

**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

**Santa Rosa, CA
October 24-25, 2005**

AGENDA
CRIMINAL RULES COMMITTEE MEETING
OCTOBER 24-25, 2005
SANTA ROSA, CALIFORNIA

I. PRELIMINARY MATTERS

- A. Chair's Remarks, Introductions, and Administrative Announcements
- B. Review and Approval of Minutes of April 2005, Meeting in Charleston, South Carolina
- C. Status of Criminal Rules: Report of Rules Committee Support Office.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by Standing Committee and Judicial Conference and Pending Before the Supreme Court (No Memo)

- 1. Rule 5. Initial Appearance. Proposed amendment permits transmission of documents by reliable electronic means.
- 2. Rule 6. The Grand Jury. Technical and conforming amendment.
- 3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means.
- 4. 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.
- 5. Rule 41. Search and Seizure. Proposed amendment permits transmission of documents by reliable electronic means.
- 6. Rule 58. Petty Offenses and Other Misdemeanors. Proposed a amendment resolves conflict with Rule 5.1 concerning right to preliminary hearing.

B. Proposed Amendments Approved by Standing Committee for Publication. (Memo)

- 1. Rule 11. Pleas. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by eliminating the court's requirement to advise a defendant during plea colloquy that it must apply the Sentencing Guidelines

2. Rule 32. Sentencing and Judgment. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by: (1) clarifying that the court can instruct the probation office to include in the presentence report information relevant to factors set forth in 18 U.S.C. § 3553(a); (2) requiring the court to notify parties that it is considering imposing a non-guideline sentence based on factors not identified in the presentence report; and (3) requiring the court to enter judgment on a special form
3. Rule 35. Correcting or Reducing a Sentence. Proposed amendment conforms to the Supreme Court's decision in *United States v. Booker* by deleting subparagraph (B), which is consistent with the *Booker* holding that the sentencing guidelines are advisory, rather than mandatory
4. Rule 45. Computing and Extending Time. Proposed amendment clarifies the computation of an additional three days when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D))
5. Rule 49.1. Privacy Protection For Filings Made with the Court. Proposed new rule complies with section 205(c)(3) of the E-Government Act of 2002 "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The proposed new rule addresses concerns raised by documents filed electronically and also similar concerns raised by documents filed in paper form

III. REPORTS OF SUBCOMMITTEES

- A. Rules 1, 12.1, 17, 32, 43.1 (Crime Victims Rights Act package of rules) (Memo).
- B. Rule 16. Proposed Amendment Regarding Disclosure of Exculpatory and Impeaching Information (Memo).
- C. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal (Memo).

IV. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

- A. Rules 4 and 5, Professor Malone's Proposal (Memo)
- B. Rule 10, Waiver of Arraignment, Judge McClure's Proposal (Memo)

V. 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. Status Report on Time Counting Rules Project (Memo)**
- C. Other Matters**

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

- A. Spring Meeting – April 3-4, 2006, Washington, D.C.**
- B. Other**

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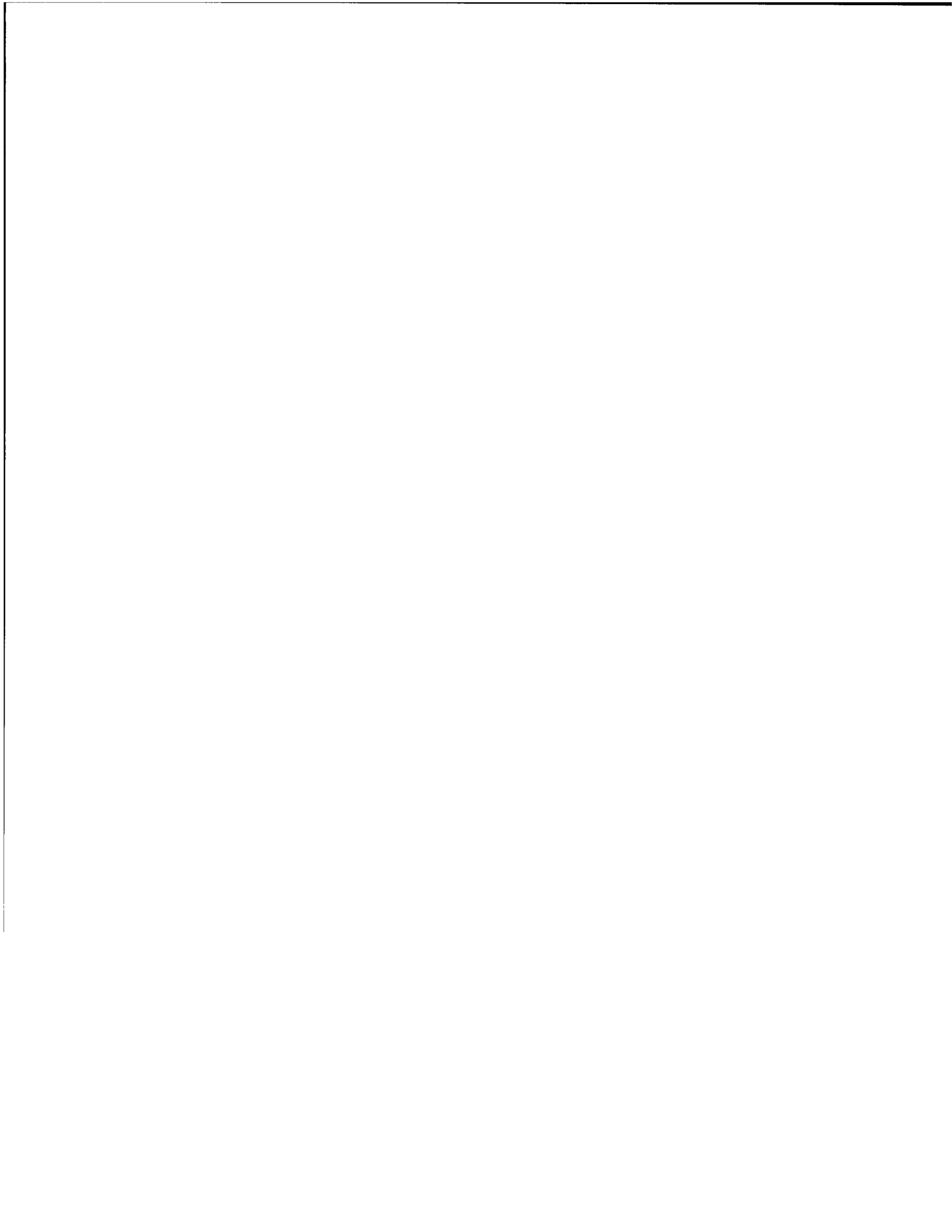
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**[DRAFT] MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE**

**April 4 & 5, 2005
Charleston, South Carolina**

The Advisory Committee on the Federal Rules of Criminal Procedure met at Charleston, South Carolina on April 4 and 5, 2005. 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 8:30 a.m. on Monday, April 4, 2005. The following persons were present for all or part of the Committee's meeting:

Hon. Susan C. Bucklew, Chair
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Hon. Robert H. Edmunds, Jr.
Prof. Nancy J. King
Mr. Robert B. Fiske, Jr.
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal
Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee, Mr. Christopher Wray, Assistant Attorney General of the Department of Justice; 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 Sara Sun Beale,

Duke University School of Law, Consultant to the Committee and Reporter Designate; Mr. Bob McCallum, Department of Justice; and Ms. Laurel Hooper, Federal Judicial Center. Professor Dan Capra, Reporter to the Evidence Rules Committee, participated for a portion of the meeting by telephone.

Judge Bucklew welcomed a new member, Justice Robert Edmunds, an Associate Justice of the Supreme Court of North Carolina, who replaced Judge Reta Struhbar. Judge Bucklew also noted that this would be the last official meeting for Judge Friedman and Mr. Campbell, who had completed six years of valuable service to the Committee. She also announced that the Reporter, Dave Schlueter, was completing 17 years of service and that his replacement would be Professor Sara Sun Beale.

II. APPROVAL OF MINUTES

Judge Trager moved that the minutes of the Committee's meeting in Santa Fe, New Mexico in October 2005 be approved. The motion was seconded by Judge Battaglia and, following corrections to the Minutes, carried by a unanimous vote.

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

A. Report on Rules Amendments from Chief, Rules Committee Support Office.

Mr. Rabiej informed the Committee that as part of the on-going consideration of proposed rules to the various rules of procedure, there was a growing concern from the practicing bar about possible inconsistencies between those rules, concerning various timing provisions. To that end, Judge Levi had appointed a committee, chaired by Judge Kravitz, to consider amending the rules to simplify timing requirements and make them as consistent as possible. He noted that Mr. Robert Fiske, a member of the Criminal Rules Committee, had been asked to be a member of Judge Kravitz's committee.

He also reported that the Appellate, Bankruptcy, and Civil Rules Committees were reviewing the comments from the bench and the bar on the proposed amendments to those rules that would permit courts to make electronic filing mandatory. He stated that several commentators had recommended including exceptions for pro se filers. He expected those committees to make their report to the Standing Committee at its June 2005 meeting. The Criminal Rules Committee had decided at its Fall 2004 meeting not to propose any amendments to the Criminal Rules, and instead rely upon the incorporation provision in Criminal Rule 49(d).

B. Rule Amendments Effective December 1, 2004.

The Reporter informed the Committee that the package of amendments approved by the Supreme Court in May 2004 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35), had become effective on December 1, 2004 without any changes by Congress.

C. Proposed Amendments Pending Before the Supreme Court.

The Reporter also mentioned that the following rules were currently pending before the Supreme Court:

1. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information.
2. Rules 29, 33 and 34; Proposed Amendments Re Rulings By Court On Motions to Extend Time for Filing Motions Under Those Rules.
3. Rule 32.1. 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.

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

Judge Bucklew and Professor Beale informed the Committee that the following rules had been published for comment, that the comment period had ended on February 15, 2005, and that two comments had been received on the proposed changes.

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.

The Committee briefly discussed a comment received from Mr. Frank Dunham, a Federal Public Defender, regarding his concern that the proposed amendment to Rule 5 would permit a magistrate judge to accept a non-certified electronic copy of a warrant. In his view, the rule should state that such copies are not "reliable electronic means." The Committee decided to make no further changes to Rule 5.

Following additional brief discussion on several style changes proposed by the Standing Committee's Style Subcommittee, Judge Jones moved that all of the published rules be forwarded to the Standing Committee with a recommendation that they be forwarded to the Judicial Conference. Judge Bartle seconded the motion, which carried with a unanimous vote.

IV. REPORTS OF SUBCOMMITTEES¹

A. Rules 11, 32, and 35; *Booker-FanFan* Package of Rules.

Judge Bucklew reported that following the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005) (holding that Sentencing Guidelines are advisory and not mandatory), she had asked Judge Friedman to chair a subcommittee to study the question of whether that case required any amendments to the Criminal Rules. Also serving on that Subcommittee were Judge Trager, Mr. Campbell, Professor King, and Ms. Rhodes.

Judge Friedman stated that Professors Beale and King had reviewed all of the Criminal Rules and had compiled a list of rules that they believed should probably be amended. The Subcommittee, in a series of telephone conference calls, had reviewed the

¹ Although several items on the agenda were discussed in an order different from that indicated in the published agenda—in order to accommodate the scheduled of several of the participants—they are reported here in the order in which they appeared on that agenda

list and based upon those discussions, Professor Beale had drafted proposed amending language to Rules 11, 32, and 35, along with proposed language for accompanying Committee Notes. The Subcommittee tried to be conservative as to changes but, he added, they believed that strong arguments existed for amending those three rules at this time.

1. Rule 11(b)(1)(M) (advice to defendant regarding application of sentencing guidelines).

Professor Beale explained the purpose of the proposed amendment to Rule 11, which included a provision recognizing that the court is to “calculate” the sentence under the Sentencing Guidelines and also specifically referenced 18 USC § 3553(a). In the discussion on the amendment, several members questioned whether the word “calculate” was appropriate, noting that some judges may not believe that they are required to calculate any guidelines following the Court’s decision in *Booker*. Other members stated that for now, the rules should recognize two separate steps in determining a sentence. There was also a brief discussion on whether it was necessary to specifically include a reference to § 3553. Following additional brief discussion, Judge Bartle moved that the amendment be approved, as drafted. Judge Friedman seconded the motion, which carried by a unanimous vote. Following the vote, Judge Friedman informed the committee that he and Professor Beale would consider using terms other than “calculate.”

2. Rule 32(d)(2)(F). Additional Information in Presentence Report.

Judge Friedman explained that the Subcommittee had recommended a change to Rule 32(d) to provide that the presentence report must also contain anything relevant to the factors listed in § 3553(a). During the brief discussion on this proposed amendment, Mr. Campbell expressed the concern that probation officers might be reluctant to include any additional information in the presentence report if the court does not explicitly require its inclusion. Judge Friedman moved that the amendment be approved and that it be published for comment. Judge Trager seconded the motion, which carried by a vote of 9 to 1.

3. Rule 32(h). Notice of Possible Departure from Sentencing Guidelines.

Judge Friedman explained that the Subcommittee had discussed whether it might be advisable to delete Rule 32(h) in its entirety but had ultimately decided to leave it in, at least for now. He added that the *Booker* decision should not really make any difference in the notice requirement. Judge Friedman explained that the Subcommittee had proposed two alternatives: The first version would make a distinction between “variances” and “departures.” The second version would make no distinction. Professor Beale observed that

“departures.” The second version would make no distinction. Professor Beale observed that some courts had used the term “variance” but that the Criminal Law Committee had rejected that term. During the following discussion, the Committee decided to use the first alternative, with some minor changes, which included using the term “non-guideline sentence” instead of the term “variance.”

Judge Friedman moved that the amendment be approved with a recommendation that it be published for comment. Professor King seconded the motion, which carried by an 8 to 2 vote.

4. Rule 32(k). Judgment.

Judge Friedman explained that the Subcommittee believed it was appropriate to amend Rule 32(k) to provide that when entering a judgment, the court must use the judgment form that had been approved by the Judicial Conference. The purpose of the amendment is to standardize the collection of data on federal sentences. Following a brief discussion, Judge Friedman moved that the amendment be approved and published for comment. Professor King seconded the motion, which carried by a unanimous vote.

5. Rule 35(b). Reducing a Sentence for Substantial Assistance.

Judge Friedman and Professor Beale explained the proposed amendment to Rule 35, which would delete (b)(1)(A) and (B) because those provisions assume that the sentencing guidelines are mandatory—a principle rejected by the Supreme Court in *Booker*. Judge Friedman moved that the amendment be approved and published for comment. Judge Trager seconded the motion, which carried by a vote of 10 to 1.

B. Rules 11 and 16; Proposed Amendment Regarding Disclosure of Brady Information;

Mr. Goldberg, chair of the Rule 16 Subcommittee, reported that the Subcommittee had continued its study of the proposal from the American College of Trial Lawyers, to the effect that Rule 16 should be amended to require the government to disclose to the defense evidence that could be favorable to the defendant. The issue had been initially discussed at the Committee’s May 2004 meeting and then again at the Committee’s October 2004 meeting. As a result of those discussions, the Subcommittee had continued its study of the proposal and had considered a study conducted by the Federal Judicial Center and a report from the Rules Committee Support Staff, which detailed the various local rules that already

addressed the issue. He reported that following additional discussion, the Subcommittee had decided to delete the “materiality” requirement from any proposed rule. He added that Ms. Rhodes had provided a memo detailing the Department of Justice’s opposition to an amendment to Rule 16.

He emphasized that the amendment would not codify *Brady* and that the proposed amendment would not address the issue in *Ruiz* regarding disclosure of information before entering a guilty plea.

A majority of the Subcommittee, he said, supported some sort of amendment to Rule 16. He noted that the Subcommittee had decided not to propose a 14-day requirement in the amendment.

Professor Beale commented that the Committee was faced with a policy decision — whether more evidence should be disclosed pre-trial. Mr. Fiske stated that because prior inconsistent statements and other impeachment evidence could be important, it was critical to have that information soon enough in the process to use it effectively.

Justice Edmunds noted that people have been taken off of death row because prosecutors failed to disclose evidence and that the issue before the Committee was an important one.

Ms. Rhodes expressed two key concerns about the proposal; timing and materiality. She pointed out that on multiple occasions the Committee had considered amendments to Rule 16, and that each time the Committee had considered reciprocal discovery provisions. She also stated that the Committee had considered the so-called *Brady* proposal on several previous occasions and had decided, for a variety of reasons, not to tackle the problem through a rule amendment. She pointed out that it is often difficult to distinguish between inculpatory and exculpatory evidence and that Rule 16 already provides adequate discovery in several significant respects, for example, with regard to documents and test results. She also raised concerns about the potential impact of the proposed amendment on the Jencks Act requirements.

Mr. Fiske agreed that if there is a conflict between disclosure of favorable information and the Jencks Act, the latter controls.

Ms. Rhodes explained that the Department has not reached any decision about whether to address this problem in the U.S. Attorneys’ Manual and that any amendment to Rule 16 should contain a materiality requirement.

Professor Schlueter pointed out that the Committee had considered the topic in the past, but that it had never really studied the issue to the extent it had been studied in this instance. He also observed that although there were instances of reciprocal discovery in Rule 16, that was not part of a long-range plan and that it had occurred on a case by case basis. In some instances, he noted, the Department had agreed to a change in Rule 16 if the defense was also required to disclose information.

There was also some discussion about whether an amendment to Rule 16 would require the government to shoulder the burden of proof on appeal if the defendant alleged a violation of the discovery requirement. Judge Friedman observed that the Subcommittee had apparently addressed the three main issues—Jencks, timing, and materiality.

Following additional brief discussion about the particular language of an amendment to Rule 16, Mr. Goldberg moved that the Committee proceed with the amendment to Rule 16. Mr. Fiske seconded the motion, which carried by a vote of 8 to 3.

C. Proposed New Criminal Rule 49.1 to Implement E-Government Act.

Judge Bucklew reported that the Rule 49.1 Subcommittee, chaired by Judge Bartle, had reviewed the proposed template for what would be new Rule 49.1 and had considered a number of issues raised during the Committee's discussion of that rule at the Fall 2004 meeting. Judge Bartle stated that the Subcommittee had considered the proposed changes to the template and generally approved of those changes.

Professor Capra (participating by telephone) pointed out that the provision in Rule 49.1(a)(5) concerning redaction of the city and state of the home address would be unique to the criminal version of the rule. Professor King questioned whether the redaction requirement should also extend to specific street addresses as well, at least in some cases. Ms. Rhodes responded that it would be difficult to limit such disclosure in some cases and not others.

There was also some discussion on the need in Rule 49.1(b)(1) regarding an exception to the redaction requirement, in criminal or civil forfeiture proceedings, for information about the address for real property.

Members of the Committee also focused on Rule 49.1(b)(6) concerning information relating to § 2254 and § 2255 proceedings and the provision in Rule 49.1(b)(7) regarding § 2241 proceedings not relating to immigration cases. The Committee decided to amend the

Committee Note to expressly state that disclosure in immigration cases would be covered in the civil rules version of the rule.

As a result of additional discussion, the Committee decided to delete any reference in the rule to "criminal case cover sheets."

Judge Bartle moved that the revised Rule 49.1 be approved and published for public comment. Mr. Campbell seconded the motion, which carried by a unanimous vote.

V. OTHER PROPOSED AMENDMENTS TO THE CRIMINAL RULES.

A. Rules 4 Arrest Warrant or Summons on a Complaint and Rule 5, Initial Appearance; Proposal to Amend Rules.

Judge Bucklew stated that the Committee had received materials from Professor Malone at William and Mary University School of Law. She had proposed that the Committee amend Rules 4 and 5 to implement the requirements of the Vienna Convention on Consular Relations, which requires that foreign citizens are to be advised of their right to contact their country's consulate when they are served with an arrest warrant or are at the initial appearance. Professor Beale noted that the issue is currently before the Supreme Court in the case of *Medellin v. Dretke*. Following brief discussion, Professor King moved that the proposal be tabled until the Committee's next meeting. Judge Battaglia seconded the motion, which carried by a unanimous vote.

B. Rule 6. Grand Jury; Technical Amendments

Judge Bucklew informed the Committee that as a result of congressional action on Rule 6, the question had been raised whether those amendments should be restyled to conform to the Committee's earlier proposed amendments to the same rule. Mr. Rabiej explained that the proposed amendments were strictly technical and conforming in nature and that it would normally not be necessary to publish the proposed changes for public comment. Following brief discussion, Judge Battaglia moved that the style amendments be made and forwarded to the Standing Committee with a recommendation that they be sent to the Judicial Conference, without being published for comment. Professor King seconded the motion, which carried by a unanimous vote.

