial, unless the defense shows good cause for later disclosure.

(f) If the government elects not to follow the **open file policy** described in **Criminal L.R. 16.1**(b), discovery must proceed pursuant to Fed.R.Crim.P. 16 and **Criminal L.R.** 12.1(c).

[Effective January 31, 2001.]

U. S. Dist. Ct. Rules E.D.Wis., Crim **L.R. 16.1**
WI R USDCTED Crim **L.R. 16.1**
END OF DOCUMENT

Terry Deppner/WVSD/04/USCOURTS@USCOURTS
09/07/2004 09:21 AM

To Laural Hooper/Research/FJC@FJC
cc
bcc
Subject Fw: Request for Information for the Advisory Committee on Cri

Dear Ms. Hooper,

You will have to read the whole sequence of this e-mail to get the comments from the U. S. Attorney's Office in our District on the Brady doctrine. Hope this is helpful.

Thanks,
Terry Deppner, Clerk
U. S. District and Bankruptcy Courts
Southern District of West Virginia
(304) 347-3055

---- Forwarded by Terry Deppner/WVSD/04/USCOURTS on 09/07/2004 09:23 AM ----

"Philip.Wright@usdoj.gov" <Philip.Wright@usdoj.gov>
09/02/2004 11:21 AM

To "'Terry_Deppner@wvsd.uscourts.gov'" <Terry_Deppner@wvsd.uscourts.gov>
cc
Subject RE: Request for Information for the Advisory Committee on Cri

Terry,

I understand the request, although when I sent you the response, I probably should have gone back to that e-mail to re-read it.

-----Original Message-----
From: Terry_Deppner@wvsd.uscourts.gov
[mailto:Terry_Deppner@wvsd.uscourts.gov]
Sent: Thursday, September 02, 2004 10:54 AM
To: Wright, Philip
Subject: RE: Request for Information for the Advisory Committee on Cri

Dear Phil,

I appreciate your response and will forward it to the Federal Judicial Center. After you read the entire text of the FJC's request which I forwarded to you, did it make any more sense to you, or were you still as confused? I tried to put in my email to you by just copying their request word-for-word.

Thanks,
Terry Deppner
(304) 347-3055

"Philip.Wright@usdoj.gov" <Philip.Wright@usdoj.gov>
09/01/2004 09:49 AM

To
"'Terry_Deppner@wvsd.uscourts.gov'" <Terry_Deppner@wvsd.uscourts.gov>
cc
"Kasey.Warner@usdoj.gov" <Kasey.Warner@usdoj.gov>,
"'Mary_Newberger@fd.org'" <Mary_Newberger@fd.org>
Subject
RE: Request for Information for the Advisory Committee on Cri

Terry,

As you know, since I called to ask you about the questions, I too was somewhat unsure about the questions and how to respond.

I don't think I can answer directly the question about the nature and scope of the government's due diligence obligations. However, in addressing our local practice, while the local rules do not expressly address Brady/Giglio obligations (other than through the standard request form), this Office's obligation to turn over favorable evidence is set forth in Supreme Court and 4th Circuit case law. Use of the standard request form triggers our obligation, and that obligation is continuous. That is, a defendant need not file numerous "Brady" requests after we have filed our provided our initial discovery response. (I do not address a situation where a defendant does not make a request for Brady/Giglio information. I have never seen such a case.) In that respect, our position appears to be consistent with what Lou has written below.

With respect to sanctions, I agree with Lou that a defendant could move for sanctions if the government violates its discovery obligation under Brady. I take no position here on what an appropriate sanction might be in a given case.

Phil

-----Original Message-----
From: Mary_Newberger@fd.org [mailto:Mary_Newberger@fd.org]
Sent: Tuesday, August 31, 2004 4:47 PM
To: Warner, Kasey; Wright, Philip; Terry_Deppner@wvsd.uscourts.gov
Subject: Re:Request for Information for the Advisory Committee on Cri

Terry,
I'm not entirely sure I understand the questions, but given the extremely limited time to respond to this inquiry I will have to make several asumptions:
that the inquiries are directed to this district specifically and in particular
to practice under the standard discovery request/order system we currently

use.
In light of those assumptions my answers are:
1. The Standard discovery Request and Stand Discovery Order do not contain an explicitly stated requirement on the part of the government to exercise due diligence in locating and disclosing Brady material. However, the Order does not relieve the government of any obligations as defined and delineated in case law.