C. Rule 10. Arraignment; Proposal to Amend Rule to Permit Defendant to Waive Arraignment.

Judge Bucklew informed the Committee that Judge James McClure had written to the Committee, recommending an amendment to Rule 10 that would permit the defendant to waive the arraignment. Several members noted that during the recent restyling project the Committee had considered a similar proposal but had decided not to permit a waiver of the arraignment itself, because several rules make the arraignment a triggering event. Following a brief discussion, Professor King moved that the proposal be tabled until the next meeting. Judge Battaglia seconded the motion, which carried by a unanimous vote.

D. Rule 16. Discovery and Inspection and Rule 32. Sentencing; Proposal to Amend.

Judge Bucklew informed the Committee that Mr. James Felman had proposed that Rules 16 and 32 be amended. Specifically, he recommended that Rule 32 be amended to require that a party providing information to the court regarding sentencing should be required to provide the opposing party with the same information. With regard to Rule 16, he recommended that the rule require the government and defendant to produce all documents, tangible materials, etc. that it intends to use at sentencing. During the ensuing discussion, there was a consensus that no amendments should be made to Rule 16 and that there are already adequate discovery mechanisms and requirements in Rule 32. The Committee decided not to pursue the proposals any further.

E. Rule 29. Motion for Judgment of Acquittal; Proposal to Amend Rule to Require Deferment of Ruling.

Judge Bucklew provided an overview of the status of a proposal from the Department of Justice to amend Rule 29, to require that in all cases, that court would be required to defer a ruling on a motion for judgment of acquittal until after verdict. She explained that the Committee at its meeting in Fall 2003 had approved the amendment in concept, but at the Spring 2004 meeting had decided not to pursue the amendment; at that time the information available to the Committee seemed to indicate that there was no compelling need for an amendment. As a result, the Committee had not considered a possible compromise amendment that would have permitted the court to defer those rulings, if the defendant first waived his or her double jeopardy protections.

At the Standing Committee's January 2005 meeting, the Department renewed its concerns about the need for an amendment to Rule 29 and presented additional information to that Committee. Following discussion, the Standing Committee asked the Criminal Rules Committee to again consider any appropriate amendments to Rule 29 and to present those

amendments to the Standing Committee with a recommendation to publish, or not publish, the amendments.

Judge Bucklew noted that Professor Schlueter had prepared a rough draft of proposed amendments to Rule 29, which would incorporate the waiver concept first proposed by Judge Levi, chair of the Standing Committee, in Spring 2004. Professor Schlueter stated that he included a requirement for an in-court colloquy between the court and the defendant concerning the possible implications of the Double Jeopardy Clause; he added that the draft Committee Note drew heavily from a detailed memo prepared by Ms. Brooke Coleman, a judicial clerk for Judge Levi.

Mr. Christopher Wray thanked the Committee for its consideration of the rule and expressed how important the rule was to the Department, and in particular to the United States Attorneys who had initially proposed the rule change. He pointed out the additional new information available to the Committee, which he believed further demonstrated the need for an amendment. In his view, the amendment would be a modest remedy for a major problem. He cited several cases where the judge had clearly made an erroneous ruling in granting the defense motion for acquittal, without leaving any possibility for a government appeal. He pointed out that in 1994, the Committee had amended Rule 29 to encourage judges to defer ruling on such motions until after verdict and that this amendment would simply require what that amendment had encouraged.

Mr. Wray cited statistics to support the argument that it could be safely assumed that in many of the cases in which a court had granted the motion pre-verdict, that had there been an appeal, the appellate courts would have reversed the decision. He noted that the Department was open to suggestions for addressing the problem.

Mr. Goldberg stated that he was concerned that an amendment might unnecessarily burden defendants who should be entitled to a judgment of acquittal. And Judge Bucklew noted that originally the Committee had been concerned about any amendment which would jeopardize the ability to manage the case. Judge Jones raised a jurisdictional question in the context of a case where the defendant agrees to a pre-verdict ruling on some counts, the court grants the motions on those counts but the case proceeds on the remaining counts. He questioned whether an appellate court would have jurisdiction to consider a government appeal on the counts on which the trial court had ruled. Judge Friedman responded that the Committee Note could reflect the view that the trial could continue with regard to the remaining counts. Mr. Wray noted that most criminal trials only last a few days so that it would not be likely that Judge Jones' scenario would be a common one.

Mr. Campbell stated that he was still opposed to any amendment and expressed doubt about the statistical information relied upon by the Department regarding the

projected reversal rate in un-appealable Rule 29 cases. He added that there are other non-appealable, dispositive motions that a court may grant. He also noted that if the rule contained a waiver provision, the defendant would still be exposed to the possibility of a second trial.

Judge Bucklew questioned whether any amendment could adequately address the issue of a hung jury. Judge Trager generally agreed and raised the issue of what would be the best practice concerning hung jury situations. In his view, if the jury cannot reach a verdict, the judge should dismiss the indictment.

Following additional discussion, Judge Friedman suggested that perhaps the best approach would be to require that the judge defer ruling in all cases in which a substantial number of counts or defendants would be affected. Judge Jones agreed with that approach, but Mr. Wray stated that that proposal would raise a number of different problems. Professor Schlueter questioned how the rule might address the definition of "substantial."

Judge Bucklew stated that it might be helpful to conduct a straw poll on where the Committee stood on the proposals. Eight members favored some change to Rule 29, while three members opposed any change.

Concerning the proposal to include a waiver provision in the amendment, nine members favored that approach and two members opposed that approach.

During the following discussion about the draft proposal, it was generally decided that the defendant's waiver of his Double Jeopardy rights would not need to be in writing. Additional suggested changes in the language were proposed. Professors Schlueter and Beale stated that based upon those suggestions, another draft would be prepared.

Judge Kravitz stated that he did not believe that the Standing Committee was necessarily expecting a final draft at the June 2005 meeting, if the Criminal Rules Committee believed it would be important to have additional time to consider the amendments to the draft.

Judge Bucklew responded that if more time was in fact needed to refine the amendment and the Committee Note, the Criminal Rules Committee could nonetheless present a draft amendment as an information item for the Standing Committee's June meeting.

F. Rule 41. Search and Seizure; Status of Amendments Concerning Tracking Device Warrants.

Judge Bucklew provided brief background information on the amendment to Rule 41, which would provide procedures for tracking-device warrants: The rule had been recommended, published for public comment in 2002, reviewed by the Criminal Rules Committee at its Spring 2003 meeting and also approved by the Standing Committee at its June 2003 meeting. Following that meeting, however, the Department of Justice had asked for, and received, additional time to review the proposal. Since then, however, no further action or report had been submitted by the Department.

Ms. Rhodes stated that the Department had completed its review of the amendment and that it had no further recommended changes to the rule. She noted that originally the Department had been concerned that the amendment would require warrants in all cases, but that upon further review of the amendment and the accompanying note, was satisfied that the rule did not so require.

Judge Bucklew responded that she would include that information in her report to the Standing Committee along with a recommendation to forward the Rule 41 amendment to the Judicial Conference.

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

Judge Bucklew explained that Judge Carnes, former chair of the Committee, had recommended that the Committee consider amending Rule 45(c) to parallel a recent amendment to Civil Rule 6, to make it clear that the three-day extension provided in the rule, is to be added after the prescribed period for filing stated in the rules. Professor Beale stated that the proposed amendment to Rule 45(c) closely tracked the civil rule. She added that a similar provision had been included in the Appellate Rules as well. Following brief discussion, Professor King moved that the amendment be approved with a recommendation that it be published for public comment. Judge Battaglia seconded the motion, which carried with a unanimous vote.

H. Rules Affected by Victims' Rights Act.

Judge Bucklew informed the Committee that Judge Cassell (Dist. Utah) had provided extensive materials on proposed amendments to a number of criminal rules, which he believed were required by the recent Victims' Rights Act. She reminded the Committee that it had approved an amendment to Rule 32 extending victim allocution rights, but that it had been withdrawn once the Act was passed. During the discussion which followed, she

stated that she would appoint a subcommittee to consider the effect of the Act on the criminal rules and the matter would be on the agenda for the Committee's next meeting.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew stated that the Committee would be meeting in the San Francisco area on October 24 and 25, 2005.

The meeting adjourned at 10:30 a.m. on Tuesday, April 5, 2005

Respectfully submitted

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



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT JUDICIAL CONFERENCE ACTIONS September 20, 2005

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

At its September 20, 2005 session, the Judicial Conference of the United States:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2005.

Committee on the Administration of the Bankruptcy System

Approved with respect to certain bankruptcy judgeships the fixing and transfer of official duty stations and designation of additional places of holding court requested by the circuit judicial councils and recommended by the Director.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Approved adoption of the Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2007, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Committee on Rules of Practice and Procedure

Approved proposed amendments to Appellate Rule 25(a)(2)(D), Bankruptcy Rule 5005(a)(2), and Civil Rule 5(e) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed new Appellate Rule 32.1 with the condition that the rule would apply only to judicial dispositions entered on or after January 1, 2007, and agreed to transmit the proposed rule to the Supreme Court for its consideration with a recommendation that the rule be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 1009, 5005(c), and 7004 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 16, 26(a), 26(b)(2), 26(b)(5), 26(f), 33, 34, 37(f), 45, and 50 and Form 35 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Supplemental Rules A, C, and E, new Supplemental Rule G, and conforming amendments to Civil Rules 9, 14, 26(a)(1)(E), and 65.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 5, 6, 32.1, 40, 41, and 58 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rules 404, 408, 606, and 609 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Committee on Security and Facilities

With regard to the *U.S. Courts Design Guide*:

- a. Endorsed *U.S. Courts Design Guide* Phase I revisions 9 through 18 and recommitted revisions 1 through 8 for further consideration;

MEMO TO: Members, Criminal Rules Advisory Committee
FROM: Professor Sara Sun Beale, Reporter
RE: Proposed Amendments Approved for Publication
DATE: September 23, 2005

At its June meeting the Standing Committee approved the following criminal rules for publication: amendments to Rules 11, 32, 35, 45, and new Rule 49.1. The text for each rule is attached.

The Administrative Office posted the amendments on the Internet on August 15, and the published pamphlet was to be mailed out in mid September. As of September 23, no comments had been received.

This item is on the agenda for the October meeting in Santa Rosa.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE***

Rule 11. Pleas

1

* * * * *

2

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

3

4

(1) *Advising and Questioning the Defendant.* Before

5

the court accepts a plea of guilty or nolo

6

contendere, the defendant may be placed under

7

oath, and the court must address the defendant

8

personally in open court. During this address, the

9

court must inform the defendant of, and determine

10

that the defendant understands, the following:

11

* * * * *

12

(M) in determining a sentence, the court's

13

obligation to calculate the applicable

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

14 sentencing guideline range apply the
15 ~~Sentencing Guidelines, and the court's~~
16 ~~discretion to depart from those guidelines~~
17 ~~under some circumstances~~ and to consider
18 that range, possible departures under the
19 Sentencing Guidelines, and other sentencing
20 factors under 18 U.S.C. § 3553(a); and

21 * * * * *

COMMITTEE NOTE

Subdivision (b)(1)(M). 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 757. Rule 11(b)(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

1 * * * * *

2 **(d) Presentence Report.**

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

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

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

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

11 (D) identify any factor relevant to:

12 (i) the appropriate kind of sentence, or

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

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

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

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

21 (i) any prior criminal record;

22 (ii) the defendant's financial condition; and

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

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

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

- 34 (D) when the law provides for restitution,
35 information sufficient for a restitution order;
- 36 (E) if the court orders a study under 18 U.S.C.
37 § 3552(b), any resulting report and
38 recommendation; and
- 39 (F) any other information that the court requires,
40 including information relevant to the factors
41 under 18 U.S.C. § 3553(a).

42 * * * * *

- 43 **(h) Notice of Possible ~~Departure From Sentencing~~**
44 **~~Guidelines~~Intent to Consider Other Sentencing Factors.**
- 45 Before the court may ~~depart from the applicable sentencing~~
46 ~~range~~ rely on a ground not identified for ~~departure~~ either in
47 the presentence report or in a party's prehearing
48 submission, the court must give the parties reasonable
49 notice that it is contemplating either departing from the
50 applicable guideline range or imposing a non-guideline

51 sentence such a departure. The notice must specify any
52 ground not earlier identified on which the court is
53 contemplating a departure or a non-guideline sentence.

54 * * * * *

55 **(k) Judgment.**

56 (1) *In General.* The court must use the judgment form
57 prescribed by the Judicial Conference of the United
58 States. In the a judgment of conviction, the court must
59 set forth the plea, the jury verdict or the court's
60 findings, the adjudication, and the sentence, including
61 the statement of reasons required by 18 U.S.C.
62 § 3553(c). If the defendant is found not guilty or is
63 otherwise entitled to be discharged, the court must so
64 order. The judge must sign the judgment, and the
65 clerk must enter it.

66 * * * * *

COMMITTEE NOTE

Subdivision (d). 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 757. 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.

Subdivision (h). 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 757. 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 in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a “non-guideline” sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. Compare *United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to “non-Guidelines” sentence), with *United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (suggesting the term “variance”). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

Subdivision (k). 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 757. The *Booker* opinion cast no doubt on the continuing validity of 18 U.S.C. § 3553(c), which requires the sentencing court to provide “the court’s statement of reasons, together with the order of judgment and commitment” to the Sentencing Commission.

Rule 35. Correcting or Reducing a Sentence

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* * * * *

(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~~

10 ~~investigating or prosecuting another~~

11 ~~person; and~~

12 ~~(B) reducing the sentence accords with the~~

13 ~~Sentencing Commission's guidelines and~~

14 ~~policy statements.~~

15 * * * * *

COMMITTEE NOTE

Subdivision (b)(1). 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 757. Subsection (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

Rule 45. Computing and Extending Time

1 * * * * *

11 FEDERAL RULES OF CRIMINAL PROCEDURE

2 (c) **Additional Time After Certain Kinds of Service.**

3 ~~When these rules permit or require~~ Whenever a party
4 ~~must or may to~~ act within a specified period after a
5 ~~notice or a paper has been served on that party~~ service
6 ~~and service is made in the manner provided under~~
7 Federal Rule of Civil Procedure 5(b)(2)(B), (C), or
8 (D), 3 days are added ~~after to~~ the period would
9 otherwise expire under subdivision (a) ~~if service~~
10 ~~occurs in the manner provided under Federal Rule of~~
11 Civil Procedure 5(b)(2)(B), (C), or (D).

COMMITTEE NOTE

Subdivision (c). 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.

Rule 49.1. Privacy Protection For Filings Made with the Court**

- 1 **(a) Redacted Filings. Unless the court orders otherwise, an**
- 2 electronic or paper filing made with the court that

** Amendments proposed to the Bankruptcy, Civil, and Criminal Rules implementing the E-Government Act and the Judicial Conference privacy policy are included in a side-by-side comparison chart on page 159.

13 FEDERAL RULES OF CRIMINAL PROCEDURE

3 includes a social security number or an individual's tax
4 identification number, a name of a person known to be
5 a minor, a person's birth date, a financial account
6 number or the home address of a person may include
7 only:

8 (1) the last four digits of the social security number
9 and tax identification number;

10 (2) the minor's initials;

11 (3) the year of birth;

12 (4) the last four digits of the financial account
13 number; and

14 (5) the city and state of the home address.

15 **(b) Exemptions from the Redaction Requirement.** The
16 redaction requirement of Rule 49.1 (a) does not apply to
17 the following:

- 18 (1) in a forfeiture proceeding, a financial account
19 number or real property address that identifies the
20 property alleged to be subject to forfeiture;
- 21 (2) the record of an administrative or agency
22 proceeding;
- 23 (3) the official record of a state-court proceeding;
- 24 (4) the record of a court or tribunal whose decision is
25 being reviewed, if that record was not subject to (a)
26 when originally filed;
- 27 (5) a filing covered by (c) of this rule;
- 28 (6) a filing made in an action brought under 28 U.S.C.
29 § 2254 or 2255;
- 30 (7) a filing made in an action brought under 28 U.S.C.
31 § 2241 that does not relate to the petitioner's
32 immigration rights;
- 33 (8) a filing in any court in relation to a criminal matter
34 or investigation that is prepared before the filing of

35 a criminal charge or that is not filed as part of any
36 docketed criminal case;

37 (9) an arrest or search warrant; and

38 (10) a charging document and an affidavit filed in
39 support of any charging document.

40 **(c) Filings Made Under Seal.** The court may order that a
41 filing be made under seal without redaction. The court
42 may later unseal the filing or order the person who made
43 the filing to file a redacted version for the public record.

44 **(d) Protective Orders.** If necessary to protect private or
45 sensitive information that is not otherwise protected
46 under (a), a court may by order in a case:

47 (1) require redaction of additional information; or

48 (2) limit or prohibit remote electronic access by a
49 nonparty to a document filed with the court.

50 **(e) Option for Additional Unredacted Filing Under Seal.**

51 A party making a redacted filing under (a) may also file

52 an unredacted copy under seal. The court must retain the
53 unredacted copy as part of the record.

54 **(f) Option for Filing a Reference List.** A filing that
55 contains information redacted under (a) may be filed
56 together with a reference list that identifies each item of
57 redacted information and specifies an appropriate
58 identifier that uniquely corresponds to each item of
59 redacted information listed. The reference list must be
60 filed under seal and may be amended as of right. Any
61 reference in the case to an identifier in the reference list
62 will be construed to refer to the corresponding item of
63 information.

64 **(g) Waiver of Protection of Identifiers.** A party waives the
65 protection of (a) as to the party's own information to the
66 extent that the party files such information not under
67 seal and without redaction.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 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 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). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

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 (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 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 49.1 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.

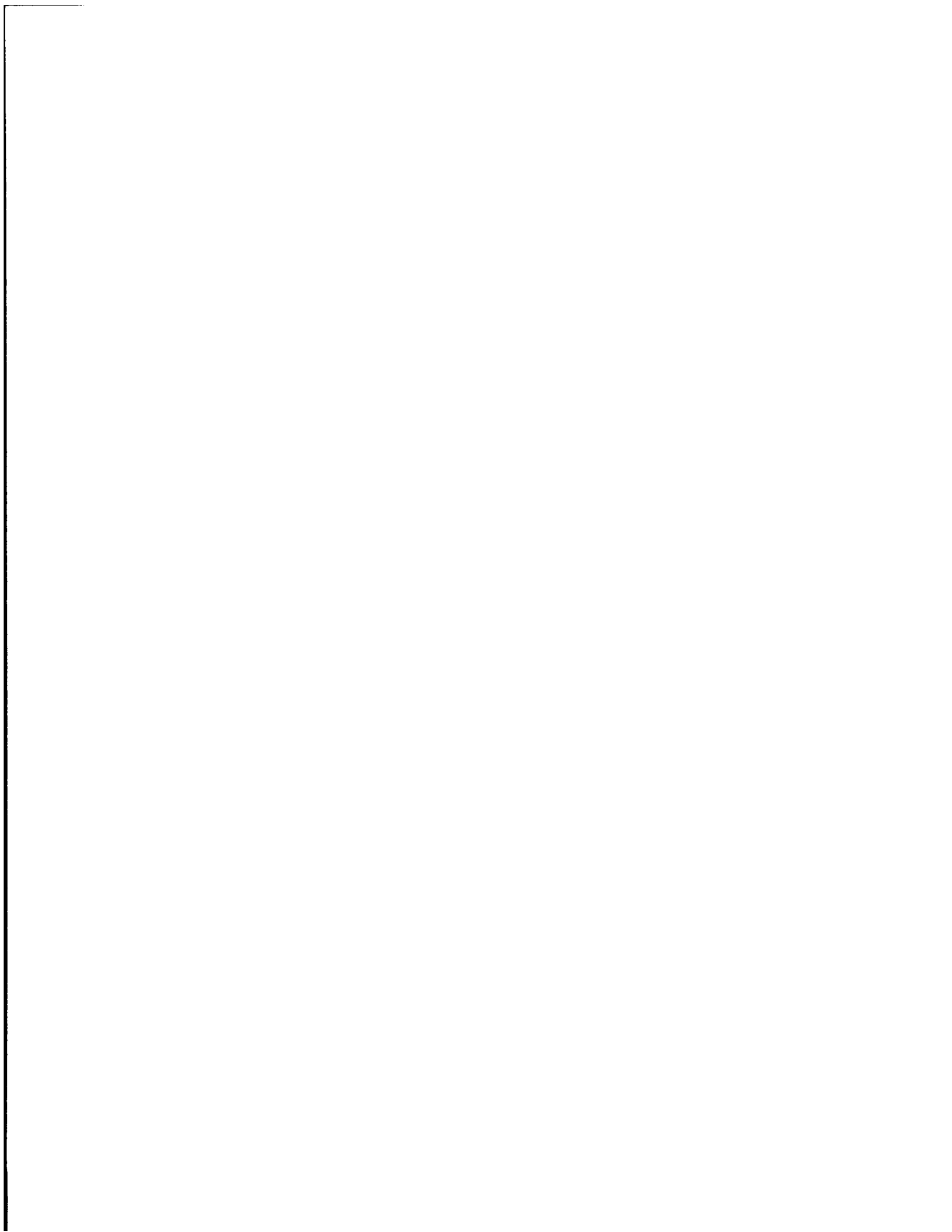
The Judicial Conference Committee on Court Administration and Case Management has issued “Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files” (March 2004). This document sets out limitations on remote electronic access to certain 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;
- 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).



MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rules Implementing Crime Victims Rights Act (CVRA)

DATE: September 19, 2005

Judge Bucklew appointed a CVRA Subcommittee, chaired by Judge James Jones, to prepare recommendations regarding any revisions to the rules necessary to implement the Crime Victims Rights Act (CVRA), codified as 18 U.S.C. § 3771. The other members of the Subcommittee are Judge Anthony Battaglia, Justice Robert Edmunds, Nancy King, and Deborah Rhodes.

After three lengthy conference calls, the CVRA Subcommittee agreed upon a package of proposals that are described in the pages that follow. The Subcommittee deliberations included extended discussion of the proposals in a lengthy article authored by Judge Paul Cassell (which is appended).

The material that follows is organized into two sections. The first section contains the amendments proposed by the CVRA Subcommittee, with accompanying committee notes. The second section reports on some of the main proposals in Judge Cassell's article that were discussed but not recommended by the Subcommittee.

The CVRA Subcommittee made two basic decisions that governed its determination what rules to propose and how to draft those rules. The most basic decision was how far beyond the statutory provisions the rules should go at this time. Although the CVRA enumerates a number of specific rights, it also contains general language stating that victims have a "right to be treated with fairness." Judge Cassell advocates using this general right to fairness as a springboard for a variety of victim rights not otherwise provided for in the CVRA.

The Subcommittee concluded that the rules should incorporate, but not go beyond, the specific statutory provisions. The CVRA reflects a careful Congressional balance between the rights of the defendant, the discretion afforded to prosecution, and the new rights afforded to

victims. In light of this careful statutory balance, the Subcommittee felt that it would not be appropriate to create new victim rights not based upon the statute. Rather, it sought to incorporate the rights Congress did afford into the rules. In so doing, the Subcommittee attempted, to the degree possible, to use the statutory language. The Subcommittee anticipates that the courts will develop the meaning of the statutory terms on a case-by-case basis, and it did not attempt to use the rules to anticipate and resolve the interpretative questions that will arise.

The other basic decision made by the Subcommittee was to place as much of the new material as possible into a single rule, rather than dispersing victim right provisions throughout the rules. (In contrast, Judge Cassell's proposals tend to be more dispersed.) New Rule 43.1 contains the bulk of the CVRA provisions.

Putting as much as possible in a single rule has several advantages. It will be convenient for victims and their advocates, because it provides a single place in which all of the main rights granted in the CVRA are stated. It also facilitates drafting that closely follows the statutory text. In addition, this approach somewhat limits the number of amendments to other rules. There are several precedents for a single rule approach. Although the current rules generally follow a step-by-step procedural approach, Title IX (Rules 43-60) contains a variety of "General Provisions" that apply to and modify the provisions governing particular stages in the process. Thus, for example, Rule 43 governs the defendant's presence at all stages of the proceedings, and the various rules regarding time counting are supplemented by Rule 45.

Although this structural decision somewhat limited the number of rules to be amended, the Subcommittee proposes, in addition to new Rule 43.1, amendments to the following rules:

Rule 1.	Scope; Definitions
Rule 12.1	Notice of Alibi Defense
Rule 17	Subpoenas
Rule 18	Place of Trial
Rule 32	Sentencing and Judgment

After the text and committee note for each of the proposed amendments, I have described briefly the rules the Subcommittee considered but does not propose amending. The rules proposed by the Subcommittee deal only with the provisions of the CVRA relevant to judicial proceedings. Note, however, that the CVRA also contains a variety of provisions not dealt with in the draft amendments, such as non-judicial proceedings (e.g., proceedings related to parole or escape), enforcement within the executive branch, and mandamus proceedings in the appellate courts.

This item is on the agenda for the October meeting in Santa Rosa.

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except as provided by (b)(2).

COMMITTEE NOTE

Subdivisions (b)(1)(A) and (c). The amendment implements the victims' rights under the Crime Victims Rights Act to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when an alibi defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests. For example, the court might authorize the defendant and his counsel to meet with the victim in a manner and place designated by the court, rather than giving the defendant the name and address of a victim who fears retaliation if the defendant learns where he or she lives.

In the case of victims who will testify concerning an alibi claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (c).

22 judicial approval before service of a subpoena seeking personal or confidential information
23 about a victim from a third party. The amendment also provides a mechanism for notifying
24 the victim, and makes it clear that a victim may move to quash or modify the subpoena under
25 Rule 17(c)(2) on the grounds that it is unreasonable or oppressive.
26

27 The amendment applies only to subpoenas served after a complaint, indictment, or
28 information has been filed. It has no application to grand jury subpoenas. When the grand
29 jury seeks the production of personal or confidential information, grand jury secrecy affords
30 substantial protection for the victim's privacy and dignity interests.
31

32 The amendment seeks to protect the interests of the victim without unfair prejudice to the
33 defense. It permits the defense to seek judicial approval of a subpoena ex parte, because
34 requiring the defendant to make and support the request in an adversarial setting may force
35 premature disclosure of defense strategy to the government. The court may approve or reject
36 the subpoena ex parte, or it may provide notice to the victim, who may then move to quash.
37 In exercising its discretion, the court should consider the relevance of the subpoenaed material
38 to the defense, whether giving notice would prejudice the defense, and the degree to which the
39 subpoenaed material implicates the privacy and dignity interests of the victim.

1 **Rule 32. Sentencing and Judgment**

2
3 **(a) Definitions.** The following definitions apply under this rule:

4 (1) ~~“Crime of violence or sexual abuse” means:~~

5 (A) a crime that involves the use, attempted use, or threatened use of physical force
6 against another’s person or property; or

7 (B) a crime under 18 U.S.C. §§ 2241–2248 or §§ 2251–2257.

8 (2) ~~“Victim” means an individual against whom the defendant committed an offense~~
9 ~~for which the court will impose sentence.~~

10 * * *

11 **(c) Presentence Investigation.**

12 (1) *Required Investigation.*

13 * * *

14 (B) *Restitution.* If the law requires permits restitution, the probation officer must
15 conduct an investigation and submit a report that contains sufficient information
16 for the court to order restitution.

17 * * *

18
19 **(d) Presentence Report.**

20 * * *

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

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

24 (i) any prior criminal record;

25 (ii) the defendant’s financial condition; and

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

28 (B) ~~verified information, stated in a nonargumentative style,~~ that assesses
29 the financial, social, psychological, and medical impact on ~~any individual~~
30 ~~against whom the offense has been committed~~ the victims [of the crime]⁴

31 ...

⁴Joe Kimball questioned whether the bracketed phrase is necessary in light of the definition in Rule 1.

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* * *

(I) Sentencing.

* * *

(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 be reasonably heard⁵ ~~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~~

⁵The Subcommittee's approach of placing all possible victim-related provisions in a single rule could provide a basis for removing the provision regarding victim allocation from Rule 32(i)(4)(b), rather than amending it to conform to the CVRA. The Subcommittee did not favor that approach. Rule 32's provision for victim allocation provides specifically for a well known and valued victim's right, and deleting it in favor of the general provisions of Rule 43.1 might be misunderstood as depriving victims of this right. That seems a sufficient reason to retain the provision, though it is to a degree redundant. The Subcommittee also noted that in one respect Rule 32(i)(4)(b) is not redundant. It goes beyond Rule 43.1 in requiring the court to address any victim who is present at sentencing. In contrast, Rule 43.1 provides only the statutory right to "be reasonably heard," which may not always require the court to address a victim in open court. It is not clear whether the current language giving the victim the right to "speak or submit any information about the sentence" is precisely the same as the new statutory right to "be reasonably heard." For that reason, the Subcommittee favored using the statutory language.

35 (ii) one or more family members or relatives the court designates, if the victim
36 is deceased or incapacitated.
37

38
39 COMMITTEE NOTE
40

41 **Subdivision (a).** The Crime Victim’s Rights Act, codified at 18 U.S.C. § 3771(e), adopted
42 a new definition of the term “crime victim.” The new statutory definition has been
43 incorporated in an amendment to Rule 1, which supercedes the provisions that have been
44 deleted here.
45

46 **Subdivision (c)(1).** This amendment implement the victim’s statutory right under the
47 Crime Victims Rights Act to “full and timely restitution as provided by law.” See 18 U.S.C.
48 § 3771(a)(6). Whenever the law permits restitution, the presentence investigation report
49 should contain information permitting the court to determine whether restitution is appropriate.
50

51 **Subdivision (d)(2)(B).** This amendment implements the Crime Victims Rights Act,
52 codified as 18 U.S.C. § 3771. The amendment employs the term “victim,” which is now
53 defined in Rule 1. The amendment also makes it clear that victim impact information should
54 be treated in the same way as other information contained in the presentence report. It deletes
55 language requiring victim impact information to be “verified” and “stated in a
56 nonargumentative style” because that language does not appear in the other subdivisions of
57 Rule 32(d)(2).
58

59 **Subdivision (i)(4).** The deleted language, referring only to victims of crimes of violence
60 or sexual abuse, has been superceded by the Crime Victims Rights Act, 18 U.S.C. § 3771(e).
61 The act defines the term “crime victim” without limiting it to certain crimes, and provides that
62 crime victims, so defined, have a right to be reasonably heard at all public court proceedings
63 regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition
64 as the definition of the term “victim” for purposes of the Federal Rules of Criminal Procedure,
65 so the language in this section is no longer needed.
66

67 Subdivision (i)(4) has also been amended to incorporate the statutory language of the

35 Crime Victims Rights Act, which provides that victims have the right “to be reasonably heard”
36 in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4).

1 **Rule 43.1. Victims**

2
3 **(a) Rights of victims.**⁶

4
5 **(1) Notice.** A victim has the right to reasonable, accurate, and timely notice of any
6 public court proceeding involving the crime.

7
8 **(2) Attendance at proceedings.** A victim has the right not to be excluded from any
9 such public court proceeding involving the crime, unless the court determines by clear
10 and convincing evidence that testimony by the victim would be materially altered if the
11 victim heard other testimony at that proceeding. The court must make every effort to
12 permit the fullest attendance possible by the victim and must consider reasonable
13 alternatives to the exclusion of the victim from the proceeding. The reasons for any
14 decision denying relief under this rule must be clearly stated on the record.

15
16 **(3) Right to Be Heard.** A victim has the right to be reasonably heard at any public
17 proceeding in the [district] court⁷ involving release, plea, or sentencing involving the
18 crime.

19
20 **(b) Enforcement and Limitations.** The court must decide any motion asserting a victim's

⁶The draft rule does not include all of the rights afforded by the CVRA, many of which seem to fall outside the parameters of the Federal Rules of Criminal Procedure. Rule 43.1 does not include the following rights defined by the statute: the right to be reasonably protected from the accused, the reasonable right to confer with the Government, the right to full and timely restitution, the right to proceedings free from unreasonable delay, and the right to be treated with fairness and respect.

Additionally, the draft rule speaks only of the rights related to judicial proceedings, and not to other matters included in the CVRA, such as proceedings related to parole or escape, and enforcement by the executive branch. Finally, the rule does not deal with the statutory provisions regarding mandamus in the court of appeals.

⁷Although the statute uses the term “district court,” that phrase does not generally appear in the Rules of Criminal Procedure, which generally refer only to the “court.” The phrase “district court” was used in subsection (a)(4) of 18 U.S.C. § 3771 – defining the right to be heard -- and not in the remainder of the subsections stating the victim’s rights. Since this phrasing might have been intended to make it clear that a victim does not have a right to be heard in every criminal appeal, the Subcommittee included the word “district” in Rule 43.1(a)(3).

21 right promptly.⁸

22
23 (1) *Who May Assert Rights.* The rights described in subdivision (a) may be asserted
24 by the victim and the attorney for the government. A person accused of the crime may
25 not obtain any relief under this rule.

26
27 (2) *Multiple victims.* If the court finds that the number of victims makes it _____
28 impracticable to accord all of the victims the rights described in subsection (a), the court
29 must fashion a reasonable procedure to give effect to these rights that does not unduly
30 complicate or prolong the proceedings.

31
32 (3) *Where rights may be asserted.* The rights described in subsection (a) must be
33 asserted in the district in which a defendant is being prosecuted for the crime or, if no
34 prosecution is underway, in the court in the district in which the crime occurred.

35
36 (4) *Limitations on relief.* In no case shall a failure to afford a right under this rule
37 provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence
38 only if:

39
40 (A) the victim has asserted the right to be heard before or during the proceeding at
41 issue and such right was denied;

42
43 (B) the victim petitions the court of appeals for a writ of mandamus within 10 days;
44 and

45
46 (C) in the case of a plea, the accused has not pled to the highest offense charged.

47
48 **COMMITTEE NOTE**

49
50 This rule implements several provisions of the Crime Victims Rights Act, codified as 18
51 U.S.C. § 3771, in judicial proceedings in the federal courts.

52
53 **Subdivision (a)(1).** This subdivision implements 18 U.S.C. § 3771(a)(2), which provides

⁸The CVRA uses the term “forthwith.” The Subcommittee believes the term “promptly” has the same meaning and is more readily understood.

54 that a victim has a “right to reasonable, accurate, and timely notice of any public court
55 proceedings. . . .” The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing
56 statutory requirement that all federal departments and agencies engaged in the detection,
57 investigation, and prosecution of crime identify victims at the earliest possible time and inform
58 those victims of various rights, including the right to notice of the status of the investigation,
59 the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial
60 proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

61 The Department of Justice and the Administrative Office of the U.S. Courts are working
62 together to design procedures for notification. Eventually it may be possible to generate
63 notices automatically, as is now done in bankruptcy proceedings.
64

65 **Subdivision (a)(2).** This subdivision implements 18 U.S.C. § 3771(a)(3), which provides
66 that the victim shall not be excluded from public court proceedings unless the court finds by
67 clear and convincing evidence that the victim’s testimony would be materially altered by
68 attending and hearing other testimony at the proceeding, and 18 U.S.C. § 3771(b), which
69 provides that the court shall make every effort to permit the fullest possible attendance by the
70 victim.
71

72 **Subdivision (a)(3).** This subdivision implements 18 U.S.C. § 3771(a)(4), which provides
73 that a victim has the “right to be reasonably heard any public proceeding in the district court
74 involving release, plea, [or] sentencing....”
75

76 **Subsection (b).** This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1),
77 (2), (3), and (5). The statute provides that the victim and the attorney for the government may
78 assert the rights provided for under the Crime Victims Rights Act, and that those rights are to
79 be asserted in the district where the defendant is being prosecuted (or if no prosecution is
80 underway, in the district where the crime occurred). Where there are too many victims to
81 accord each the rights provided by the statute, the district court is given the authority to fashion
82 a reasonable procedure to give effect to the rights without unduly complicating or prolonging
83 the proceedings.
84

85 Finally, the statute and the implementing rule make it clear that failure to provide relief
86 under the rule never provides a basis for a new trial. Failure to afford the rights provided by
87 the statute and implementing rule may provide a basis for re-opening a plea or a sentence, but
88 only if the victim can establish all of the following: the victim asserted the right before or
89 during the proceeding, the right was denied, the victim petitioned for mandamus within 10

90 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did
91 not plead guilty to the highest offense charged.

PROPOSALS THE SUBCOMMITTEE DID NOT ADOPT

Judge Cassell's article advocates a number of amendments to the rules that the Subcommittee discussed at length but ultimately decided not to recommend. They are discussed briefly below.

Rule 15

Judge Cassell proposed amending Rule 15 to permit victims to attend "any public deposition." The Subcommittee noted that depositions do not fall within the CVRA, which refers only to the victim's right not to be excluded from "public court proceedings" 18 U.S.C. § 3771(a)(3) (emphasis added).

Rules 20, 21, and 23

These rules govern transfers for plea and sentence, transfer of trial, and jury trial.

Rule 20 allows transfers where the defendant wishes to plead guilty in the transferee district and the United States attorneys in both districts approve the transfer in writing. Judge Cassell proposed that the attorney for the government be required to inform the court of any victim's objection to such a transfer. The CVRA does not specifically address transfers. It does give the victim a right to confer with the attorney for the government, 18 U.S.C. § 3771(a)(5), but that is not the same as requiring the attorney for the government to notify the court of the victim's views regarding transfers. Indeed, the CVRA provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6). Accordingly, the CVRA contemplates that the attorney for the government will consider the victim's interests in exercising prosecutorial discretion, including the discretionary determination whether to consent to a Rule 20 transfer. The Subcommittee was not persuaded that the rule should disturb this statutory balance by requiring the attorney for the government to advise the court of a victim's objection to a Rule 20 transfer. In appropriate cases, the attorney for the government should appraise the court of the victim's views.

Rule 21 governs transfers for prejudice or convenience. Judge Cassell proposed that the court be required to consider the views of the victim before making any transfer decision. As noted above, the CVRA does not directly address transfers. Judge Cassell grounded his proposal on the general provision of the CVRA that gives a victim a right to be treated with "fairness." 18 U.S.C. § 3771(a)(8). The Subcommittee was not persuaded that this general language warranted an amendment that would require the court to consider the victim's views. In the case of transfers for prejudice, the preferences of the victim could not outweigh the defendant's right to a fair proceeding. In the case of transfers for convenience, the statutory right to confer with the attorney for the government provides the mechanism for incorporating

the victim's views. As in the case of Rule 20, the Subcommittee declined to go beyond the carefully crafted limitations of the statute. In appropriate cases, the attorney for the government should appraise the court of the victim's views.

Judge Cassell also proposed that **Rule 23** be amended to require the court to consider the victim's views before allowing a non-jury trial. The Subcommittee viewed this proposal as presenting many of the same issues as the proposed amendments to Rules 20 and 21, and again it declined to go substantially beyond the specific provisions of the CVRA, which do not address the issue whether the trial should be to the court or to a jury. In appropriate cases, the attorney for the government should appraise the court of the victim's views.

Rule 32

In addition to the amendments to Rule 32 that are proposed above, the Subcommittee also considered and rejected several other possible amendments to this rule.

The Subcommittee rejected Judge Cassell's proposal to amend **Rule 32(c)(3)** to provide that the probation officer "must" determine whether any victim wishes to provide information for the presentence report. Since the rule requires the presentence report to contain information regarding the crime's impact on any victims, there seemed to be no need to include mandatory language telling probation officers that they must gather the necessary information.

The Subcommittee also rejected Judge Cassell's proposal to amend **Rule 32(e)** to require that the prosecutor disclose all relevant portions of the presentence report to any victim who wishes to receive this information. The Subcommittee noted that presentence reports are typically treated as confidential, because they include a great deal of personal information about the defendant (and may include other confidential information about third parties). In the Subcommittee's view, the prosecutor should remain the victim's source of information regarding the sentencing process and the contents of the presentence report, and the prosecutor should have discretion to determine what information from the presentence report should be imparted to the victim. If disputes arise, the courts can gradually flesh out the meaning of the statutory right under 18 U.S.C. § 3771(a)(5) to "confer with the attorney for the Government" in this context.

The Subcommittee did not support Judge Cassell's proposed amendment of **Rule 32(f)(1)** to require the prosecutor to raise for the victim any reasonable objection that the victim has to the presentence report. This goes beyond the statutory rights to "confer" with the prosecution and to be "reasonably heard," and may conflict with 18 U.S.C. § 3771(6), which provides that nothing in the CVRA "shall be construed to impair the prosecutorial discretion of the Attorney General." Similarly, the Subcommittee did not support amending **Rule 32(h)** to require the prosecutor (or attorney for the victim if any) to advise defense counsel and the court of any ground identified by the victim that might serve as a basis for a

sentencing departure.

Finally, the Subcommittee rejected Judge Cassell's suggestion that **Rule 32(I)(1)(C) & (2)** be amended to allow the victims (as well as the parties) to comment on the probation officer's determinations, and to introduce evidence on objections to the presentence report. The Subcommittee felt it would be desirable for the courts gradually to flesh out what the right to be heard means in this context (determining, for example, when the right to be heard would include the right to introduce evidence). It is by no means clear that the CVRA contemplates that victims will be entitled to access to all of the particulars of the presentence report and be entitled to litigate issues concerning the application of various guidelines, etc.

Victim Notice – Proposed Rule 10.1

The Subcommittee considered, but ultimately decided against recommending a rule incorporating Judge Cassell's proposal that the rules require the attorney to identify victims at the earliest possible moment, and then notify victims of each of their statutory rights. Rule 43.1(a), as proposed by the Subcommittee, contains a general statement that victims have a right to timely notification of public court proceedings, but it does not assign the duty to provide that notice to the attorney for the government (nor, for that matter, to the court).

The Subcommittee had several reasons for deciding not to assign the duty of notification to the attorney for the government. First, existing statutory authority requires victim notification even earlier than the institution of formal proceedings, and imposes the obligation to identify victims and inform them of their rights on all federal departments and agencies involved in the investigation, detection, and prosecution of federal crimes – not just the attorney for the government. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D). Thus other actors have responsibility for providing notice, and in many (if not most) cases some notice will have been given by the time judicial proceedings commence. Second, as stated in the draft note, the Department of Justice and the Administrative Office of the Courts are presently working out the procedures for notification, with the hope that an automated notice system like that currently used in bankruptcy can be developed. If that occurs, it will not be wholly accurate to say that the attorney for the government will be providing the notice.

Finally, the Subcommittee felt that the rules should not, at least at this point, become as detailed as Judge Cassell's proposed Rule 10.1, which enumerated the victim rights and provided that victims should be notified of these rights, and enumerated the proceedings of which victims should receive notice. Here – as in other matters – the Subcommittee took the view that the rules should follow the statutory language closely, rather than extending far beyond it. The CVRA does not contain detailed provisions on notice. Note, however, that it does provide that the Department of Justice must develop an implementation plan. Moreover, the existing provisions of 42 U.S.C. § 10607(b) & (c)(3)(A)-(D) already require that government personnel involved in the investigation, detection, and prosecution of crime to provide various kinds of notice to victims.

Rule 48

Judge Cassell proposed that the court be required to consider the defendant's views on dismissal. The Subcommittee recognized that victims will have a great interest in whether charges are dismissed. The CVRA does not, however, explicitly address dismissals, and it speaks only of not excluding the defendant from, and providing the defendant has a right to be reasonably heard at public proceedings in the district court. If the government moves for dismissal there is ordinarily no public proceeding. (When there is a public proceeding, the victim's right not to be excluded, and to be reasonably heard is provided for in Rule 43.1.)

In light of the statutory statement in 18 U.S.C. § 3771(b)(6) that nothing in the CVRA "shall be construed to impair the prosecutorial discretion of the Attorney General," as well as the separation of powers issue raised by judicial review of the government's decision to terminate a prosecution, the Subcommittee was not persuaded that the rule should be amended to require the court to consider the victim's views on dismissal. When there is no public court proceeding, the victim's views will be taken into account through the right to confer with the government under 18 U.S.C. § 3771(a)(5).

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Draft Rule 16(a)(1)(H) and Committee Note

DATE: September 27, 2005

The Committee has had an amendment to Rule 16 under consideration since 2003, when it received a proposal from the American College of Trial Lawyers to require the government to disclose exculpatory and impeachment evidence 14 days before trial. Two subcommittees have considered the issue.

Most recently, Donald Goldberg chaired a subcommittee that proposed an amendment to the Rules Advisory Committee at its April 2005 meeting. At that time, the Advisory Committee voted in favor of amending Rule 16, though no committee note had been drafted. The Subcommittee report for the April meeting did not include specific language for the proposed rule, and the draft minutes do not state the specific language that was adopted. The discussion, however, focused on the proposal provided in earlier reports from the Subcommittee. In his September 30, 2004 report, Subcommittee chair Donald Goldberg proposed the following language:

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.

At the April 2005 meeting the Advisory Committee agreed that the Subcommittee's proposal should be amended in two respects to address the concerns of the Department of Justice: it should exclude material covered by the Jencks Act, and disclosure should be required at the beginning of trial, rather than 14 days before trial.

The Subcommittee has refined the language of the proposed amendment in light of the discussion at the April meeting and additional concerns raised in the Subcommittee's continuing discussions, and it has drafted a committee note. Its proposals and a supporting memorandum are attached.

The agenda book also includes the following: the original proposal from the American College of Trial Lawyers, a report prepared by the Federal Judicial Center concerning procedural rules in the states, and local orders and rules from the Federal District Courts; two compilations of federal cases involving the failure to provide exculpatory or impeachment evidence to the defense; and the relevant provisions of the Model Rules of Criminal Procedure and the ABA Criminal Justice Standards. In addition, other materials previously from the Subcommittee may be added, and the Department of Justice may submit additional information.

This item is on the agenda for the October meeting in Santa Rosa.

1 **Rule 16. Discovery and Inspection**

2
3 **(a) Government's disclosure.**

4
5 **(1) Information subject to disclosure.**

6 * * * *

7 (H) *Exculpatory or Impeaching Information*.⁹ [Except as provided in 18 U.S.C. §
8 3500,¹⁰] upon a defendant's request, the government must make available no later than the start
9 of trial all information that is known to the government – or through due diligence could be
10 known to the government – that the government has reason to believe may be favorable to the
11 defendant because it tends to be either exculpatory or impeaching. [The court may order
12 disclosure earlier, but in no instance more than 14 days before trial.¹¹]

13
14 **COMMITTEE NOTE**

⁹The Subcommittee discussed whether the rule should refer to “evidence” or the potentially broader term “information.” The general caption for subdivision (a)(1) uses the term “information,” and the ABA Model Rules and the ABA Criminal Justice Standards, which are appended, both use the phrase “evidence or information.”

¹⁰Although the Rules Committee decided at its April meeting that the new disclosure rule would be limited by the Jencks Act, this language may not be necessary. Rule 16(a)(2) already states: “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.” Because of its concern for the protection of cooperating witnesses, the Justice Department prefers that the bracketed language be included in order to emphasize the limitation.

¹¹The bracketed language limits the court’s ability to accelerate the time for disclosure. At its April meeting the Rules Committee substituted the bracketed phrase for the subcommittee’s language “at least 14 days before trial.” The change was an effort to meet the Department of Justice’s concern that pretrial disclosure could subject witnesses (especially cooperating witnesses) to coercion, threats, and undue influence prior to trial. Subsequent discussion by the Subcommittee revealed that the revised language may not achieve the Advisory Committee’s goal. As the draft Committee Note explains, lines 38-40, unless additional limiting language is added, the phrase “no later than the start of trial” would allow the courts to order accelerated disclosure (though only after hearing from the parties, who may request a protective or modifying order under Rule 16(d)(1)). Fearing that acceleration would be common unless the bracketed language on lines 11 and 12 is added, the Department prefers the original “at least 14 days prior to trial” to the unqualified language approved by the Advisory Committee in April.

15 **Subdivision (a)(1)(H).** New subdivision (a)(1)(H) is intended to supplement the
16 prosecutor’s obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*,
17 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S.
18 263, 280-81 (1999). These cases and others require the prosecutor to provide to the defense
19 not only directly exculpatory evidence (*Brady*) but also evidence impeaching the credibility
20 of the government’s witnesses (*Giglio*). This requirement covers not only evidence
21 specifically requested by the defense (*Brady*) but also that which is not requested (*United*
22 *States v. Agurs*, 427 U.S. 97 (1976)). It covers evidence known to the prosecutor (*United*
23 *States v. Bagley*, 473 U.S. 667 (1985)), and evidence known to agents of law enforcement
24 involved in the investigation of the case (*Kyles*). See generally *Banks v. Dretke*, 540 U.S. 668,
25 691 (2004), and *Strickler*, 527 U.S. at 280-81 (1999). The amendment is based on the
26 principle that fundamental fairness is enhanced when the defense has access to any exculpatory
27 or impeaching evidence known to the prosecution. The requirement that exculpatory and
28 impeaching information be provided to the defense also reduces the possibility that innocent
29 persons will be convicted in federal proceedings.

30
31 The amendment contains no requirement that the information be “material” to the
32 defense. It requires prosecutors to disclose to the defense all information that they believe to
33 be exculpatory or impeaching, without speculation about whether this information will
34 ultimately be material to the defense.

35
36 The new provision requires the prosecutor to make all exculpatory or impeaching
37 information available to the defendant no later than the start of trial. It is anticipated that, like
38 many other discovery deadlines, this one can be accelerated or extended by agreement of the
39 parties, order of the court, or local rule.¹² Timely disclosure of favorable information to the
40 defense is essential to fundamental fairness. See ABA STANDARDS FOR CRIMINAL JUSTICE,
41 PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.11(a) (3d ed. 1993), and ABA MODEL
42 RULE OF PROFESSIONAL CONDUCT 3.8(d) (2003). If necessary, the government may apply to
43 the court for a protective order under the already-existing provision of Rule 16(d)(1), so as to
44 defer disclosure to a later time.

¹²See footnote 3 regarding the bracketed language on lines 11 and 12.

46 For purposes of this rule, the start of trial is the time when the jury has been selected
47 and sworn or, in a bench trial, when the first witness has been sworn. *Cf. Crist v. Bretz*, 437
48 U.S. 28 (1978) (defining this as the time jeopardy attaches).

49
50 The rule requires a request from the defense, but the rule is not intended to obviate the
51 prosecutor's obligation, under *Agurs*, to provide information favorable to the defense even in
52 the absence of a defense request, *United States v. Agurs, supra.*¹³ [This amendment
53 supplements the government's constitutional obligations under the *Brady* line of cases, and
54 is not intended to limit or restrict those obligations.]

¹³The Subcommittee felt that it was important to make this point, but left open the question whether the first bracketed sentence by itself was too narrow to express the point that the rule does (and of course could not) limit the prosecution's constitutional obligations. The bracketed sentence is intended to make this point in more general terms, and might be used in addition to or instead of this sentence.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Draft Rule 16(a)(1)(H) and Committee Note

DATE: September 24, 2005

I. Introduction

The proposed amendment is the result of three years of discussion and consideration by the full Advisory Committee and by two subcommittees. The issue has been a difficult one because of the importance of each of the competing interests. This memorandum describes the rationale for the proposed amendment, and comments briefly on the reasons for opposition by the Department of Justice. Although the Committee has already voted to adopt the amendment, a full articulation of the issues is appropriate because of the continued opposition of the Department of Justice, which has indicated that it plans to oppose the amendment in the Standing Committee.

The case for the amendment rests on three premises (1) disclosure of exculpatory and impeachment evidence is an important component of fairness in the criminal justice system, (2) a rule mandating disclosure is needed, and (3) a rule mandating disclosure will not create serious problems that outweigh the need for disclosure.

Neither the Department of Justice nor any other member of the Advisory Committee questions the importance of disclosure. Providing the defense with access to exculpatory or impeaching evidence and information is critical to accuracy of the fact-finding process and to fundamental fairness in an adversarial system. As the Supreme Court explained in *Brady v. Maryland*, 373 U.S.83, 87 (1963):

...[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. 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 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."

Thus failure to disclose exculpatory or impeachment evidence renders the trial of any accused unfair. In addition, it significantly increases the chance that a factually innocent defendant may be convicted. Cf. JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995*, Appendix A, at 1-4 (2000), available at <http://justiceccjr.policy.net/cjedfund/jpreport/liebman2.pdf.finrep.pdf>. (concluding that 16 percent of erroneous capital convictions were caused by prosecutorial suppression of exculpatory evidence).

The critical questions are whether a rule mandating disclosure is needed to insure that exculpatory and impeachment evidence are provided to the defense in federal cases, and -- even if the case for such a rule might otherwise be sufficient -- whether a rule mandating disclosure would cause such serious problems that it would be unwise to amend the rule. The Department contends that no rule is needed, and that adoption of the proposed rule would create serious and unwarranted problems.

II. WHY A RULE REQUIRING DISCLOSURE IS NEEDED

In federal cases the government is already subject to both a constitutional and a statutory duty to disclose some forms of exculpatory and impeachment evidence: a constitutional duty under *Brady* and its progeny, and a duty to disclose various types of evidence under Rule 16. Moreover, the Department of Justice emphasizes that it takes its constitutional duty seriously, and provides extensive training to prosecutors to insure that they will comply with this duty. The fundamental question is whether these are sufficient. In other words, what is the evidence that there is a problem of sufficient seriousness to warrant an amendment to the rules?

The material gathered by the Advisory Committee approaches this issue from two directions. First, we can ask whether we can identify cases in which exculpatory and impeachment evidence was not disclosed, despite the Department of Justice's efforts to train and supervise its prosecutors to insure that they comply with *Brady*. Second, we can ask whether as a policy matter the scope of the duty imposed by *Brady* and Rule 16 in combination is sufficient.

A. Evidence of Failure to Comply With *Brady* in Federal Cases

Attempting to gauge the number of cases where there has been a failure to comply with *Brady* is intrinsically difficult because – by definition – the evidence in question is neither known to the defense independently nor provided to it by the prosecution. Thus the cases in which this issue is litigated are generally those in which the defense learns, by chance, that additional information exists which was not disclosed. (There are also a few cases in which the government belatedly informs the court of its failure to disclose.) There is no way to determine how many other cases there may be.

Prior to the April 2005 meeting the Committee obtained two compilations that identified federal cases where the courts found that the prosecution had failed to comply with *Brady*. Material from two compilations is attached.

The first list is excerpted from a publication prepared by the Habeas Training and Assistance Project in 2001. Their study included state as well as federal cases, but I have deleted all but the cases that were clearly federal prosecutions. There are approximately 50 cases on the list, coming from twelve different circuits. Thirty nine of the cases come from the period 1990 to 2001. I attempted to limit the excerpted list to cases in which the court found a violation of *Brady* sufficient to grant relief, on some or all counts. (Note that in some of these cases the relief was based in part on the *Brady* error, and in part on other prosecutorial error.) The list includes a brief description of the nature of the violation, which is helpful in getting a sense of the range of cases in which the courts have found that federal prosecutors failed to comply with *Brady*.

Note that the Habeas Training and Assistance Project's list does not include post 2001 cases, such as *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004) (holding the cumulative effect of government's suppression of evidence regarding its star witness warranted a new trial); *United States v. Rivas*, 377 F.3d 195 (2nd Cir. 2004) (reversing conviction because government withheld a critical piece of evidence – that government's chief witness, not defendant, brought drugs onto ship – that supported the defense theory); *United States v. Conley*, 332 F. Supp. 2d 302 (D. Mass. 2004) (conviction for perjury and obstruction of justice reversed because prosecution suppressed memorandum indicating key witness had uncertainty about his recollection and contained request for polygraph); and *United States v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich. 2004) (conviction for providing material support to terrorists reversed after government informed court that *Brady* and *Giglio* materials had not been disclosed). See also *United States v. Ferrara*, 372 F. Supp. 2d 108 (D. Mass. 2005) (resentencing defendant because prosecution withheld evidence that its only direct source of information on murder charge had twice stated that defendant did not order the murder; disclosure of this information would have led defendant not to plea bargain murder charge).

Second, I have included Jason B. Binimow, *Constitutional Duty of a Federal Prosecutor to Disclose Brady Evidence Favorable to Accused*, 158 ALR FED. 401 (1999) (Supp. 2005). This printout is noteworthy because it contains not only cases in which the court found that exculpatory or impeachment evidence was “material” in the sense used in the *Brady* case, but also a large number of cases in which the court found that exculpatory material had not been provided, but that the error was not of constitutional dimensions because the defendant was unable to show a reasonable probability that if the evidence in question had been disclosed the result of the trial would have been different.

Thus the published studies found multiple cases each year throughout the federal system in which there was a failure to disclose that violated due process, as well as many additional cases in which exculpatory material was not provided, though the failure to disclose did not rise to the level of a due process violation. Given the size of the federal system, is this a sufficient showing to warrant a change? The point made at the outset bears repeating. These are not necessarily the only cases in which exculpatory and impeachment evidence was withheld from the defense. They are merely the cases in which the defense learned by chance of exculpatory or impeachment evidence that had not been disclosed. We have no way of determining how many other cases there may be, except to note that we know of no reason to think that chance disclosure after the fact would occur in every case where such evidence was in the prosecution’s control but not released.

B. The Current Rules Do Not Provide for the Disclosure of All Exculpatory and Impeaching Evidence and Information

Given the importance of providing the defense with exculpatory and impeachment evidence, the Committee also considered whether the current federal rules are drafted in a fashion that provides adequately for the disclosure of this material. The current federal rules fall short of this goal for two reasons. First, the rules do not fully implement the prosecution’s constitutional obligation. Equally important, as a policy matter the Advisory Committee believes that the disclosure obligation should be broader than the minimal constitutional obligation.

The present rules do not fully incorporate the prosecution’s due process obligation to provide the defense with certain exculpatory or impeachment evidence. In other words, the Federal Rules neither codify nor fully incorporate the *Brady* obligation.¹⁴ Rule 16 currently

¹⁴The Advisory Committee made this point explicit. The 1974 Advisory Committee Note for Rule 16 states “the Advisory Committee decided not to codify the *Brady* Rule.” Given the importance of the constitutionally required disclosure of exculpatory and impeachment evidence, it would be appropriate to amend the rules to reflect and implement the constitutional obligation.

provides for pretrial government disclosure to the defense of several kinds of information relevant to the preparation of the defense, but the rules impose no general obligation to provide the defense with all exculpatory or impeaching evidence or information. There is no disclosure obligation for exculpatory or impeachment material that falls outside of the defined categories.¹⁵ For example, the government may be aware that a witness to the crime gave a description of the perpetrator that does not resemble the accused. If the prosecution regards the witness as mistaken and perhaps unreliable, it would not call the witness, so midtrial disclosure would not be available under Rule 26.2 and 18 U.S.C. § 3500. If the information is not embodied in a document, it is not covered by Rule 16(a)(1)(E), even though it is “material to preparing the defense.”¹⁶ Similarly, many forms of impeachment evidence fall outside of the government’s disclosure obligations under Rule 16(a).

Moreover, evidence and information -- even if clearly exculpatory or impeaching -- is not necessarily required to be disclosed under *Brady* and its progeny. The due process obligation is subject to a number of limitations. *Brady* does not create a right to pretrial disclosure. Rather, it holds that a conviction fails to meet due process standards if it rests upon a trial that was unfair because the defendant did not have access to exculpatory or impeachment evidence, and that evidence was “material” in a very specialized sense that reflects the procedural posture in which the Supreme Court has addressed the issue. The government’s constitutional duty to disclose has been defined and enforced in post trial proceedings and appeals. At that stage, the Supreme Court has held that the defense must meet a very high standard of “materiality,” i.e., a reasonable probability that if the information had been disclosed the result of the trial would have been different. This is quite different from the meaning the term “material” is given in other sections of the rule, which requires disclosure of evidence that is “material to preparing the defense,” i.e., relevant to the preparation of the defense.

The Supreme Court recently emphasized this point in *Strickler v. Green*, 527 U.S. 263, 281-82 (1999) when it distinguished between “so-called *Brady* violations” – violations of a

Many other federal rules codify or implement constitutional rulings. *See, e.g.*, Rule 26.2 (adopting procedures to implement *Nobles v. United States*, 422 U.S. 225 (1975), and Rule 32(h) (codifying *Burns v. United States*, 501 U.S. 129, 138-39 (1991)). However, as discussed below, the Committee’s proposal goes beyond the constitutional minimum.

¹⁵The disjunction has been noted by scholars. *See, e.g.*, 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 254.2 at 137 & n. 27 (3d ed. 2000) (noting timing issues related to material that “is exculpatory and within *Brady*, but not discoverable under Rule 16”).

¹⁶Note that even if this information were included in a document, such as a prosecutor’s memorandum, it would likely be exempt from disclosure under Fed. R. Crim. P. 16(a)(2).

“broad obligation to disclosure exculpatory evidence” – and “true” *Brady* violations, which occur only when the defendant can show a reasonable probability that the result would have been different if exculpatory or impeachment evidence had been disclosed. This is an extremely difficult burden for the defense to bear, and it encompasses only a narrow range of information.

Thus at present the government does not have either a constitutional or a rule-based obligation to disclose *all* evidence or information that is directly exculpatory or that would impeach government’s witnesses. Even though this evidence is “material” in the sense that this term is presently used throughout Rule 16 – meaning relevant to the preparation of the defense – it is not necessarily “material” in a constitutional sense under the line of cases following *Brady v. Maryland*, because it might not be sufficient to change the result at trial. Failure to disclose this information is not a “true” *Brady* violation, and does not violate Due Process.

C. The Rationale For A Broader Rule

As a policy matter, the Subcommittee concluded – and the Advisory Committee agreed at the April meeting in Charleston – that the Federal Rules should require disclosure that goes beyond the constitutional minimum. This is desirable because the *Brady* materiality standard is ill suited to the pretrial context, and because a broader rule is consistent with the prosecution’s ethical duties, and with a developing consensus on the best practices for the criminal justice system, as reflected in both published professional standards and state procedural rules. These ethical rules, professional standards, and procedural rules all reflect the judgment, with which the Committee agrees, that fundamental fairness will be advanced by requiring the prosecution to disclose to the defense all exculpatory or impeachment evidence or information within its possession or control. In addition, there are already some precedents in the federal system, where a number of districts (or individual judges within those districts) require disclosure of exculpatory and impeachment evidence not directly addressed by Rule 16.