2. The Court can impose sanctions for the Government's failure [either party's] failure to meet their discovery obigations. The Standard Discovery Requests order makes a specific reference to Local Rule 1.01(c) & (d) which states that the government (c) and the defendant (d) "must provide the requested material" within 10 days of the Request (c) and of the receipt of the requested material (d). This Rule, and reference to it in the Standard Discovery Request, impose a mandatory obligation on the parties to comply with the matters set out in the Request. Upon failure to comply with the Request, the opposing party may seek sanctions from the District Court without the necessity of first obtaining an order from the court requiring the party to comply with the request. In this way, the use of the Standard Discovery Request, in combination with the local rule, result in judicial economy----one of the usual steps in the process is eliminated: request?motion to compel/order?noncompliance=sanctions Request & local rule?noncompliance=sanctions

Lou

_____Reply Separator_____
Subject: Request for Information for the Advisory Committee on Crimin
Author: Terry_Deppner@wvsd.uscourts.gov
Date: 8/30/2004 4:21 PM

In July 2004, Judge Edward Carnes, Chair of the Advisory Committee on Criminal Rules, asked the Federal Judicial Center (FJC) to conduct a study of federal local rules of court, state laws, and state court rules relating to the principles announced in Brady v. Maryland and its progeny. The Committee is interested in learning whether federal district courts and

state courts have adopted formal standards or rules providing specific guidance to prosecutors on discharging the Brady obligations.

Pursuant to the direction of our judges, I shared the revised Standard Arraignment Order and Discovery Requests form which was amended by Order entered with the FJC.

(See attached file: 112103ord.pdf)

Two of the judges also suggested that I contact you for your input on the following areas of concern by the FJC on behalf of the Advisory Committee on Criminal Rules. These two areas are:
(1) whether there exists a due diligence obligation on the government to located and disclose Brady material favorable to the defendant; and
(2) whether the court can impose sanctions for hte government's failure to comply with disclosure procedures.

The e-mail that requested this information was dated August 26, 2004, with a turnaround time of September 1, 2004, for inclusion in the report to the Criminal Rules Committee at its October 2004 meeting. I was in our Huntington Division on Friday with Chief Judge Faber and Judge Chambers on August 27, 2004, and did not read this e-mail until today, so I apologize for the shortness in response time.

Please let me know if there are any comments you would like for me to forward.

Thanks,
Terry Deppner, Clerk
U. S. District and Bankruptcy Courts
Southern District of West Virginia

(304) 347-3055

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

RE: AMENDMENT OF LOCAL RULES OF CRIMINAL PROCEDURE 1.01 (UNIFORM LOCAL CRIMINAL RULE NUMBER 10.1 AND 16.1)

ORDER

In order to conform to the 2002 amendments to the Federal Rules of Criminal Procedure, it is hereby **ORDERED** that Form 4, the Arraignment Order and Standard Discovery Requests, referred to in Local Rule of Criminal Procedure 1.01(a), is amended as set forth in the amended Form 4 attached to this order.

It is further **ORDERED** that Local Rule of Criminal Procedure 1.01(b) is amended to reflect the new lettering of the subdivisions of Rule 16, Fed. R. Crim. Pro., and shall read as follows:

> *(b) If counsel for the defendant requests discovery under FR Cr P 16(a)(1)(E), (F), or (G), in an Arraignment Order and Discovery Request form, the defendant is obligated to provide any reciprocal discovery that may be available to the government under FR Cr P 16(b)(1)(A), (B), or (C).*

With the exception of these amendments, the remaining text of Local Rule of Criminal Procedure 1.01 shall remain in full force and effect.

ENTER:

David A. Faber
DAVID A. FABER, CHIEF JUDGE

CHARLES H. HADEN II, JUDGE

JOHN T. COPENHAVER, JR., JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
_____ DIVISION

UNITED STATES OF AMERICA

v. Criminal No.

ARRAIGNMENT ORDER AND
STANDARD DISCOVERY REQUESTS

I. ARRAIGNMENT ORDER

[Defendant present] At _____, on the _____ day of _____, 20___, came the United States of America by _____, Assistant United States Attorney, and also came the defendant in person, and by **court-appointed/retained** counsel, _____, for the purpose of an arraignment.

After the Court interrogated the defendant and was satisfied that the defendant had received a copy of the indictment, and had read and understood the contents thereof, and that his/her attorney had explained the nature of the charges to him/her, the defendant entered a voluntary plea of **NOT GUILTY** to the indictment.

[Defendant not present] At _____, on the _____ day of _____, 20___, came the United States of America by _____, Assistant United States Attorney, and also came _____, **court-appointed/retained** counsel for the defendant, who had previously waived his/her right to be present at the arraignment, which waiver was accepted. A **NOT GUILTY** plea to the indictment was entered for the defendant, pursuant to the waiver.

IT IS ORDERED that this case be set for trial to a jury at _____ a.m. on the _____ day of _____, 20__, in _____, before the Honorable _____.