1. The *Brady* Materiality Standard Is Not Well Suited to the Pretrial Context

In the pretrial context it is difficult to apply the narrow *Brady* concept of materiality, which was designed to be applied after trial. Under *Brady* a due process violation has occurred only when the defendant can establish a reasonable probability that if the disputed information had been disclosed the result of the trial would have been different. It is only after the trial that one can judge the effect of information that was withheld in light of the evidence as a whole, and thus determine whether the result would have been different if the evidence in question had been available to the defense. Before trial, in contrast, the prosecution cannot

know with certainty even how its own case will develop, and it has very limited knowledge of the defense evidence and strategy. Thus the prosecutor cannot predict with precision the impact of exculpatory or impeachment evidence in the hands of the defense, though that is exactly what the *Brady* materiality standard requires. Moreover, it is particularly difficult for the prosecutor – the advocate who is also preparing to argue the government’s case – to make predictions about the likely impact of information as it might be developed by the defense. See generally Scott B. Sundby, *Fallen Superheros and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002).

The Federal Rules do not require the attorneys for the government to make predictions of this nature regarding the likely impact of evidence before providing it to the defense. Instead, they use the broader and more readily applied test of whether evidence or information is “material to preparing the defense.” See Fed. R. Crim. P. 16(a)1)(E)(i) and (F)(iii). This phrase has been interpreted as requiring a showing that the evidence would be “helpful to the defense,” see 25 MOORE’S FEDERAL PRACTICE § 616.05 [1][b] n.10 (3rd ed. 2005) (collecting cases).¹⁷ This is far more favorable to the defense than the *Brady* materiality standard, and much easier to apply in the pretrial context.

2. Ethical Rules and Statements of Good Practice Support a Broader Duty of Disclosure

More fundamentally, there is a developing consensus that favors broader disclosure of all exculpatory and impeachment evidence to the defense (i.e., what the Supreme Court in *Strickler* referred to as “so-called *Brady*” material). This is expressed in statements of the prosecutor’s ethical duties, published professional standards for criminal justice practices, and procedural rules from many jurisdictions.

A broad duty to disclose exculpatory and impeachment evidence to the defense can be found in the current statement of the prosecutor’s ethical duties under the Model Rules of Professional Conduct, and in the American Bar Association’s Criminal Justice Standards governing the prosecution function and discovery. These standards agree on two key points. They are not limited to exculpatory and impeachment evidence that is “material” in the narrow sense that term is used in the context of the *Brady* cases. Instead, they apply to both “evidence” and other “information” that is exculpatory or impeaching in a broad sense.

¹⁷ But note that in the context of claims of selective prosecution, which involve prosecutorial work product, the courts have held that evidence is not material to the preparation of the defense unless the defendant can demonstrate that the disputed evidence would enable the defendant to significantly alter the quantum of proof in his favor. See 2 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 254 at 108-09 (3d ed. 2000).

The Model Rules of Professional Conduct state the following ethical standard for prosecutors:

The prosecutor in a criminal case shall:

.....

(d) 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 mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal....

AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8(d) (2002). Note that this extends to “all evidence or information” as long as it “tends to negate the guilt of the accused,” a much broader standard than *Brady* materiality. The American Bar Association’s CRIMINAL JUSTICE STANDARDS FOR DISCOVERY states the same obligation.¹⁸

The ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, 3rd, provide that broad disclosure – not disclosure limited to *Brady* materiality – is required at the earliest possible time:

(a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, 3RD, Standard 3-3.11 (1993).

¹⁸It provides that the prosecution should disclose:

(viii) Any material or information within the prosecutor’s possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY, Standard 11-2.1 (a) (3rd Ed. 1996).

3. State Precedents Support a Broader Disclosure Rule

A similar trend has occurred in the state procedural rules. A 2004 study by the Federal Judicial Center (which is included as an appendix to this report) found that most states have adopted procedural rules codifying the prosecution's duty to disclose exculpatory and impeachment evidence, and that many states have adopted the language of the ABA's Model Rules and the Criminal Justice Standards. According to the FJC study, twenty three states have adopted rules that require disclosure of "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 therefore." LAUREL L. HOOPER, ET AL., 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 19 (October 2004). Ten additional states provide for a duty to disclose "exculpatory evidence" or "exculpatory material." *Ibid.* Five states require the disclosure of evidence "favorable to the accused" that is also "material and relevant to the issue of guilt or punishment." *Id.* at 20. Many states also provide for the disclosure of types of evidence and information, not included in Rule 16, that would be helpful to the defense. *Id.* at 21.

4. Local Rules in Various Federal Districts Also Provide Precedents for Broader Disclosure of Exculpatory and Impeachment Evidence

The Federal Judicial Center study also found that in a number of districts local court rules require some form of disclosure of exculpatory and impeachment material. Although the terms vary from district to district, taken together they indicate a sentiment that more disclosure of exculpatory and impeachment evidence is desirable and that earlier disclosure is desirable as well. The FJC study found that thirty of the ninety-four districts had a relevant local rule, order, or procedure governing disclosure of that they called "*Brady* material." *Id.* at 4, 7-8. (Note, however, that in some cases these orders are specific to a particular judge or magistrate, and do not apply to the entire judicial district.) Eighteen use the term "favorable to the defendant," and nine more refer to "exculpatory" material. *Id.* 9. Three districts explicitly state that disclosure is required "without regard to materiality." *Ibid.* The timing of the required disclosure varies. In some districts a general term like "timely" is applicable, but in many districts where more specific provision is made disclosure is required early in the process (e.g., 14 days after arraignment). *Id.* at 4, 12-13.¹⁹ For purposes of timing, many of the districts differentiate between exculpatory and impeachment material. Although they

¹⁹The rules and procedures vary in other respects. Twenty-one districts mandate automatic disclosure, and five state that the material must be disclosed at the request of the defendant. *Ibid.*

reflect only a minority of federal districts (and in some cases only particular judges within those districts), these rules, orders, and procedures – particularly in light of the state rules and the national professional standards discussed above – provide some support for an amendment to Rule 16.

III. POTENTIAL PROBLEMS CREATED BY THE AMENDMENT

Although the Department of Justice is not convinced that there is a need for an amendment, its opposition is grounded principally on its grave concerns that the amendment will cause serious problems. It is concerned that the amendment would be unduly vague, and that it would expose witnesses – especially cooperating witnesses – to threats and other forms of undue influence prior to trial. In the Department's view, this would undermine, rather than increase the accuracy of federal proceedings. The Department's concerns center on the difficulty of identifying the material that would have to be disclosed, and the need to disclose prior to trial, which subjects witnesses to the possibility of various forms of pressure and undue influence for a longer period of time. The brief comments below are intended to provide some background to assist the Committee in addressing the Department's concerns.

In order to meet the Department's timing concerns, at the April meeting in Charleston the Advisory Committee agreed to eliminate the requirement that the disclosure take place 14 days before trial, and revised the proposed amendment to require disclosure no later than the beginning of trial. The draft Advisory Committee Note defines that as the time the jury has been selected and sworn (or in a bench trial, the time when the first witness has been sworn). If disclosure is not required until this point in the trial, the Department's concerns have less salience. In particular cases where that would still be far in advance of the testimony of a particular witness, the Department could seek a modification of the discovery duty under Rule 16(d)(1).

Laying aside the timing issue, it is not clear that the danger of coercion and undue influences that might affect the testimony of witnesses, especially cooperating witnesses, would be greater if the scope of the obligation to disclose all exculpatory and impeachment evidence were enlarged as proposed in the amendment. Indeed, the premise of the amendment is that enhancing the defendant's ability to test each witness's testimony with the aid of exculpatory or impeachment evidence would make that testimony and the trial itself more, rather than less, reliable. Thus the crux of the problem regarding witness coercion and undue influence seems to be the timing requirement.

The Department is concerned that the amendment adopted in April would permit the court to advance discovery, since it speaks in terms of discovery no later than the start of trial.

The Department has suggested that the current language of the amendment might actually be more problematic than a definite cut off date of 14 days before trial. Since the change from 14 days to the start of trial was made to address the Department's concerns, this issue should be discussed at the October meeting in Santa Rosa. If the Committee reintroduces the 14 day before trial timing provision, it would seem that this too could be accelerated by the court, and that the government could seek a protective order under Rule 16(d)(1) under either version of the amendment.

The other main ground of concern expressed by the Department of Justice is that the proposed amendment is so broadly and vaguely worded that the government will find it difficult to comply without adopting an open file policy. The amendment requires disclosure of "information that is known to the government – or through due diligence could be known to the government – that the government has reason to believe may be favorable to the defendant because it tends to be either exculpatory or impeaching." There are several elements of the proposed rule:

- "known to the government – or through due diligence could be known to the government"

This language was drawn from Rule 16(a)(1)(B)(i) & (D), so precedents interpreting those subdivisions will be available to guide the interpretation of the amendment. This does not seem to be the focus of the government's concern. Rather, the Department's concerns focus on one or both of the final two elements:

- "that the government has reason to believe may be favorable to the defendant"
- "because it tends to be either exculpatory or impeaching."

As noted above, the language "tends to be either exculpatory or impeaching" is found in the Model Rules of Professional Conduct, the ABA Criminal Justice Standards, and many state discovery rules. Thus there should be ample precedents to guide federal prosecutors who seek to comply with this language. I am not certain whether there are precedents for the language referring to the government having reason to believe the evidence may be favorable to the defendant. However, this language appears to benefit the government by insulating it from any suggestion that it would have a duty to disclose evidence that tends to be exculpatory or impeaching, even if the government lacked the background knowledge necessary to appreciate the exculpatory or impeaching potential of the evidence.

IV. OTHER ISSUES REGARDING THE SCOPE OF THE AMENDMENT

In addition to issues flagged by the footnotes to the draft rule, a variety of other issues regarding the scope of the propose rule were discussed by the Subcommittee during the conference call and in comments provided to me subsequently. The following issues may be raised again at the Advisory Committee meeting in Santa Rosa.

(1) The draft rule applies to exculpatory and impeachment "information," rather than evidence. The Subcommittee favored the broader term information, though some members favored the narrower term evidence. (As noted in footnote 1 accompanying the draft rule, the ABA Model Rule and Criminal Justice Standards use both terms: evidence *and* information.) The draft rule thus includes information that would be not be admissible evidence. This might be information that would lead to admissible evidence, and also could include inadmissible evidence. How far should or does this go? Does it include polygraphs and hypnosis? Privileged information? Hearsay barred by *Crawford*? What about work product? (Is that protected by Rule 16(a)(2)?) What about strategic information that could arguably could be considered exculpatory (poor witness demeanor, reluctance to testify, other witness or evidence availability issues, assessments of credibility)? If the draft rule retains the term information, should the Advisory Committee Note state some limitations?

(2) The draft rule is not limited to information that is within the possession or control of prosecutor, though that phrase is used elsewhere in Rule 16. The Subcommittee discussed this briefly, but did not add it to the draft rule. Could that create problems?

(3) The word "government" is much broader than the limitation to agencies and agents assisting in investigation that appears in the comment. Should the limitation be moved from the comment to the text of the rule?

(4) The draft includes information that "may be" favorable because it "tends to be" exculpatory or impeaching. In contrast, *Brady* requires evidence that "is favorable or impeaching" (*see Strickler*). As noted above, the Advisory Committee intended to go beyond the constitutional minimum, and the Subcommittee discussed, but did not accept, the suggestion that the rule should be revised to read "the Government has reason to believe is exculpatory or impeaching."

(5) The *Brady* constitutional obligation extends to evidence that is material to punishment as well as evidence material to guilt or innocence. Should the rule extend to information related to mitigating punishment?

Excerpts from
Summaries of Successful Cases
Under *Brady v. Maryland*,
Through July 2001,
A Publication of the
Habeas Assistance and Training Project

UNITED STATES COURTS OF APPEALS

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.

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.

United States v. Auten, 632 F.2d 213 (5th Cir. 1980). Prosecutor's lack of knowledge of witness's criminal record was no excuse for Brady violation.

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.

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.

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.

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.

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.

United States v. Tinch, 907 F.2d 600 (6th Cir. 1990). "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. Tinch, 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.

United States v. Spagnuolo, 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. Gregory, 983 F. 2d 1069 (6th Cir. 1992) (unpublished). 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. [Case remanded for resentencing.]

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.

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.

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.

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.

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.

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.

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.

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."

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.2d 1003 (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.

United States District Courts

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 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.

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.

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.

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.

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.

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 identified 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.

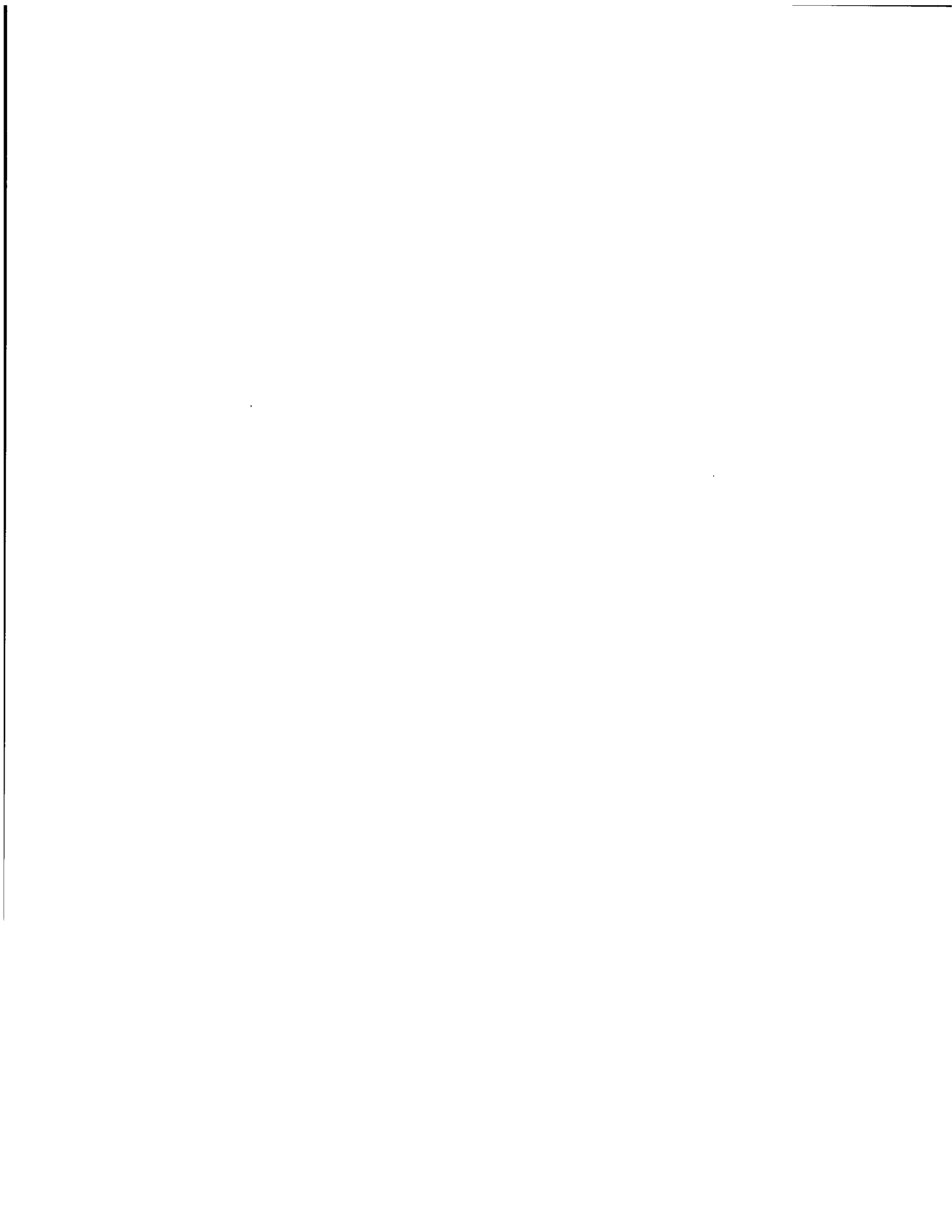
United States v. Dollar, 25 F.Supp. 2d 1320, 1332 (N.D.Ala. 1998). The district court dismissed charges of conspiracy and concealing the identity of firearms purchasers as a result of the government's repeated, egregious violations of its disclosure obligations under Brady. These violations centered 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."

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.

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.

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.

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."



CONSTITUTIONAL DUTY OF FEDERAL PROSECUTOR
TO DISCLOSE BRADY EVIDENCE FAVORABLE TO ACCUSED

Jason B. Binimow

158 A.L.R. Fed. 401 (1999)

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Annotation

CONSTITUTIONAL DUTY OF FEDERAL PROSECUTOR TO DISCLOSE BRADY EVIDENCE
FAVORABLE TO ACCUSED

Jason B. Binimow, J.D.

The United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), held that the suppression by the prosecution of evidence favorable to an accused on 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. In the case of *U. S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the Supreme Court explicitly extended the principle of *Brady* to the due process clause of the Fifth Amendment to the Constitution, and the Court held that a federal prosecutor has a constitutional duty to volunteer exculpatory matter to the defense, even in the absence of a specific request for *Brady* material, and the Court addressed the standard of materiality that gives rise to the duty to disclose *Brady* evidence. Subsequently, the Supreme Court held in *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), that evidence is material for *Brady* purposes only if reasonable probability exists that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The court in *U.S. v. Scarborough*, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), held that the prosecutor's revelation of exculpatory material just prior to the end of the trial did not violate the defendant's right to due process under the Fifth Amendment to the Federal Constitution, since the constitutional standard of materiality was not met, as the defendant did not show that an earlier disclosure of the exculpatory material by the federal prosecutor would have created any greater doubt about the defendant's guilt or affected the result of the trial.

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§ 2. Summary and comment

[a] Generally

The United States Supreme Court stated that within the federal system a United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it win a case, but that justice be done. [FN9] The Supreme Court accordingly, as noted in the decisions below, set forth constitutional rules under the Fifth and Fourteenth Amendments to the Constitution ensuring and protecting the special role played by the American prosecutor in the search for truth in criminal trials. [FN10]

The United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a case arising under the Fourteenth Amendment, held that the suppression by the prosecution of evidence favorable to an accused on 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. [FN11] Thus, the government's Brady obligation to disclose evidence extends only to favorable evidence that is material. [FN12] Since Brady interpreted the constitutional guaranty of due process, it applies alike to federal and state prosecutions. [FN13]

The Supreme Court in *Giglio v. U. S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), a case arising under the Fifth Amendment, held that when the reliability of a given witness may well be determinative of guilt or innocence, the nondisclosure of evidence affecting credibility falls within the rule that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution. Further, the Supreme

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Court in *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972), reh'g denied, 409 U.S. 897, 93 S. Ct. 87, 34 L. Ed. 2d 155 (1972), a case arising under the Fourteenth Amendment, held that a valid Brady complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense.

The Supreme Court in *U. S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), a case arising under the due process clause of the Fifth Amendment, described "three quite different situations" in which the rule of *Brady v. Maryland* applies and set forth varying tests of materiality to determine whether a criminal conviction must be overturned. The *Agurs* court stated that in the first situation, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury, and the Court imposed a strict standard of materiality where the prosecution uses evidence that it knew, or should have known, was false so that in such a case, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. The second situation in which *Brady* applies, according to the *Agurs* court is characterized by a pretrial request for specific evidence followed by noncompliance, and the Court also imposed a strict standard of materiality in this situation, with the defendant being entitled to a new trial if there is any reasonable likelihood that the evidence could have affected the outcome of the trial. The *Agurs* Court also extended the holding of *Brady* to the situation where the prosecutor failed to volunteer exculpatory evidence never requested, or requested only in a general way, but only when suppression of the evidence would be of sufficient significance to result in the denial of the defendant's right to a fair trial. One federal circuit has described the relevant standard of materiality where the government failed to volunteer exculpatory evidence never requested, or requested only in a general way, with the statement that the defendant will be entitled to a new trial only if the undisclosed evidence, viewed in the context of the entire record, creates a reasonable doubt that otherwise would not exist. [FN14]

The Court in *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), a case arising under the due process clause of the Fifth Amendment, held that regardless of the type of the defendant's request for *Brady* material, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. [FN15] The *Bagley* Court also disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes. [FN16]. Due to the Supreme Court's abandonment of the distinction between "specific request" and "general or no request" situations in *Bagley*, the government's responsibility to produce *Brady* materials is neither heightened nor relaxed by the presence or absence of a written *Brady* request or a motion to compel, and the government has an ongoing burden to provide material exculpatory evidence whenever it discovers that it has such information in its possession. [FN17]

The Court noted that it is not clear whether the *Bagley* Court intended to subsume the prosecutor's knowing use of or failure to disclose perjured testimony under this new test, or whether the old *Agurs* test is still applicable in that situation. [FN18] The Court also noted that, when a court finds that the government knowingly, recklessly, or negligently used false testimony, or if the prosecution knowingly fails to disclose that testimony used to convict a defendant was false, the *Agurs* "any reasonable likelihood" standard applies. [FN19] Thus, under the *Brady* analysis, the standard of materiality is less stringent when the prosecutor knowingly uses perjured testimony or fails to correct testimony the prosecutor learns to be false, in which instance the falsehood is deemed material if a "reasonable likelihood" exists that the false testimony could have affected the jury's verdict. [FN20] The "reasonable probability of a different result" materiality standard is substantially more difficult for a defendant to meet than the "could have affected" standard. [FN21] The Court also held that when undisclosed *Brady* material undermines the credibility of specific evidence that the government otherwise knew, or should have known, to be false, this strict standard of materiality applies, and the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. [FN22] Evidence of perjury not released to the defendant by a federal prosecutor has been (§ 16[a], *infra*) and has not been (§ 16[b], *infra*) held to warrant a new trial under the *Agurs* standard of materiality for such evidence.