IT IS FURTHER ORDERED that a pretrial hearing on motions in this case be held on the _____ day of _____, 20___, at _____ __.m. in _____. Pursuant to Rule 1.01(h) of the Local Rules of Criminal Procedure for the Southern District of West Virginia (Uniform Local Criminal Rule Number 10.1), counsel must notify the presiding judge whether either party will seek to present evidence at the pretrial hearing on motions. Further, counsel must immediately notify the presiding judge if agreement has been reached on all pretrial issues, rendering the pretrial hearing on motions unnecessary.

IT IS FURTHER ORDERED that if the Standard Discovery Requests are elected, then pretrial motions are due on or before the _____ day of _____, 20__, with copies provided to the presiding judge's chambers. Proposed Voir Dire Questions and Jury Instructions are due to the presiding judge on or before the _____ day of _____, 20__.

On or before the _____ day of _____, 20__, counsel is requested to provide a list of prospective witnesses to chambers for use in voir dire; such list need not be served on opposing counsel.

The defendant did/did not execute a waiver of right to be present at hearings on motions prior to trial.

With respect to a defendant represented by court-appointed counsel, **IT IS FURTHER ORDERED** that the defendant is given the right to subpoena witnesses to testify in this case on the date of trial, and the costs incurred by the process and fees of the witnesses so subpoenaed be paid in the same manner in which similar costs and fees are paid in the case of witnesses so subpoenaed on behalf of the government.

II. CUSTODIAL/NON-CUSTODIAL STATUS

(check applicable sections)

_____(I) The defendant was previously ordered detained pending trial.

_____(II) The government has moved for a detention hearing, and the Court hereby ORDERS that a detention hearing be held on the ___ day of _____, 20__, at _____. The defendant is remanded to the temporary custody of the United States Marshal pending the detention hearing.

_____(III) The defendant was previously released on a surety/non-surety bond in the amount of $_____ with special conditions as set forth in the Order Setting Conditions of Release, and it is ORDERED that said bond and Order shall continue.

_____(IV) The defendant is hereby ORDERED released upon execution of a surety/non-surety bond in the amount of $_____, as set forth in the Order Setting Conditions of Release.

_____(V) The defendant is hereby ORDERED detained as set forth in the Detention Order.

III. STANDARD DISCOVERY REQUEST FORM

(initial "a" or "b")

_____(a) The defendant has elected to utilize the Standard Discovery Requests, as set forth in Rule 1.01 of the Local Rules of Criminal Procedure for the Southern District of West Virginia (Uniform Local Criminal Rule Numbers 10.1 and 16.1).

_____ (b) The defendant has elected **NOT** to utilize the Standard Discovery Requests, as set forth in Rule 1.01 of the Local Rules of Criminal Procedure for the Southern District of West Virginia (Uniform Local Criminal Rule Numbers 10.1 and 16.1). Accordingly, the defendant is hereby ORDERED to file all pretrial motions together with supporting memoranda within twenty (20) days of this date, not later than _____, and to provide copies to the presiding judge's chambers. Responses shall be filed within seven (7) days, not later than _____, with copies provided to the presiding judge's chambers..

Whereupon, the following **Standard Discovery Requests** were made:

1. On Behalf of the Defendant, the Government Is Requested to: (defense counsel must initial all applicable sections)

_____A. Disclose to defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial. [F.R.Crim.P. 16(a)(1)(A)].

_____B. **[Individual defendant]** Disclose to defendant and make available for inspection, copying or photographing, all of the following: (I) any relevant written or recorded statement by the defendant if the statement is within the government's possession, custody, or control; and the attorney for the government knows--or through due diligence could know--that the statement exists; (ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and (iii) the defendant's recorded testimony before a grand jury relating to the charged offense. [F.R.Crim.P. 16(a)(1)(B)].

_____C. **[Organization defendant]** Where the defendant is an organization, e.g., corporation, partnership, association or labor union, disclose to the defendant any statement described in F.R.Crim.P. 16(a)(1)(A) and (B), if the government contends that the person making the statement (I) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or (ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent. [F.R.Crim.P. 16(a)(1)(C)].

_____D. Furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows--or through due diligence could know--that the record exists. [F.R.Crim.P. 16(a)(1)(D)].

_____E. Permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control, and (I) the item is material to preparing the defense; (ii) the government intends to use the item in its case in chief at trial; or (iii) the item was obtained from or belongs to the defendant. [F.R.Crim.P. 16(a)(1)(E)].

_____F. Permit the defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if (I) the item is within the government's possession, custody or control; (ii) the attorney for the government knows--or through due diligence could know--that the item exists; and (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial. [F.R.Crim.P. 16(a)(1)(F)].

_____G. Give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under Federal Rules of Criminal Procedure 16(b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. [F.R.Crim.P. 16(a)(1)(G)].

_____H. Disclose to defendant all evidence favorable to defendant, including impeachment evidence, and allow defendant to inspect, copy or photograph such evidence.