The Court in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), a case arising under

(Publication page references are not available for this document.)

the Fourteenth Amendment, explicitly stated that the Bagley Court had abandoned the distinction between the second and third Agurs circumstances, the specific request and the general or no request situations, in favor of the reasonable probability test of materiality. The Kyles Court did not address the first Agurs category, undisclosed evidence of perjury. The Kyles Court also expanded on Bagley's definition of materiality. The Kyles Court held that while the constitutional duty of Brady is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal, but rather whether in the absence of the undisclosed evidence the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Thus, according to the Kyles Court, a reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. [FN23] The Kyles Court also emphasized that Bagley materiality is to be defined in terms of suppressed evidence considered collectively, and not item by item, as the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. Since, as the Kyles Court pointed out, the Constitution does not demand an open file policy on the part of the prosecutor, the rule in Bagley and 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. [FN24]

The Court held that the suppression of exculpatory evidence by the government constitutes a material violation of the due process principles of Brady and its progeny, and thus warranted a new trial or other remedial action (§ 3[a], § 4, § 5[a], § 6[a], § 8[a], § 9). The Court also held that suppression of exculpatory evidence by the government does not constitute a material violation of the due process principles of Brady and its progeny, thus not warranting a new trial or other remedial action (§ 3[b], § 5[b], § 6[b], § 7, § 8[b], § 10-12).

Evidence can be exculpatory, for purposes of compelling disclosure under Brady, although the evidence is not directly about the defendant; there are many cases where impeachment evidence concerning a witness or codefendants leads to reasonable doubt about the defendant's guilt or innocence. [FN25] Because impeachment is integral to a defendant's constitutional right to cross-examination, there exists no pat distinction between impeachment and exculpatory evidence under Brady. [FN26] Impeachment evidence is subjected to the same materiality analysis as is purely exculpatory evidence. [FN27] In a Brady materiality inquiry, the evidence is "material" if the undisclosed evidence could have substantially affected the efforts of the defense counsel to impeach a witness, thereby calling into question the fairness of the ultimate verdict. [FN28] Evidence of impeachment is material if the witness whose testimony is attacked supplied the only evidence linking the defendants to the crime, or where the likely impact on the witness' credibility would have undermined a critical element of the prosecution's case. [FN29] Similarly, impeaching matter may be found material where the witness supplied the only evidence of an essential element of the offense. [FN30] Impeachment evidence is material where the undisclosed matter would have provided the only significant basis for impeachment. [FN31] Undisclosed impeachment evidence is not material in the Brady sense when, although possibly useful to the defense, it is not likely to have changed the verdict. [FN32] Where a witness' credibility is not material to the question of guilt, failure to disclose impeachment evidence does not violate Brady. [FN33] Suppressed impeachment evidence is also not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. [FN34] However, the fact that other impeachment evidence was available to the defense counsel does not necessarily render undisclosed impeachment evidence "immaterial" for Brady purposes; undisclosed impeachment evidence can be "immaterial," because of its cumulative nature only if the witness was already impeached at trial by the same kind of evidence. [FN35] Courts have held that undisclosed impeachment evidence was (§ 13[a], § 14[a], § 15, *infra*) and was not (§ 13[b], § 14 [b], *infra*) a material violation of Brady.

Information withheld by the prosecution is not material, for Brady purposes, unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes. [FN36] Inadmissible evidence is by definition not material for Brady purposes, because it never would have reached the jury and therefore could not have affected the trial outcome. [FN37] To determine whether evidence that could be used to impeach a prosecution witness that the prosecution does not disclose to the defendant is material to the

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defendant's case, an appellate court must determine what evidence would technically be admissible and what portion of that evidence the trial court would allow under the discretion granted to it under the evidentiary rule. [FN38] regarding the admissibility of evidence of specific acts of a witness for impeachment purposes. [FN39] Exculpatory (§ 8[b], *infra*) and impeachment (§ 13[b], *infra*) evidence has been held to be inadmissible, and thus immaterial for Brady purposes.

The Supreme Court has never explicitly pinpointed the time at which the disclosure under Brady must be made for materiality purposes. [FN40] The Court held that Brady is not violated when the Brady material is made available to the defendants during the trial. [FN41] When Brady evidence is disclosed at trial in time for it to be put to effective use, a new trial will not be granted simply because the evidence was not disclosed as early as it might have and, indeed, should have been. [FN42] Moreover, even if the prosecution's disclosure of exculpatory evidence in accordance with Brady was impermissibly delayed, reversal will not obtain unless such evidence was material. [FN43] The relevant standard of materiality does not focus on the trial preparation, but instead on whether earlier disclosure would have created a reasonable doubt of guilt that did not otherwise exist. [FN44] The Court also stated, however, that in considering the delayed disclosure of Brady material, the critical question is whether the delay prevented the effective use of the material by the defense, and the defendant is required to show some prejudice beyond mere assertions that the defendant would have conducted the cross-examination differently. [FN45] Thus, a Brady violation can occur if the prosecution delays in transmitting evidence during trial, but only if the defendant can show prejudice, e.g., that the material came so late that it could not be effectively used. [FN46] A Brady violation based on the inability to adequately investigate or to develop additional evidence is not sufficient to establish prejudice *per se*. [FN47] The Court also stated that the standard to be applied under Brady and *Agurs* in determining whether a delay by the prosecutor in disclosing material evidence to the defense violates due process is whether the delay prevented the defendant from receiving a fair trial, and as long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence, due process is satisfied. [FN48] Another variation on the test for constitutional error in the delayed release of Brady evidence is that no violation of due process occurs if the evidence is disclosed to the defendant at a time when the disclosure remains of value. [FN49] The Court also stated that the government's failure to timely disclose Brady information warrants reversal only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. [FN50] While Brady material must ordinarily be disclosed in time for its effective use at trial, and while Brady material includes information that may be used to impeach the credibility of a prosecution witness, the government is not obligated to disclose such information prior to trial, as the defendant's due process rights will be fully protected if the disclosure of information that may be used to impeach the credibility of a prosecution witness is made on the day that the witness testifies. [FN51] The Jencks Act requires the Federal Government to produce a witness' statement only after that witness has testified on direct examination. [FN52] The Supreme Court did not address the inherent conflict between the principles of due process underlying Brady and the Jencks Act, as Brady was a case arising under the Fourteenth Amendment, and there is a split of authority over whether the due process principles of Brady and its progeny or the Jencks Act control the timing of the disclosure of evidence which is subject to both Brady and the Jencks Act. Some courts hold that Brady and Jencks material need not be disclosed by the government until after direct examination, as directed by the Jencks Act. [FN53] Other courts have held that compliance with the Jencks Act does not necessarily satisfy the due process requirements for Brady material. [FN54] The belated disclosure of exculpatory evidence during trial has been held to not constitute a material violation of Brady (§ 17-23). The belated disclosure of impeachment evidence during trial has been (§ 24[a], *infra*) and has not been (§ 24[b], *infra*) held to constitute a material violation of Brady.

The government's obligation to make Brady disclosures is pertinent not only to an accused's preparation for trial but also to his determination of whether to plead guilty. [FN55] The defendant is entitled to make that decision with full awareness of favorable material evidence known to the government. [FN56] Thus, some courts have concluded that a federal prosecutor's nondisclosure of Brady/Giglio material may be sufficient to invalidate a guilty plea. [FN57] In the guilty plea context, a defendant establishes the "materiality" of undisclosed Brady/Giglio evidence by showing a reasonable probability that, but for the failure to disclose the evidence, the defendant would have refused to plead and would have opted for trial. [FN58] The test for whether a defendant

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would have chosen to go to trial if the defendant had received Brady material is an objective one that centers on the likely persuasiveness of the withheld information. [FN59] While a defendant seeking to withdraw his plea under Federal Rule of Criminal Procedure 32(e) normally bears the burden of demonstrating both that there are valid grounds for withdrawal and that such grounds are not outweighed by any prejudice to the government, where a Brady violation is established, that is, the court found that the government withheld favorable information from the defendant and ruled that there is a reasonable probability that the information, if disclosed, would have led the defendant not to plead guilty, a court has no discretion to deny the motion; rather, if the undisclosed evidence could in any reasonable likelihood have affected the judgment of the jury, a new trial is required, since in the context of a proven Brady violation, it would be entirely inappropriate to allow the government to defeat the motion by arguing that the warranted remedy for its own constitutional violation is likely to cause it prejudice. [FN60] Based on the circumstances present, a defendant's guilty plea has been held to be invalid due to the nondisclosure of material impeachment evidence (§ 14[a], *infra*). In other situations, a defendant's guilty plea has been held to be valid despite the nondisclosure of impeachment evidence (§ 14[b], *infra*). The Court also held a defendant's guilty plea to be valid despite the nondisclosure of exculpatory witness statements (§ 6 [c]).

The Brady requirement that the government disclose exculpatory information applies to sentencing. [FN61] The due process requirement that a defendant receive a fair sentencing hearing has been held to be violated by the nondisclosure of material Brady exculpatory [FN62] and impeachment (§ 15, *infra*) evidence.

[b] Practice pointers

The United States Supreme Court, in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), a case arising under the Fourteenth Amendment, held that while a showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more, the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Thus, according to the *Kyles* Court, 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. [FN63] Accordingly, the Brady obligation extends only to material evidence that is known to the federal prosecutor. [FN64] An individual federal prosecutor is presumed, however, to have knowledge of all information gathered in connection with his office's investigation of the case. [FN65] Nonetheless, knowledge on the part of persons employed by a different office of the Federal Government does not in all instances warrant the imputation of knowledge to the federal prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would require the adoption of a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis. [FN66]

The *Kyles* Court also held that once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review, as assuming *arguendo* that a harmless error inquiry were to apply, a *Bagley* error could not be treated as harmless, since a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict.

A court of appeals reviews *de novo* a claim of failure to disclose evidence in violation of Brady. [FN67] While a court of appeals conducts an independent examination of the record to determine whether Brady has been violated by nondisclosure, and the court likewise makes an independent review of the district court's determination of materiality, which is a mixed question of fact and law, [FN68] the trial judge's conclusion as to the effect of the government's nondisclosure of evidence on the outcome of the trial is entitled to great weight. [FN69] A court of appeals reviews a district court's denial of a defendant's Brady challenge on grounds of materiality for an abuse of discretion, [FN70] and a court of appeals reviews for abuse of discretion a district court's denial of a motion for a new trial based on newly discovered evidence claimed to violate Brady. [FN71]

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Absent a mistake of law, a court of appeals reviews a district court's finding that the prosecution's delayed disclosure of evidence favorable to the defense was harmless under the abuse-of-discretion standard. [FN72] A defendant who claims that his hand was prematurely forced by the delayed disclosure of favorable evidence cannot rely on wholly conclusory assertions, but must bear the burden of producing, at the very least, a prima facie showing of a plausible strategic option which the delay foreclosed. [FN73]

A court of appeals determines the existence of a reasonable probability that the proceeding would have been different had the government disclosed the evidence to the defendant based on the cumulative impact of all the evidence suppressed in violation of Brady. [FN74] For purposes of a new trial based on newly discovered Brady evidence, a showing of materiality does not require the suppressed evidence in question to establish the defendant's innocence by a preponderance of the evidence, and the question is not whether the defendant would more likely 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. [FN75]

The United States Attorney's Office for the District of Columbia prosecutes cases in both the federal district court and the local superior court, and the prosecutor is responsible, at a minimum, for all Brady information in the possession of that office. [FN76]

Evidence is "material" for Brady purposes, and thus must be disclosed by prosecution, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S.C.A. Const Amend V. U.S. v. Lemmerer, 277 F.3d 579 (1st Cir. 2002).

To prevail on a Brady claim, the defendant must show that (1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced at a time when it would have been of value to the accused; and (3) the suppressed evidence was material to his guilt or punishment. U.S. v. Blocker, 39 Fed. Appx. 543 (9th Cir. 2002)

To establish a Brady violation, the defendant must show: (1) that the government possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not obtain the evidence with reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different. U.S. v. Woodruff, 296 F.3d 1041 (11th Cir. 2002).

II. UNDISCLOSED EVIDENCE

A. Exculpatory Evidence

1. Documentary Evidence and Statements, Generally

§ 3. Nontestimonial evidence generally

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of the nontestimonial exculpatory evidence in question constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant or a hearing to determine whether the government withheld material exculpatory evidence, in violation of Brady.

The court in *U.S. v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993), held that the prosecutor's failure to disclose salient information unearthed during an investigation into the defendant's claim that she had been coerced by a drug trafficker into carrying heroin into the United States violated the prosecutor's obligation under Brady, and

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thus warranted a new trial, where the prosecutor learned that the source named by the defendant existed and was a prominent drug trafficker.

The court in *U.S. v. Srulowitz*, 785 F.2d 382 (2d Cir. 1986), held that evidence withheld by the government in a case under the Racketeer Influenced and Corrupt Organizations Act alleging that the defendant was a member of a RICO enterprise that engaged in arson-for-profit schemes, was material, thereby entitling the defendant to a new trial. The court concluded that the evidence in the undisclosed files must be considered material in the constitutional sense, as that concept was defined by the Supreme Court, since, although the defendant did not show that the evidence would more likely have resulted in his acquittal, the evidence was sufficient to create a "reasonable" probability that the outcome of the trial would have been different had the files been disclosed and to undermine confidence in the outcome of the trial.

For purposes of Brady claim, exculpatory evidence is considered "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Taus v. Senkowski*, 293 F. Supp. 2d 238 (E.D. N.Y. 2003).

The court in *U.S. v. Wilson*, 135 F.3d 291, 48 Fed. R. Evid. Serv. (LCP) 883 (4th Cir. 1998), cert. denied, 118 S. Ct. 1852, 140 L. Ed. 2d 1101 (U.S. 1998), held that the prosecution's closing argument that the defendant murdered someone who stole or attempted to steal drugs from him was improper when the prosecution knew that a different man was in prison for the murder, but did not disclose that fact to the defense in violation of Brady, assuming that the defendant did not know about such exculpatory and impeachment evidence before the trial.

Undisclosed evidence is material for Brady purposes when its cumulative effect is such that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; "reasonable probability" is one sufficient to undermine confidence in the outcome. *U.S. v. White*, 238 F.3d 537 (4th Cir. 2001).

Evidence is material, for purposes of determining whether a prosecutor's failure to turn over allegedly exculpatory evidence is a Brady due process violation, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S.C.A. Const Amend V. Williams v. Puckett*, 283 F.3d 272 (5th Cir. 2002).

Government's intentional withholding, in prosecution of a former Central Intelligence Agency (CIA) officer for illegally shipping plastic explosives to Libya, of information favorable to the former officer's defense that he had continued to be associated with the CIA after his formal employment ended, constituted a Brady violation; withheld material tended to be exculpatory and would have impeached government's denial of the continuing association, and there was a reasonable probability of a different verdict had the material been produced. *U.S. v. Wilson*, 289 F. Supp. 2d 801 (S.D. Tex. 2003).

The court in *U.S. v. Ranger Electronic Communications, Inc.*, 22 F. Supp. 2d 667 (W.D. Mich. 1998), held that the prosecutor violated the Brady obligation to share exculpatory information, in a prosecution against a foreign manufacturer of radio equipment that ended in a dismissal with prejudice of the illegal importation charges, by failing to timely produce documents that would have provided the manufacturer with an argument that the imported radios were not prohibited by law and that the regulations in place did not provide adequate notice to importers that the radios were so prohibited.

Evidence is material under Brady if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S. v. Koubriti*, 297 F. Supp. 2d 955 (E.D. Mich. 2004).

Government's failure, in prosecution for conspiracy to provide material support and resources to terrorists, conspiracy to engage in document fraud, and document fraud, to produce potential Brady and/or Giglio material,

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required dismissal of terrorism related count and new trial on document fraud count; government's withholding of materials materially misled the Court, the jury, and the defense as to the nature, character, and complexion of critical evidence, violating defendants' due process, confrontation, and fair trial rights. U.S.C.A. Const. Amends. V, VI. *U.S. v. Koubriti*, 2004 WL 2022904 (E.D. Mich. 2004).

Under Brady, government must disclose evidence favorable to defense where evidence is material to either guilt or punishment of defendant. *Ienco v. Angarone*, 291 F. Supp. 2d 755 (N.D. Ill. 2003).

The court in *U.S. v. Robinson*, 39 F.3d 1115 (10th Cir. 1994), held that the district court did not abuse its broad discretion in ordering a new trial for a defendant convicted of distributing cocaine on the ground of a Brady violation in the government's failure to disclose evidence tending to identify a former codefendant, rather than the defendant, as the drug courier. The court found that the conviction was based largely on the testimony of the codefendant and another former codefendant, the defendant had a strong alibi defense, and the Brady evidence did not simply impeach the former codefendants, but instead exculpated the defendant by implicating one of the codefendants.

The court in *U.S. v. Fernandez*, 136 F.3d 1434 (11th Cir. 1998), held that the defendant, a police officer convicted of conspiracy to import and distribute cocaine for alleged tipping off the leader of the conspiracy that a cocaine shipment from Venezuela was under surveillance, was entitled to a hearing to determine whether the government withheld material exculpatory evidence, in violation of Brady; the court found that post-trial news reports described a possible link between the Central Intelligence Agency and the shipment at issue, and evidence of such a link may have supported the defendant's theory that there were other possible tipsters.

In order to establish Brady violation, defendant must demonstrate that State possessed evidence favorable to him; that defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; that State suppressed the favorable evidence; and that had evidence been disclosed to defense, there was reasonable probability that outcome of proceedings would have been different. *Chandler v. Moore*, 240 F.3d 907 (11th Cir. 2001).

The court in *U.S. v. Lloyd*, 71 F.3d 408, 76 A.F.T.R.2d (P-H) ¶ 95-8019 (D.C. Cir. 1995), reh'g and suggestion for reh'g in banc denied, (Feb. 5, 1996), held that a defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to a new trial where the prosecution, without wrongdoing, withheld the tax return of the defendant's client for the year which the defendant did not prepare returns as the undisclosed return raised a reasonable probability of a different result had it been disclosed at trial.

The court in *In re Sealed Case No. 99-3096*, 185 F.3d 887 (D.C. Cir. 1999), held that, in granting a new trial for the defendant, who was convicted of unlawful possession of a firearm and ammunition by a convicted felon, the prosecution had a Brady obligation to disclose any co-operation agreements between a witness and the government, even if Brady disclosure obligations did not apply to evidence impeaching defense witnesses, as the witness effectively became a government witness when he "flipped" and started testifying against the defendant, and the defendant sought agreements not for impeachment purposes, but to show the witness' motive for planting firearms underlying the prosecution in the defendant's home, and thus corroborate his innocence defense. Thus, the agreement giving the witness motive to plant firearms in the defendant's home qualified as Brady material regardless whether the witness testified. The court noted that although the defendant, at the time of his pretrial motion, was not entitled to disclosure of co-operation agreements involving an informant who provided information leading to the defendant's arrest, given that the informant's identity was confidential and the helpfulness of the requested information was speculative, disclosure became necessary once the informant voluntarily revealed himself to the defense counsel, admitted planting evidence in the defendant's home, and stated that he was co-operating with the police to work off local charges; together with the search warrant affidavit stating the basis for the informant's reliability, such information eliminated the speculative nature of the possibility that a materially relevant co-operation agreement existed. The court found that despite its claim that it

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should not have been required to "scamper" about searching for requested evidence during the middle of the trial, the government was not relieved of its Brady obligation to search for and disclose any co-operation agreements involving the witness under the theory that it was too late to compel production of such evidence when the witness testified, as the government could have gathered the evidence earlier, particularly when the defendant had requested the information earlier and had indicated the relevance of the witness' motive during opening statements. The Court also held that it was irrelevant, for purposes of the prosecution's Brady obligation to disclose material exculpatory and impeachment evidence, that the requested records could have been in possession of the local police department, the Federal Bureau of Investigation (FBI), or Drug Enforcement Administration (DEA), rather than the United States Attorney's Office, as the prosecutor had a duty to learn of favorable evidence known to others working on the case on the government's behalf, including the police. The government's failure to satisfy its Brady obligation to disclose the witness' co-operation agreements also was not excused by the court on the ground that the information was otherwise available to the defense when the government conceded that it had not yet conducted a full search of its own, and thus did not know the full details of any such agreements, and when the defense was seeking information from more trustworthy source than the witness.

Evidence is material for purposes of Brady 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. *Boone v. U.S.*, 769 A.2d 811 (D.C. 2001).

Favorable evidence is "material" within meaning of Brady doctrine only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of proceeding would have been different. *Rowland v. U.S.*, 840 A.2d 664 (D.C. 2004).

A violation of Brady, which requires that a prosecutor disclose to defense counsel material information which is exculpatory, is one of due process, and a three-part test is used to evaluate whether a violation has occurred: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to the defendant; (3) the evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. U.S.C.A. Const. Amend. 14. *Keeter v. State*, 97 S.W.3d 709 (Tex. App. Waco 2003).

Evidence is "exculpatory," as element of prosecution's due process obligation under Brady to disclose material exculpatory evidence, if it is favorable to the accused. U.S.C.A. Const. Amend. XIV. *Martinez v. Com.*, 590 S.E.2d 57 (Va. Ct. App. 2003).

[b] Held not material

The courts in the following cases held that the federal prosecutor's failure to disclose the exculpatory nontestimonial evidence in question did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

To state a valid Brady claim, a plaintiff must show that the evidence was (1) suppressed, (2) favorable, and (3) material to the defense, and evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense. *Riley v. Taylor*, 237 F.3d 300 (3d Cir. 2001).

Government's failure to inform defendant of disciplinary suit against police detective did not constitute Brady violation, where detective testified as defense witness, evidence was neither material or exculpatory, and evidence was contained in detective's lawsuit against employer, to which defendant had access. *U.S. v. Coletta*, 59 Fed. Appx. 492 (3d Cir. 2003).

In prosecution of highway contractor and purported subcontractor for misrepresentations concerning compliance

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with disadvantaged business enterprise (DBE) requirements, there was no Brady violation in failing to disclose state agency's audit file on the project, as the file was available through sources other than the prosecutor, such as a Freedom of Information Act (FOIA) request, and it was readily apparent from the audit report, which was disclosed, that the audit was based, at least in part, upon documents maintained and collected by the agency, and where it was not explained how the information not disclosed was exculpatory. 5 U.S.C.A. § 552. U.S. v. Brothers Const. Co. of Ohio, 219 F.3d 300 (4th Cir. 2000).

In prosecution for felony murder and distribution of heroin, prosecution's failure to disclose evidence that key prosecution witness had an affair with a police officer did not constitute a Brady violation, though such evidence was favorable to defendant; defendant was not prejudiced, as testimony of another witness was enough to support a guilty verdict. Hillman v. Hinkle, 114 F. Supp. 2d 497 (E.D. Va. 2000), appeal dismissed, 238 F.3d 412 (4th Cir. 2000).

The court in U.S. v. McKellar, 798 F.2d 151 (5th Cir. 1986), held that the rights of the defendant under Brady to the requested exculpatory material were not violated by the failure of the prosecutor to turn over to the defendant, who was charged with making false statements to two federally insured lending institutions in connection with a development project, information that an employee of the company promoting the projects had raised the amounts on the defendant's financial statements to make the defendant appear more financially stable, where the defendant had confirmed that one statement at issue was a true copy of one he submitted, the other statement forming the basis of the charges reflected lower valuations than the statement adopted by the defendant, and the defendant never challenged the genuineness of the contents of the statements.

The court in U.S. v. Aubin, 87 F.3d 141, 78 A.F.T.R.2d (P-H) ¶ 96-5311 (5th Cir. 1996), reh'g and suggestion for reh'g in banc denied, 100 F.3d 955 (5th Cir. 1996) and cert. denied, 519 U.S. 1119, 117 S. Ct. 965, 136 L. Ed. 2d 850 (1997), held that the prosecution's failure to disclose a report of the state Savings and Loan Department that allegedly showed that the Department knew of the defendant's involvement in the loan transaction, in the prosecution of the defendant for bank fraud, did not violate the Brady rule requiring the disclosure of exculpatory evidence, as the court found that the defendant did not show any likelihood that the result of the trial would have been different if he had been in possession of the report prior to the trial.

The court in U.S. v. Burns, 162 F.3d 840 (5th Cir. 1998), cert. denied, 119 S. Ct. 1477, 143 L. Ed. 2d 560 (U.S. 1999), held that the government audit report showing that the corporation which contracted to provide management services for properties in receivership was owed back management fees by the receiver was not material in a prosecution of the corporation's chief executive officer for conspiracy, illegal participation in a transaction involving a federal credit institution, and making false statements, and thus, the prosecution's claimed failure to produce the audit during trial could not support the Brady claim, as the overwhelming evidence indicated that the defendant intentionally falsified and inflated invoices in a scheme to defraud the government, and the audit would have weakened testimony stating that the larger amount was still owed the corporation.

The court in U.S. v. Guerrero, 894 F.2d 261 (7th Cir. 1990), held that a downward revision of the amount of cocaine that the defendant personally delivered did not constitute material evidence under Brady for purposes of determining the defendant's sentence such that the defendant was entitled to a new sentence due to the government's alleged failure to disclose the postsentencing revision. The court found that the defendant was sentenced as a conspirator and the sentence was based on the amount of cocaine involved in the conspiracy, rather than merely the amount the defendant delivered.

The court in U.S. v. Carson, 9 F.3d 576 (7th Cir. 1993), held that the government's alleged withholding of documents, which would have shown that the government informant threatened or harmed others, did not constitute a Brady violation, on the theory that the evidence was relevant to the defendant's defense that the informant coerced him into joining the drug conspiracy, where no reasonable possibility existed that the material described by the defendant would have been sufficient to rebut the direct evidence of his participation in the scheme to deal cocaine. The court in U.S. v. Bolduc, 134 F.3d 374 (7th Cir. 1998), reh'g and suggestion for reh'g

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en banc denied, (Apr. 14, 1998) and cert. denied, 119 S. Ct. 209, 142 L. Ed. 2d 171 (U.S. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 53(b)(2) of the Seventh Circuit, held that there was no indication that nondisclosure of the alibi evidence undermined the confidence in the verdict; instead, the court found that there was ample, independent corroborating evidence of the defendant's guilt, and therefore, there was no reasonable probability that the defendant's trial would have been different had the alibi evidence been introduced.

The court in *U.S. v. Copple*, 827 F.2d 1182, 23 Fed. R. Evid. Serv. (LCP) 1033 (8th Cir. 1987), held that even if the defendant was denied access to FDIC examinations of the bank and the person who prepared the examinations, there was not a reasonable probability that access to the reports would have brought a different result on the charge arising out of a scheme to finance a real-estate development by obtaining bank loans in violation of federal law, and thus, the evidence was not material for Brady purposes.

The court in *U.S. v. Ryan*, 153 F.3d 708 (8th Cir. 1998), reh'g denied, (Sept. 21, 1998) and cert. denied, 119 S. Ct. 1454, 143 L. Ed. 2d 541 (U.S. 1999), held that no reasonable probability existed that evidence of tests performed by government experts on samples from the floor of the building that had burned, and of the fact that one of the government's experts disagreed with other experts regarding the cause of the deep charring on the floors of the building, if disclosed, would have changed the outcome in the arson prosecution under 18 U.S.C.A. § 844(i), and thus, the district court did not abuse its discretion in determining that the government's failure to disclose the evidence did not warrant a new trial under Brady; the court found that the presence of floor burn patterns was merely a small part of the government's well-supported theory that the fire was intentionally set, and the undisclosed evidence had limited exculpatory value.

The court in *U.S. v. Lehman*, 792 F.2d 899 (9th Cir. 1986), held that even assuming that the FBI report were "favorable" to the accused and "material" evidence, there was no reasonable possibility that the government's failure to disclose the report materially affected the verdict, and thus did not warrant reversal of the defendant's conviction under Brady, as the report stated only that footprint photographs were taken on the asphalt of the hangar area south of the airport terminal and did not say that the photos were taken in an area where a car might have been waiting for the robbers, and thus did not provide support for the defendant's claim that the robbers met a waiting getaway car, instead of meeting the defendant's waiting plane.

The court in *U.S. v. Amlani*, 111 F.3d 705, 46 Fed. R. Evid. Serv. (LCP) 1422 (9th Cir. 1997), opinion after remand, 169 F.3d 1189 (9th Cir. 1999), held that the government's failure to produce a compliance letter written by an attorney, which outlined procedures to ensure that the defendant's telemarketing company complied with telemarketing laws, did not constitute a Brady violation in the prosecution for telemarketing fraud, absent a reasonable probability that the outcome would have been different had the letter been disclosed. The court found that although the defendant contended that the letter, which allegedly was seized during a search, would have allowed him to show that he intended to comply with the law and not to commit fraud, the letter was consistent with the prosecution as well as the defense theories.

The court in *U.S. v. Cooper*, 173 F.3d 1192, 48 Env't. Rep. Cas. (BNA) 1477, 29 Env'tl. L. Rep. 21044 (9th Cir. 1999), petition for cert. filed, 68 U.S.L.W. 3138 (U.S. Aug. 23, 1999), held that a government report indicating that the investigation of the print shop identified by a witness as a source of falsified certificates revealed no evidence that the shop had ever printed certificates for the defendant or that the witness was not "material," for the purposes of the defendant's claim that the government failed to disclose the report in violation of Brady, given that the defense was able to impeach the witness extensively and there was ample evidence of guilt independent of the witness' testimony.

In wire fraud prosecution, failure to disclose the presentence report (PSR) of one of defendant's co-schemers, which revealed that co-schemer had been arrested several times and noted his history of alcohol use, was not sufficiently prejudicial to warrant a new trial on ground of Brady violation, because the evidence against defendant was overwhelming and he vigorously cross-examined co-schemer, who admitted that he had previously

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been convicted of wire fraud and to having an impaired memory, and told jurors about his plea agreement. U.S.C.A. Const. Amend. 5. U.S. v. Ciccone, 219 F.3d 1078 (9th Cir. 2000).

Defendant failed to prove his claim of Brady violation, where he did not identify any exculpatory evidence that government had failed to produce or that it produced too late to be useful to defendant, and even if he had, he also failed to articulate a "reasonable probability" that the outcome of his case would have been different had certain information been provided or provided in a more timely manner. U.S. v. Carrillo, 81 Fed. Appx. 141 (9th Cir. 2003).

Evidence that witness had several traffic misdemeanor charges and that prosecutor in capital murder case personally helped him achieve favorable dispositions on those charges was not material, and thus, prosecutor's failure to disclose that evidence to defendant did not deprive defendant of due process, where there was no reasonable probability that outcome of trial would have been different if defense had known about undisclosed benefits, given that witness was impeached with his plea agreement on burglary charge in which state granted him immunity on murder charge in return for testimony against defendant, and his testimony was corroborated by other, disinterested witnesses. U.S.C.A. Const. Amend. 14. Belmontes v. Woodford, 335 F.3d 1024 (9th Cir. 2003).

The court in U.S. v. Conner, 752 F.2d 504 (10th Cir. 1985), held that in a prosecution for the robbery of a federally insured institution, the government's failure to reveal a third lineup to the defendant did not violate Brady, as that lineup related to the government's ongoing investigation into other potential defendants involved in the robbery and did not relate to the defendant, so that it was not material.

The court in U.S. v. Kluger, 794 F.2d 1579 (10th Cir. 1986), held that the denial of the motion for a new trial by the defendants, convicted of obtaining money by false promises of loans from European banks, was not an abuse of discretion where the government's failure to make available two letters and an FBI report concerning the legitimacy of a Belgian bank was not a "material" denial of the right to a fair trial, as the claim by the defendants that the evidence would establish their good-faith belief in the bank was a mere "thread in a tapestry" showing that the defendants fraudulently obtained money by false promises of loans from many European banks; thus, the court found that there was no reasonable probability that the introduction of the documents would have changed the result.

The court in U.S. v. Page, 828 F.2d 1476 (10th Cir. 1987), held that the financial records of the company, from which the defendant allegedly received bribes, were not material, and their suppression by the prosecutor did not require a new trial under Brady. The court found that the records would have merely provided cumulative evidence that payments to the defendant were described as past attorney's fees, rather than bribes, and the defendant could have obtained essentially the same evidence by calling the company's accountant to testify about the contents of the records.

The court in U.S. v. Hernandez, 94 F.3d 606 (10th Cir. 1996), held that the defendant failed to show there was a reasonable probability that the disclosure of evidence regarding the size of the drug organization in which he was involved and others' fear of the organization would have produced a different verdict had it been disclosed by the government in his prosecution on drug and continuing criminal enterprise (CCE) charges. The court found that the size of the organization was irrelevant to the defendant's CCE conviction, and evidence of others' fear did not create a reasonable probability of acquittal without any objective evidence of threats.

COMMENT:

The court in Hernandez noted that the Tenth Circuit had previously followed the Supreme Court case of Agurs in holding that in a case where specific information was not requested, materiality depends on whether the omitted evidence creates a reasonable doubt that did not otherwise exist. The court held, however, that in light of the Supreme Court case of Bagley, where a majority of the Supreme Court agreed that the proper standard

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for materiality, at least in cases where the defendant's request was not specific, is whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, the court would proceed to apply the Bagley standard, although the court suspected that the distinction between the Agurs standard and the Bagley standard might well be one without a difference.

The court in *U.S. v. Hanzlicek*, 1999 WL 638204 (10th Cir. 1999), held that the government's failure to produce the list of victims who received fraudulent checks from the leader of an antigovernment group and information regarding the cashing of those checks was not a Brady violation; the court found that the significance of whether banks actually cashed the checks was not material to the defendant's prosecution for mail fraud, conspiracy, and attempting to pass a counterfeit obligation of the United States.

The court in *U.S. v. Nichols*, 242 F.3d 391 (10th Cir. 2000), cert. denied, 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001), affirming *U.S. v. Nichols*, 67 F. Supp. 2d 1198 (D. Colo. 1999), aff'd, 242 F.3d 391 (10th Cir. 2000), cert. denied, 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001), rejected the defendant's contention that either a whole new trial or an evidentiary hearing should have been granted by the district court due to the failure of the prosecution during trial to turn over some 40,000 Federal Bureau of Investigation "lead sheets." In setting the issues for discussion raised by the defendant's post-trial motions, the district court described the universe of FBI reports compiled in this case as " 'information control' sheets, informally called 'lead sheets'." Routinely, FBI agents and other FBI personnel use a standard form, in triplicate, to record received information that may possibly be relevant to an investigation, identifying the source, method, date and time of contact and a narrative summary of what was heard from the source. This form is also used to document communications between agents. Each lead sheet is given a control number and the form provides a space for reporting what investigative steps were taken as a result of the information received or the agent's message. The follow-up to the lead is an interview of the source or of others who may have more information, the agent conducting the interview will report what was said on a Form 302 if the information is thought to be relevant to the investigation or in the form of an "insert" if the information is of no apparent value. Although all 302s and inserts were turned over by the government to the defense prior to trial, none of the more than 40,000 lead sheets were made available. The defendant claimed he was unaware of their existence prior to an incident during trial, and the government did not contest this assertion. The court noted that due process requires prosecutors to disclose "evidence favorable to the accused ... where the evidence is material either to guilt or to punishment," and to establish a violation of Brady, the defendant must show the evidence was: (1) suppressed by the prosecution; (2) favorable to him; and (3) material. The court noted that the prosecutors' duty to avoid suppression is an active one. It includes "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Moreover, the obligation to turn over evidence "stands independent of the defendant's knowledge." Evidence favorable to the accused includes exculpatory evidence, other information that provides important investigative leads, and impeachment evidence. In judging materiality, the focus must be on the cumulative effect of the withheld evidence, rather than on the impact of each piece of evidence in isolation. The cumulative effect of withheld evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Reasonable probability is not to be read as a requirement the defendant show by a preponderance of the evidence he would have been acquitted, *id.*, instead, "significant possibility would do better at capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence ." The court further noted that ultimately, the policy animating Brady is the desire to ensure a fair trial and a verdict worthy of confidence, and thus, the key issue is whether the government's evidentiary suppression undermines confidence in the outcome of the trial. In making his Brady argument, the defendant asserted some 219 of the 12,000 lead sheets handed over to the defense contain information directly relevant to issues tried in the case yet not turned over to the defense prior to trial. The defendant did concede, however, most of this information was available in FBI 302's and inserts turned over to the defense. His motion for a new trial focused on 62 lead sheets he contends were exculpatory, directly relevant, and never turned over in any form. The court found that while the defendant argued the lead sheets pointed to the existence of conspirators other than himself who aided Mr. McVeigh and cast doubt on his participation in the overt acts which lead to his conspiracy conviction, even proof of the existence of a real John Doe # 2 and of his participation would not

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contradict the government's indictment, as the indictment charged the defendant conspired with Mr. McVeigh and with others unknown. The participation of another conspirator disclosed by the evidence, therefore, would not relieve the defendant of culpability under the indictment. Thus, the court held that there was no reason to believe withholding this information from the defense violated the defendant's right to a fair trial.

COMMENT:

Denying certiorari, the United States Supreme Court in *Nichols v. U.S.*, 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001), let stand the Tenth Circuit decision of *U.S. v. Nichols*, 242 F.3d 391 (10th Cir. 2000), cert. denied, 532 U.S. 985, 121 S. Ct. 1632, 149 L. Ed. 2d 493 (2001) (unpublished table disposition--see 2000 WL 1846225), denying a retrial to the defendant Terry Nichols based on the failure of prosecution lawyers to turn over some 40,000 Federal Bureau of Investigation "lead sheets" during his prosecution for conspiring to bomb the Alfred P. Murrah Building in Oklahoma City on April 19, 1995. The "lead sheets," also known as "information control" sheets, are prepared by FBI personnel to record received information that may possibly be relevant to an investigation, and to document communications between agents. Among the 62 lead sheets that Mr. Nichols focused upon were those containing information about a possible additional conspirator known as "John Doe #2," and those purportedly showing that Timothy McVeigh, also convicted in connection with the bombing, had connections to militia groups that did not include Mr. Nichols. The Ninth Circuit analyzed each category of documents focused upon under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (U.S. 1963), which requires prosecutors to disclose exculpatory evidence. The Court of Appeals concluded that the government's evidentiary suppression did not undermine confidence in the outcome of the trial.

To succeed in a Brady claim, the defendant must prove the following: (1) that the State possessed evidence favorable to the defense; (2) that he did not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Hooper v. State*, 554 S.E.2d 750 (Ga. Ct. App. 2001).

§ 4. Grand jury testimony

The court in the following case held that the federal prosecutor's suppression of the grand jury testimony in question constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a reversal of the defendant's conviction.

The court in *U.S. v. Tinch*, 907 F.2d 600 (6th Cir. 1990), reh'g denied, (Aug. 13, 1990), held that the prosecutor's statement in response to a request for Brady material not previously provided, that he did not know of any additional material, amounted to deliberate misrepresentation in light of his knowledge of the testimony of the government agent before the grand jury, and required reversal since the misconduct precluded review of the agent's testimony by the district court.

Even if grand jury testimony of certain alleged bookmakers indicated no illegal behavior on the part of a defendant charged with extortion and racketeering, it was not exculpatory as to the extortion charges that were in the indictment, which did not relate to any of these alleged bookmakers, and thus disclosure was not required under Brady, even if disclosure would have been helpful to the defense in making determinations about possibly calling some of these persons as witnesses, particularly where defendant made no showing that he would have been unable to identify, locate, and interview these individuals through reasonable efforts on his own part, and it was the defendants' own recorded conversations that brought these alleged bookmakers and gamblers to the government's attention. *U.S. v. Corrado*, 227 F.3d 528, 2000 FED App. 280P (6th Cir. 2000).

A Brady violation occurs only if the government withholds evidence that, had it been disclosed, creates a

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reasonable probability that the result of the trial would have been different; the later inquiry is subjective: the 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. *U.S. v. Elem*, 269 F.3d 877 (7th Cir. 2001).

§ 5. Statements of defendant

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of the statements of the defendant in question constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial or other remedial action for the defendant.

The court in *U.S. v. Severson*, 3 F.3d 1005 (7th Cir. 1993), appeal after remand, 49 F.3d 268 (7th Cir. 1995), reh'g denied, (#94-2287) (Mar. 14, 1995) and reh'g denied, (#94-2315) (May 4, 1995), held that the government's postsentencing disclosure of possible *Brady* material relating to the substance of the defendant's custodial statements required reconsideration of the defendants' sentences insofar as the sentencing court denied a reduction for acceptance of responsibility and increased the sentences for obstruction of justice. The court found that the new evidence referred to by the government might be consistent with one defendant's testimony at a pretrial hearing, and the sentencing court made its rulings in part based on a determination that the defendant lied at the pretrial hearing.