_____I. Notify defendant of all evidence the government intends to introduce pursuant to Rule 404(b) of the Federal Rules of Evidence.

_____J. Disclose to defendant all reports of government "mail cover", insofar as the same affects the government's case against the defendant or any alleged aiders and abettors or co-conspirators.

_____K. Disclose to defendant any matter as to which the government will seek judicial notice.

_____L. Disclose to defendant and make available for inspection, copying or photographing, the results of any interception of a wire, oral or electronic communication in the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence could become known, to the attorney for the government, which contains any relevant statement made by the defendant or which is material to the preparation of the defendant's defense or which is intended for use by the government as evidence in its case-in-chief at the trial. For each such interception, disclose (a) any application for an order authorizing the interception of a wire or oral

communication, (2) any affidavits filed in support thereof, and (3) any court order authorizing such interception.

_____M. Provide notice to defendant of the government's intention to use evidence pursuant to Rule 12(b)(4)(B) of the Federal Rules of Criminal Procedure.

2. Government Responses to Defendant's Standard Discovery Requests.

(initial line)

_____A. Pursuant to Local Rule 1.01(c) (Uniform Local Criminal Rule Number 16.1), the Government hereby agrees to provide the materials to the defendant not later than: _____.

> [the local rule provides that the deadline for disclosure should ordinarily be set ten (10) days from the date of this Order, or as otherwise agreed by the parties, or ordered by the Court].

Further, the government must file a written response to the defendant's standard discovery requests with the Clerk within the time frame set forth above.

3. Reciprocal Discovery and Filing of Additional Motions by Defendant.

A. Pursuant to Local Rule 1.01(d) (Uniform Local Criminal Rule Number 16.1), the defendant shall provide to the Government any required reciprocal discovery within **ten (10) days** of receipt of the requested materials and filing of the government's written response to the defendant's discovery requests.

B. Pursuant to Local Rule 1.01(e) (Uniform Local Criminal Rule Number 16.1), the defendant shall file all additional motions with the Court **within ten (10) days** of receipt of the requested materials and filing of the government's written response to the defendant's discovery requests.

4. Continuing Duty of Disclosure.

The defendant and the government agree that their respective duties of disclosure and discovery pursuant to this order are continuing, and that they shall produce additional responsive information as soon as it is received, and in no event later than the time for such disclosure as required by law, rule of criminal procedure, or order of court.

IV. DISCLOSURE OF JENCKS ACT, RULE 26.2 MATERIALS; AND REQUEST FOR JURY QUESTIONNAIRES

(government and defense counsel initial and fill in lines)

_____A. The defendant and the government agree that all Jencks Act and Rule 26.2, F.R.Crim.P., material will be furnished to opposing counsel _____ days prior to any hearing, trial, or other event triggering the required disclosure of such material.

_____B. The defendant and the government request that the jury questionnaires answered by the petit jurors on the current panel called in this case be made available to each party for inspection and copying, which motion is **GRANTED** by the Court.

_____C. The defendant agrees that all material provided by the government which is subject to the provisions of Rule 6(e) of the F.R.Crim.P. will be used only in the preparation of the defense and will not be copied or published to any person whose knowledge of the same is not necessary to the preparation of the defense and, further, that upon request, all copies of the same will be returned to the government or destroyed at the close of the case.

The Clerk of this Court is directed to send a copy of this Order to the defendant, counsel of record, the United States Marshal and the United States Probation Office.

ENTER: _____

_____
UNITED STATES MAGISTRATE JUDGE

Inspected and Approved by:

_____
Counsel for Defendant

_____
Assistant United States Attorney

U.S.Dist.Ct.Rules D.R.I., **Rule 12**

WEST'S RHODE ISLAND **RULES** OF COURT
LOCAL **RULES** OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

Current with amendments received through 5/1/2004

RULE 12. MOTIONS

(a) Filing of and Response to Motion.
(1) The movant in every **motion** except **motions** to assign for hearing, to extend time, to compel under **Rule** 37(a)(2) of the Federal **Rules** of Civil Procedure, or to determine suffering under **Rule** 36 of the Federal **Rules** of Civil Procedure (hereafter "the excepted **motions**"), shall serve and file with the **motion** a separate memorandum of law containing the authorities and reasoning supporting his position and any affidavits and other papers or materials setting forth or evidencing facts on which he bases the **motion**. The clerk shall not accept a **motion** for filing unless it is accompanied by a memorandum of law and, on a **motion** for summary judgment, the statement required by **Rule** 12.1(a)(1) of these **Rules**.
(2) Except for excepted **motions**, which are unopposed, within 10 days after service upon him, the party against whom a **motion** is made shall serve and file, and any other party to the action may serve and file, a response to the **motion** stating whether he opposes or does not oppose the **motion**. Every party opposing a **motion** shall serve and file with his response a separate memorandum of law, containing the authorities and reasoning supporting his position, and any affidavits and other papers or materials setting forth or evidencing facts on which he opposes the **motion**. The clerk shall not accept for filing a response opposing a **motion** unless it is accompanied by a memorandum of law and, on a **motion** for summary judgment, the statement required by **Rule** 12.1(a)(1) of these **Rules**. For good cause the court may extend the time to serve and file a response to a **motion** and supporting memorandum of law, affidavits and other papers or materials.
If no response to a **motion** is served and filed, the court may make such orders as are just, including an order that the **motion** is unopposed and in the discretion of the court is deemed granted, or an order assessing reasonable expenses, including attorneys' fees, against the party against whom the **motion** is made, or his attorney, or both.
(b) Oral Hearings. Any party making or opposing a **motion** may, by endorsement on the **motion** or the response to the **motion**, request oral argument. The request shall briefly state the reasons why the party believes oral argument is desirable and the time the party believes will be necessary for both parties to be heard. Allowance of oral hearing shall be within the sole discretion of the court.
(c) Motion Day. The first and third Mondays of each month shall be designated "**Motion** Day" for the hearing of arguments on all **motions** for which oral argument is to be had. The court may request oral argument on any **motion**, and will give counsel suitable advance notice of any such argument.
(d) All **Motions**, memoranda of law, responses, affidavits and other papers or materials shall be filed with the Clerk of court in duplicate, and with a certificate of service.
(e) Criminal Discovery. The Assistant United States Attorney and the attorney for the defendant shall meet within 8 days for the purpose of disclosure of the following material and information within the control of the respective parties, unless within the 8 day period the party entitled to disclosure shall file with the clerk a waiver thereof.
A. The obligation of the Government is to disclose:
1. Any relevant written or recorded statements made by the defendant, and, the

substance of any oral statement which the government intends to offer in evidence at trial made by the defendant in response to interrogation by any person then known to the defendant to be a government agent.
2. Those portions of grand jury minutes containing testimony of the accused. A request by the accused for a transcription of his grand jury testimony must be made within the time limits of this rule.
3. Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.
4. Subject to the limitations as provided in Federal Rules of Criminal Procedure 16(b), any books, papers, documents, photographs, or tangible objects, which the Government attorney intends to use in the hearing or trial or which were obtained from or belonging to the accused.
5. The Government attorney shall disclose any material or information which tends to negate the guilt of the accused or to reduce his punishment for the offense charged.
B. The Government attorney shall inform the attorney for the defendant:
1. Whether there is any recorded grand jury testimony which has not been transcribed.
2. Whether there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party or of his premises.
C. The obligation of the defendant is to disclose:
1. Any reports of statements of experts, made in connection with the particular case, including results of physical or mental examination and of scientific tests, experiments or comparisons.
No **motions** shall be filed by the defendant except after a meeting with the Government attorney, and all discovery shall close on the 10th day following the arraignment. The time for compliance with this **rule** shall not be extended except by special order of the Court. The Clerk will accept for filing only those discovery **motions** which state that the opposing party objects to said requested discovery. Willful violations of this **rule** shall subject counsel to sanctions by the Court.

(f) Duty to Address Speedy Trial Act Excludable Time Implications in Pretrial Motions

(a) Any **motion** for a continuance of a trial, and any other pretrial **motion** filed after arraignment, whether by the government or the defendant, shall include:
(1) a statement of whether or not any delay occasioned by the making, hearing or granting of that **motion** will constitute, in whole or in part, excludable time as defined by 18 U.S.C. § 3161(h);
(2) if so, a statement or estimation of the number of days to be excluded or a statement describing how excludable time should be determined by reference to a specified future event; and
(3) a statement of whether or not there has been any past or ongoing delay, related or unrelated to the subject matter of the motion, which is excludable, and whether or not it has previously been ruled upon; if so, a statement or estimation of the number of excludable days or a statement describing how excludable time should be determined by reference to a specified future event.
(b) The opposing party shall, in addition to its opposition to or agreement with the substance of the motion, state its agreement with or opposition to, in whole or in part, the statements or estimations of the moving party made pursuant to subdivision (a).
(c) In the event that either party requests a continuance pursuant to subdivision (a) or (b) and states that the delay therefrom should be excluded under 18 U.S.C. § 3161(h)(8), that party shall set forth the reasons in support of a finding that the ends of justice served by the granting of a continuance outweigh the best interests of the public and the defendant in a speedy trial.
(d) After considering the statements and estimations made pursuant to subdivision (a), (b) or (c) and after such hearing as it may direct the court shall rule whether or not any

portion of past or future delay is to be excluded. If delay is to be excluded:
(1) The court shall rule that a specific number of days or a period of time to be determined by reference to a specified future event shall be excluded from the computation of the time within which trial must commence.
(2) If the excluded time is granted under 18 U.S.C. § 3161(h)(8), the court shall set forth the reasons for its finding as required by that section.
(3) The court shall direct the clerk to record the excluded time on the docket.
(4) If necessary, the court shall change the date for trial.
(e) The court shall determine the manner of enforcement of this rule, which may include the use of Form Y with the authority to direct the clerk not to accept for filing any motion or opposition paper unless such motion or paper is in compliance with this rule.

U. S. Dist. Ct. Rules D.R.I., Rule 12
RI R USDCT Rule 12
END OF DOCUMENT

Michael Kunz/PAED/03/USCOURTS @USCOURTS

09/15/2004 04:52 PM

To Laural Hooper/Research/FJC@FJC@USCEXT

cc Arlen Coyle/MSND/05/USCOURTS@USCOURTS, Betty Griess/WYD/10/USCOURTS@USCOURTS, bill@med.uscourts.gov, Bruce

bcc

Subject Re: Request for information for the Advisory Committee on Criminal Rules

Dear Ms. Hooper:

In response to your e:mail dated August 26th, the District Court for the Eastern District of Pennsylvania adopted **Local Criminal Rule 16.1, *(Pretrial Discovery and Inspection)***, with regard to *Brady v. Maryland*, a copy of this rule is attached.

If you have any further questions please feel free to contact me.

Sincerely,
Michael E. Kunz,
Clerk of Court
U.S. District Court
Eastern District of PA
215-597-9221

Local Criminal Rule 16.wpd

Laural Hooper/Research/FJC@FJC

Laural Hooper/Research/FJC@FJC

08/26/2004 09:55 AM

Michael Hall/AKD/09/USCOURTS@USCOURTS, Debbie Hackett/ALMD/11/USCOURTS@USCOURTS, Perry Mathis/ALND/11/USCOURTS@USCOURTS, James McCormack/ARED/08/USCOURTS@USCOURTS, Chris Johnson/ARWD/08/USCOURTS@USCOURTS, Richard Weare/AZD/09/USCOURTS@USCOURTS, Sherri Carter/CACD/09/USCOURTS@USCOURTS, Jack Wagner/CAED/09/USCOURTS@USCOURTS, Sam Hamrick/CASD/09/USCOURTS@USCOURTS, Greg Langham/COD/10/USCOURTS@USCOURTS, Nancy Mayer-Whittington/DCD/DC/USCOURTS@USCOURTS, Peter Dalleo/DED/03/USCOURTS@USCOURTS, Sheryl Loesch/FLMD/11/USCOURTS@USCOURTS, Gregory Leonard/GAMD/11/USCOURTS@USCOURTS, Luther Thomas/GAND/11/USCOURTS@USCOURTS, James Rosenbaum/IASD/08/USCOURTS@USCOURTS, Cam Burke/IDD/09/USCOURTS@USCOURTS, Jack Waters/ILCD/07/USCOURTS@USCOURTS, Michael Dobbins/ILND/07/USCOURTS@USCOURTS, Norbert Jaworski/ILSD/07/USCOURTS@USCOURTS, Steve Ludwig/INND/07/USCOURTS@USCOURTS, Laura Briggs/INSD/07/USCOURTS@USCOURTS, Ralph DeLoach/KSD/10/USCOURTS@USCOURTS, Leslie G Whitmer/KYED/06/USCOURTS@USCOURTS, Jeffrey A Apperson/KYWD/06/USCOURTS@USCOURTS, Lawrence Talamo/LAMD/05/USCOURTS@USCOURTS, Robert Shemwell/LAWD/05/USCOURTS@USCOURTS, Felicia Cannon/MDD/04/USCOURTS@USCOURTS,

These cases require the government to fully disclose to the accused all exculpatory and impeachment evidence in its possession. The Committee is interested in learning whether federal district courts and state courts have adopted formal standards or rules providing specific guidance to prosecutors on discharging the *Brady* obligations.

We, at the FJC, have completed the survey of state laws and state court rules. At this time, we are working on identifying federal local court rules that (1) codify *Brady* , (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, we seek information regarding your court's practice in two areas: (1) whether there exists a due diligence obligation on the government to locate and disclose Brady material favorable to the defendant, and (2) whether the court can impose sanctions for the government's failure to comply with disclosure procedures.

There are a variety of ways to respond to our request, and we encourage you to respond in the way that is most convenient for you and/or your staff. You can do one of the following:

1. Reply directly to this e-mail by attaching an electronic version of the relevant rule, order, written description, etc.

2. Telephone us to discuss your court's practice and fax the relevant authority. If you choose this option, please call Laural Hooper at 202-502-4093 or Jennifer Marsh at 202-502-4095 between 9:00 a.m. and 5:00 p.m. EST Monday – Friday. Our fax number is 202-502-4199.

In the event you believe that you are not the best individual to respond to this request, please forward it to the appropriate person and inform us by email with the name and title of that individual so that we can contact him or her.

In order to include your district's information in our report, we need your information by **September 1.** The study results will be reported to the Criminal Rules Committee at its October 2004 meeting.

If you have any questions about the research request or about the study, please feel free to contact either one of us. Thank you for any assistance you can provide.

Sincerely,

Laural Hooper
Senior Research Associate
202-502-4093

Jennifer Marsh
Research Associate
202-502-4095

E.D. Pa.

RULE 16.1 PRETRIAL DISCOVERY AND INSPECTION

(a) Pretrial Conference. Within five days after the arraignment, or within such other period as the Court may set, counsel for the Government and for the defendant shall confer; and at such conference ("counsel's conference"), upon request of the defendant, the Government shall comply, or if compliance is then impossible, agree to comply as soon as possible with the requirements of Fed.R.Crim.P. 16(a)(1)(A-D).

(b) Disclosure of Evidence by the Defendant. If at the counsel's conference the defendant requests disclosure under subparagraph (a)(1)(C) or (D) of Fed.R.Crim.P. 16, upon compliance with such request by the Government, the defendant, upon request of the Government, shall comply with Fed.R.Crim.P. 16(b)(1)(A) and (B).

(c) Regulation of Discovery.

(1) If, in the judgment of the attorney for either party, the requested discovery is beyond the scope of Rule 16 or if the attorney has reasonable grounds to believe that a protective order should be entered regarding such a discovery request, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to opposing counsel, and shall specify the types of disclosure that are declined and the reasons therefor.

(2) If the defendant or the Government desires to contest such declination or seeks additional discovery not specified in these rules, its attorney shall promptly confer with opposing counsel with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court.

(3) In the event that the conference prescribed by subparagraph (c)(2) does not resolve the dispute concerning discovery of items not specifically mentioned in Rule 16, the party seeking disclosure may file a motion for such additional discovery on or before the date set for filing of pretrial motions under Fed.R.Crim.P. 12 and Local Rule 12.1. If the requested discovery materials are specifically mandated by Rule 16, then the declining party must move for a protective order on or before the date set for filing of pretrial motions under Fed.R.Crim.P. 12 and Local Rule 12.1. The motion papers for additional discovery or a protective order shall contain:

(A) the statement that the prescribed counsel's conference was held;

(B) the date of said conference;

(C) the name of opposing counsel with whom the conference was held;

(D) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion; and

(E) a request for a hearing to resolve the dispute, or a waiver of argument and a suggestion that the Court rule by reference to the motion papers alone, or a request that the party be permitted to make its showing, in whole or in part, in the form of a written statement to be inspected by the Judge alone. The answer to any motion under this subparagraph may contain a request for a hearing, or a statement of that party's opposition to any request for an ex parte showing.

(d) Failure to Comply. The failure of a party to comply with this Rule or with Fed.R.Crim.P. 16 may be brought to the attention of the Court at any time, whereupon the Court may take such action as is prescribed by Fed.R.Crim.P. 16(d), or such other action that the Court deems proper under the circumstances.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA **PLAINTIFF**

V.S. **CRIMINAL ACTION NUMBER: 3:04CR-75-H**

ERIC COMPTON **DEFENDANT**

ARRAIGNMENT ORDER

RECIPROCAL ORDER OF DISCOVERY

The above-styled case was called in open Court on August 27, 2004 for arraignment. The Court also conducted a detention hearing. There appeared Brian Butler, Assistant United States Attorney. The defendant, Eric Compton, appeared in person, with Scott T. Wendelsdorf, Assistant Federal Defender.

The defendant acknowledged his identity, was furnished a copy of the Indictment and advised of the nature of the charges contained therein.

Through counsel, formality of arraignment was waived and the defendant entered a plea of **NOT GUILTY** to the charges contained therein.

IT IS HEREBY ORDERED as follows:

1. This matter is assigned for trial before a jury on **OCTOBER 26, 2004, at the hour of 9:30 a.m.** before the Honorable John G. Heyburn II, Chief United States District Judge.

For the reasons stated on the record regarding the issue of detention,

IT IS FURTHER ORDERED that the defendant is **remanded** to the custody of the United States Marshal pending his appearance as directed by the Court. A separate Order of Detention pending trial will be entered into the record.

2. Defensive motions (except motions for discovery under Paragraph 3, infra) that have not previously been made at the time of arraignment pursuant to Local Rule 12.1 shall be filed eleven (11) days after the entry hereof, accompanied by a memorandum of authorities, with an extra photocopy of such memoranda being filed for the convenience of the Court. A response

thereto shall be filed by the United States within eleven (11) days of the filing of the defendant's motion accompanied by a memorandum of authorities.

All memoranda on motions shall be in conformity with Local Rule 12.1(g) on the form of briefs. Hearings on motions requiring evidentiary hearings will be set at a mutually convenient time. Counsel shall confer and have all necessary witnesses present and ready to testify at motion hearings.

3. Pre-trial discovery and inspection.

A. Within seven (7) days after the entry hereof, the United States Attorney and the defense counsel shall confer and, upon request, the United States shall permit the defendant to inspect and copy or photograph:

(1) Any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the United States, the existence of which is known, or by the exercise of due diligence may become known, to the United States Attorney;

(2) The substance of any oral statement which the United States intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a Government agent;

(3) Recorded testimony of the defendant, before a Federal Grand Jury which relates to the offense charged;

(4) Books, papers, documents, photographs, tangible objects, building, or places or copies or portions thereof which are within the possession, custody or control of the United States and which the United States intends to introduce as evidence in chief at the trial of this case;

(5) Results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the United States, the existence of which is know, or by the exercise of due diligence may become know, to the United States Attorney, and which are material to the preparation of the defense or which the United States intends to introduce as evidence in chief at the trial of this case;

(6) Copy of the prior criminal record of the defendant, if any, that is within the possession, custody or control of the United States, the existence of which is known, or by the exercise of due diligence may become known, to the United States; and

(7) Any tape recording made by Government agents of any conversation with the defendant.

B. THE DEFENDANT

The defendant shall likewise provide to the United States Attorney within seven (7) days after entry hereof the following information for the purpose of inspection, examination and photocopying:

(1) All books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce as evidence in chief at the trial; and

(2) Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial, or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to this testimony.

C. If, in the judgment of the United States Attorney, it would not be in the interests of justice to make any one or more disclosures set forth in Paragraph A and requested by defense counsel, the disclosure may de declined. A declination of any requested disclosure shall be in writing, directed to defense counsel, and shall specify the types of disclosure that are declined. If the defendant seeks to challenge the declination, he/she shall proceed pursuant to Subsection D below.

D. Additional Discovery or Inspection. If additional discovery or inspection is sought, defendant's attorney shall confer with the appropriate Assistant United States Attorney with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written and the United States Attorney shall respond in like manner.

E. In the event defendant thereafter moves for additional discovery or inspection, his/her motion shall be filed not later than fourteen (14) days prior to the trial. It shall contain:

(1) the statement that the prescribed conference with the Assistant United States Attorney

was held;

(2) the date of said conference;

(3) the name of the Assistant United States Attorney with whom the conference was held; and

(4) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of defendant's motion.

F. Any duty of disclosure and discovery set forth in this order is a continuing one and the United States Attorney shall produce any additional information gained by the Government.

G. Any disclosure granted by the Government pursuant to this order of material within the purview of Rule 16 (a)(2) and 16 (b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the defendant and granted by the Court.

4. A concise trial memorandum shall be filed by counsel for all parties seven (7) days prior to the date set for trial. The following format shall be followed for trial memoranda:

I. STATUTE INVOLVED AND ELEMENTS OF THE OFFENSE

(With discussion of authorities, if disputed.)

II. STATEMENT OF FACTS

III. SUBSTANTIVE ISSUES OF LAW WITH CITATIONS OF AUTHORITIES

(E.g., defense of entrapment; constitutional issues; Miranda, illegal search; elements of conspiracy, etc. All issues to be separately stated and discussed.)

IV. EVIDENTIARY ISSUES

(E.g., any problems in putting on the case, i.e., Bruton rule, learned treatises, lineup, authenticity of documents, mugshots, previous convictions, qualifications of experts, etc. - with

specific reference to the Federal Rule of Evidence involved and pertinent authorities as to the admissibility or non-admissibility of any expected controversial evidence.)

V. OTHER TRIAL PROBLEMS

(E.g., anticipated admonitions to be requested, i.e., accomplices, etc., or any other problem requiring a ruling of the Court, a stipulation by opposing counsel, or which will expedite the trial, i.e., timing of production of Brady or 3500 materials.)

VI. SUBSTANTIVE AND SPECIAL JURY INSTRUCTIONS

(Both parties shall submit drafts of proposed jury instructions concerning the substantive offense and any special instructions the party desires to have delivered. It is not necessary for a party to submit standard general instructions, although a party may do so if it desires. Parties must confer prior to submission of instructions and advise the Court of the instructions on which they agree, and those to which there are objections. Additional requests at the time of trial are to be kept to a minimum.)

VII. PROPOSED VOIR DIRE QUESTIONS

ENTERED BY ORDER OF THE COURT:
JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE
JEFFREY A. APPERSON, CLERK
BY: \S\ KATHRYN D. NIEMANN
DEPUTY CLERK

Copies: U.S. Attorney
Counsel for Defendant
U.S. Probation
U.S. Marshal
0|30