The court in *U.S. v. Severdija*, 790 F.2d 1556 (11th Cir. 1986), held that the captain's statement to a member of the coast guard boarding party, that he "knew a big load was coming up in a few days on a shrimper" and that the coast guard "should stick around the area because the fishing would be good," should have been disclosed, under *Brady*, to the captain who was convicted of conspiracy to possess with intent to distribute marijuana, and thus warranted a new trial. The court found that there was no evidence that the captain knew of the recordation of his statements, and the credibility of the captain on the question of intent was the critical issue before the jury at the trial.

[b] Held not material

The court in the following case held that the federal prosecutor's suppression of the statement of the defendant did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not warranting a new trial.

Government was not required to disclose to defendant charged with being a felon in possession of a firearm photograph and tape of defendant's meeting with detective, where defendant was aware of existence of photograph and tape prior to trial and neither photograph nor tape constituted exculpatory or impeachment evidence that would have had impact on outcome of trial. *U.S. v. Lineberry*, 93 Fed. Appx. 632 (5th Cir. 2004).

Government's failure to turn over information which amounted to nothing more than defendant's protestations of innocence was not *Brady* violation; defendant's statements withheld by government were neither favorable nor material within meaning of *Brady*. *U.S. v. Danielson*, 325 F.3d 1054 (9th Cir. 2003).

The court in *U.S. v. Gutierrez-Hermosillo*, 142 F.3d 1225, 152 A.L.R. Fed. 757 (10th Cir. 1998), cert. denied, 119 S. Ct. 230, 142 L. Ed. 2d 189 (U.S. 1998), held that the defendant was not deprived of due process, pursuant to the *Brady* rule, by the prosecution's alleged failure to disclose the defendant's statement to police officers that the truck in his possession was taken by its owner during the night, prior to the discovery of marijuana in the truck on which the charges against the defendant were based, since the disclosure of the evidence at issue would not have created a reasonable probability of acquittal.

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§ 6. Statements of witnesses

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of the statements of the witness in question constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted remedial action for the defendant.

Prosecution's wrongful withholding of evidence, and in particular, of FBI memorandum which indicated that police officer, who had been present during incident in which undercover police officer was beaten by officers who mistook him for a suspect being pursued, had expressed some uncertainty about his recollection of incident, and contained request for authorization to take polygraph examination of officer, deprived second officer who had been at scene of a fair trial in prosecution for perjury and obstruction of justice in connection with investigation of beating, so that new trial was warranted under *Brady*; while other withheld evidence, standing alone, would not have warranted relief, memorandum contained significant data bearing on inability of officer, who was key witness at trial, to recall crucial events. U.S.C.A. Const. Amend. 5. *Conley v. U.S.*, 332 F. Supp. 2d 302 (D. Mass. 2004).

The court in *U.S. v. Frost*, 125 F.3d 346, 1997 FED App. 274P (6th Cir. 1997), held that the defendant charged with mail fraud in connection with billing practices under public contracts made a sufficient showing of materiality to be entitled to a hearing on his claim that the government violated *Brady* by failing to disclose the statements by a federal contracting officer that he saw no evidence that bonuses were billed in a deceptive manner, that small businesses often made technical billing violations, and that the defendant knew that the contract would be audited.

The court in *U.S. v. Locke*, 1999 WL 558130 (N.D. Ill. 1999), held that the defendant convicted of conspiracy to import heroin into the United States in violation of 21 U.S.C.A. § 963 was entitled to a new trial, as the government knew of, and failed to disclose, exculpatory evidence that a codefendant stated at his change-of-plea hearing that their trip to Thailand was for some legitimate purpose and did not involve drug smuggling. Having found that the government "suppressed" the codefendant's guilty plea statement, the court found the codefendant's guilty plea statement material to issues at the defendant's trial. The government's principal witness against the defendant testified that the defendant knew the trip to Bangkok was a heroin smuggling trip and that he participated in the trip by carrying money overseas. In addition to impeaching the witness' testimony, the court found that the codefendant's guilty plea statement tends to exculpate the defendant from any knowledge of, or participation in, the heroin importation conspiracy, as according to the codefendant, the defendant did not know about the heroin smuggling operation when he took the trip to Bangkok. This court held that in light of the strong evidence that the defendant did not knowingly participate in the heroin importation conspiracy, a new trial would be granted.

The court in *U.S. v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998), held that the government's failure to comply with the defendants' discovery request for *Brady* materials warranted dismissal of the indictment for conspiracy to defraud the government with respect to the defendants' sales of firearms, even though the evidence was sufficient to establish a conviction, as after 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.

Brady doctrine requiring prosecutor to disclose exculpatory evidence is not intended to punish society for the misdeeds of the prosecutor, but to avoid unfair trial of the accused. *People v. Mucklow*, 35 P.3d 527 (Colo. O.P.D.J. 2000).

The failure to disclose a significant change in a witness's testimony is as much a discovery violation as a complete failure to disclose a witness. West's F.S.A. RCrP Rule 3.220(j). *Scipio v. State*, 867 So. 2d 427 (Fla.

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Brady rule regarding the defendant's right to disclosure of exculpatory evidence applies to evidence impeaching the credibility of a state's witness. *Martin v. State*, 784 N.E.2d 997 (Ind. Ct. App. 2003).

Defendant, accused of molesting his wife's daughter, was denied due process by state's failure to correct investigating officer's testimony during his deposition that he had no personal interest in outcome of case when state knew officer and defendant's wife were involved in romantic relationship; there was material impeachment evidence that defense was denied by suppression of this information. U.S.C.A. Const Amend XIV. *State v. White*, 81 S.W.3d 561 (Mo. Ct. App. W.D. 2002).

Brady, which requires that a prosecutor disclose to defense counsel material information favorable to a defendant, includes both exculpatory and impeachment evidence. U.S.C.A. Const. Amend. 14. *Keeter v. State*, 97 S.W.3d 709 (Tex. App. Waco 2003).

[b] Held not material

The courts in the following cases held that the federal prosecutor's failure to disclose witness' statements did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The court in *U.S. v. Rivalta*, 925 F.2d 596 (2d Cir. 1991), reh'g denied, (Apr. 2, 1991), held that the witness' statement that she saw the original consignee of the stolen diamonds some 30 hours after the consignee was allegedly last seen talking to the defendant subsequently convicted of the transportation and sale of the diamonds was not material to the defendant's guilt for Brady purposes. The court found that although the defendant claimed that the statement showed that the consignee was alive and well at the time he and the codefendant were allegedly fleeing, the jury was never informed about the consignee's death or disappearance.

The court in *U.S. v. Bryser*, 10 F. Supp. 2d 392 (S.D.N.Y. 1998), held that a statement made to agents of the Federal Bureau of Investigation by a codefendant was not material, and thus, there was no Brady violation in the government's nondisclosure of the statement to the defendant, convicted of an armored car robbery; the court noted that any exculpatory statements by the codefendant were wholly incredible, and the statement on its face directly implicated the defendant, at least in efforts to conceal the robbery.

Defendant was not deprived of exculpatory evidence in violation of Brady, based on government's failure to provide him with form allegedly contradicting credibility of government witness, since form was not favorable evidence, where it would not have affected witness's credibility because he testified only that defendant was a party to murder, while form suggested only that victim was murdered and that codefendant was murderer. *Ida v. U.S.*, 207 F. Supp. 2d 171 (S.D. N.Y. 2002).

The court in *U.S. v. Alberici*, 618 F. Supp. 660 (E.D. Pa. 1985), held that the eyewitness' failure to identify the alleged arsonist and statements that the persons they saw were approximately 25 to 30 years of age were relevant and potentially exculpatory in the defendant's trial for mail fraud for his part in a theater fire, but the government's failure to disclose such evidence prior to trial did not entitle the defendant to a new trial, in light of the overwhelming evidence of the alleged arsonists' involvement.

The court in *U.S. v. Pungitore*, 15 F. Supp. 2d 705 (E.D. Pa. 1998), certification denied, 1998 WL 966085 (E.D. Pa. 1998), held that no Brady violation occurred from the nondisclosure of evidence that a police officer saw a murder victim after the time when government witnesses claimed he was dead, which evidence the defendant learned from a book published many years after the murder and the conviction of the defendant for racketeering that was based in part thereon, where the officer was not assigned to the investigation, was not involved in the prosecution, and gave testimony at a postconviction hearing that contradicted the evidence.

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The court in *U.S. v. Curtis*, 931 F.2d 1011 (4th Cir. 1991), held that the prosecution's failure to disclose an exculpatory memorandum of a police officer's interview with a witness, in which the witness exonerated the defendant of any connection with the crack cocaine possessed by the witness when he was arrested, did not create a reasonable probability that the outcome of trial would have been changed if the memorandum had been disclosed, and did not violate due process. The court found that the defendant was aware of the statement prior to trial, the witness testified consistently with the statement at trial, and the evidence against the defendant was overwhelming.

Witness's statements about murders were not material for Brady purposes, where there was no reasonable probability that result of trial would have been different if suppressed documents had been disclosed to defense; statements were incriminating, not exculpatory. *Bramblett v. True*, 59 Fed. Appx. 1 (4th Cir. 2003), cert. denied, 123 S. Ct. 1779 (U.S. 2003) (4th Cir. 2003).

The court in *U.S. v. Gonzales*, 121 F.3d 928 (5th Cir. 1997), held that any Brady violation arising from the government's purported suppression of the coconspirator's alleged statement that he did not believe that the defendant had been involved in the drug conspiracy of which he was convicted was harmless. The court found that other witnesses testified that the defendant was not a member of the conspiracy, and the evidence against the defendant was overwhelming.

The court in *U.S. v. Kates*, 174 F.3d 580 (5th Cir. 1999), in denying the defendant's motion for a new trial from his conviction of possession with intent to distribute crack cocaine, held that even if the government knew that the potential witness changed her story to claim that the defendant did not toss her the baggy of crack cocaine and that she did not know from where the crack came, the testimony to such effect was either not material or exculpatory, and therefore the government did not violate Brady by failing to disclose it, as the testimony that the defendant did not toss the baggy to the potential witness would have been contrary to her sworn statements at her guilty plea hearing, and thus would not be credible or exculpatory, and the testimony that the potential witness did not know the source of the baggy would not have contradicted the officers' testimony that the defendant tossed the baggy to the potential witness, who tried to throw it in a vacant lot.

The court in *U.S. v. Clark*, 988 F.2d 1459, 38 Fed. R. Evid. Serv. (LCP) 267 (6th Cir. 1993), held that there was no Brady violation in the government's failure to disclose the testimony of three witnesses who recanted seeing strangers seeking directions to the murder victim's street on the night of the murder, as there was no reasonable probability that the result of the trial would have been different had the witnesses been disclosed. The court found that the defense located two of the witnesses and called them to testify at the trial on the defendant's behalf, and the testimony gave little or no support to the defendant's claim of innocence.

There was no Brady violation in capital murder prosecution where witness statements alleged to have been withheld by state were neither exculpatory or material. *Smith v. Anderson*, 104 F. Supp. 2d 773 (S.D. Ohio 2000).

The court in *U.S. v. Asher*, 178 F.3d 486 (7th Cir. 1999), petition for cert. filed (U.S. Aug. 18, 1999), held that the statements given to the government by a witness who stole the vehicle to which the defendant allegedly transferred another vehicle's vehicle identification number (VIN) were not material within meaning of Brady, in a prosecution for various offenses arising from the transfer of the VIN, because they did not undermine confidence in the trial or show that the verdict would probably have been different, and the defendant thus was not entitled to a new trial on basis of the government's failure to disclose such statements.

The court in *U.S. v. Whitehead*, 176 F.3d 1030 (8th Cir. 1999), held that a pretrial statement by a commercial lender at one of the financial institutions involved in the scheme alleged in a bank fraud charge, opining that the defendant did not engage in check kiting, did not have to be disclosed under Brady, where the opinion was made available to the defense through a source other than the government, a defense interview with the lender himself, and the statement was not "material," in that the government's alleged suppression of the statement did not

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prevent the statement from surfacing at trial, yet the jury found the defendant guilty.

The court in *U.S. v. Zuno-Arce*, 44 F.3d 1420 (9th Cir. 1995), as amended, (Feb. 13, 1995), held that in the defendant's prosecution for participating in a conspiracy to murder a drug agent, which murder was claimed by the government to be for the purposes of protecting a drug cartel, the trial court was justified in concluding that the government's withholding of exculpatory evidence in the form of statements allegedly providing an alternative motive for the murder did not affect the outcome of the trial so as to necessitate a new trial under Brady. The court found that although the defendant claimed that the statements showed that the motive for the murder was the agent's romantic relationship with the girlfriend of a member of the cartel, the tape recording of the interrogation and torture of the agent before his murder revealed that the interrogation related solely to the business of the cartel.

In prosecution for wire fraud and money laundering in connection with purported charitable fund-raising scheme, defendant suffered no prejudice from the government's failure to disclose the extent to which two of the donors worked with the FBI, and thus non-disclosure of this information did not give rise to a Brady violation, where the government used such donors only to authenticate tapes of conversations with defendant's solicitors, and they admitted before the jury that they had assisted the FBI. *U.S.C.A. Const. Amend. 5. U.S. v. Ciccone*, 219 F.3d 1078 (9th Cir. 2000).

Government did not violate defendant's due process rights under Brady when it failed to disclose existence of anonymous letter to coconspirator who testified against defendant, even if letter was favorable to defendant, inasmuch as overwhelming evidence against defendant made it likely that disclosure of letter would not have affected result of trial. *U.S.C.A. Const. Amend. 5. U.S. v. Robison*, 19 Fed. Appx. 490 (9th Cir. 2001), cert. denied, 122 S. Ct. 634 (U.S. 2001).

Failure to disclose impeachment material concerning false names used by government witness did not prejudice defendant, in prosecution for narcotics trafficking offenses, absent reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different. *U.S. v. Mendoza-Prado*, 314 F.3d 1099 (9th Cir. 2002).

Drug defendant was not denied due process, despite government's inability to produce audible tapes of defendant's encounter with confidential informer, and informer's subsequent statement, absent showing of bad faith or that recordings were only means to prove defendant's innocence; multiple witnesses could have testified to contents of conversations. *U.S.C.A. Const. Amend. 5. U.S. v. Smith*, 118 F. Supp. 2d 1125 (D. Colo. 2000).

Government's failure to disclose prior to trial that federal agent had interviewed mail fraud defendant's adult step-daughter was not Brady violation; government did not suppress any Brady material, defendant could have easily obtained information in question, and there was no showing of reasonable probability that outcome of proceedings would have been different if government had disclosed allegedly suppressed information. *U.S. v. Day*, 405 F.3d 1293 (11th Cir. 2005).

Government's failure to disclose some information to defendant, regarding debriefings of government witnesses, violated neither Jencks Act nor government's Brady obligation, absent showing that government suppressed either exculpatory or impeachment evidence or material raising reasonable probability that result of proceeding would have been different. 18 U.S.C.A. § 3500(a); Fed. Rules Cr. Proc. Rule 16(a)(2), 18 U.S.C.A. *U.S. v. Haire*, 2004 WL 1379860 (D.C. Cir. 2004).

Prosecution's intent to impeach murder defendant's investigator if he testified was not "exculpatory" evidence, within meaning of prosecution's due process obligation under Brady to disclose material exculpatory evidence. *U.S.C.A. Const. Amend. XIV. Martinez v. Com.*, 590 S.E.2d 57 (Va. Ct. App. 2003).

Prosecution made no Brady violation by failing to disclose to capital murder defendant that witness, whose

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testimony was outlined in prosecution's opening statement, refused to testify at trial; even if knowledge of whether witness would testify constituted material evidence, thereby triggering Brady rule, and even if defendant would have changed his trial tactics, defendant did not request such information, and defendant's lack of knowledge had no effect on jury and therefore would not have affected outcome of trial. U.S.C.A. Const Amend XIV; CrR 4.7. *State v. Thomas*, 83 P.3d 970 (Wash. 2004).

[c] Effect on decision to plead guilty

The court in the following case held that the federal prosecutor's failure to disclose witness statements did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to withdraw his guilty plea.

The court in *U.S. v. Patel*, 1999 WL 675293 (N.D. Ill. 1999), in denying the defendant's motion under 28 U.S.C.A. § 2255, to vacate his sentence on the ground that the government suppressed information helpful to his claim that he was involved in the sale of 100 kilograms of cocaine that was included in the computation of his sentence and there is a reasonable probability that the result of the sentencing proceeding would have been different had the helpful information not been suppressed, rejected the defendant's contention that he would not have agreed to the sentence had he known that evidence in the government's possession showed that the \$2 million in cash seized in the two traffic stops was not attributed to him by the drivers involved. The defendant stated that, had he known what he since discovered, he would have put the government to its proof regarding any drug transactions to be inferred from the seized cash. The defendant claimed that, if the government did not suppress the witness' statements, he would not have agreed that the cocaine equivalent of the cash carried by the witnesses should be attributed to him, resulting in a lower offense level and a lesser period of incarceration. The defendant claimed he would have instead been found to have engaged in an offense involving less than 50 kilograms of cocaine, giving him a base offense level of 34 rather than 36, and potentially, he could have received a sentence 33 months shorter in length than the one imposed. The court held that even assuming the alleged statements to the police occurred, the government knew of them and failed to disclose them, and the defendant had no other adequate access to the statements, his Brady claim failed, as the proffered evidence was not material. The court found that the omitted evidence here, to the extent there is any, did not undermine confidence in the outcome of the defendant's resentencing or his decision to agree to a guideline range on remand, since in light of the other evidence linking the defendant to the drug proceeds and the risks of getting a higher sentence without striking a deal, a reasonable person would have agreed to the government's offer and stipulated to the same sentencing guideline calculations, as the defendant's own words linked him to the seizures.

§ 6.5. Other exculpatory evidence

The following authority considered the constitutional duty of a federal prosecutor to disclose other exculpatory evidence.

Under Brady, the government is required to produce to defendants exculpatory and impeachment evidence that is in its custody, possession, and control. *U.S. v. Rivera Rangel*, 396 F.3d 476 (1st Cir. 2005).

Exculpatory evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, result of the proceeding would have been different. *Bearse v. U.S.*, 176 F. Supp. 2d 67 (D. Mass. 2001)

Evidence is "material" for purposes of Brady violation if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Owens v. U.S.*, 236 F. Supp. 2d 122 (D. Mass. 2002).

The government must disclose evidence tending to exculpate defendant. *U.S. v. Catalan Roman*, 376 F. Supp. 2d 108 (D.P.R. 2005).

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Government did not improperly suppress exculpatory evidence, within meaning of Brady doctrine, where defendant knew of essential facts permitting him to take advantage of such evidence. *U.S. v. Maldonado*, 112 Fed. Appx. 768 (2d Cir. 2004).

Basic rule of *Brady v. Maryland* and its progeny, which is grounded in due process, is that the government has a constitutional duty to disclose favorable evidence to the accused where such evidence is material either to guilt or punishment; "favorable evidence" includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness. *U.S.C.A. Const Amend V. U.S. v. Holihan*, 236 F. Supp. 2d 255 (W.D. N.Y. 2002).

Prosecution did not violate Brady by failing to disclose a statement by conspiracy's ringleader that implicated another coconspirator and exculpated defendant; statement was not material since the statement, even if credible, would not have made a difference in the trial because, while it may have come in to impeach the coconspirator, it could not come in for substantive consideration by the jury because it was inadmissible hearsay, and statement would also have been undercut by the fact that Del ringleader's initial inculpatory statement regarding defendant was fully and powerfully corroborated by the defendant's passport and travel itinerary as well as the testimony of other witnesses. *U.S. v. Perez*, 280 F.3d 318, 58 Fed. R. Evid. Serv. 913 (3d Cir. 2002), cert. denied, 2002 WL 1334943 (U.S. 2002).

Government did not violate its Brady obligation to disclose exculpatory evidence regarding fact that defendant was confidential informant identified by symbol "T-13" in search warrant application papers, where defendant received government's confidential informant file on defendant during discovery and defendant relied on his identity as "T-13" in seeking Franks hearing on warrant application. *U.S.C.A. Const Amend V. Strube v. U.S.*, 206 F. Supp. 2d 677 (E.D. Pa. 2002).

No Brady violation resulted from failure to disclose prior to trial special agent's notes of interview with defendant's former part-time bookkeeper; there was nothing in the interview notes that was not already known or knowable by the defendant through the exercise of reasonable diligence, the interview notes were not exculpatory, and were not material. *U.S. v. Ringwalt*, 213 F. Supp. 2d 499, 90 A.F.T.R.2d 2002-5572 (E.D. Pa. 2002).

To demonstrate a Brady violation and obtain a new trial based on the suppression of evidence favorable to the accused, the defendant must show that the government suppressed evidence that would have been favorable to the defense and material to guilt or punishment. *U.S.C.A. Const Amend V. Morelli v. U.S.*, 285 F. Supp. 2d 454 (D.N.J. 2003).

Speculation that evidence contained exculpatory material is insufficient to state a Brady violation. *U.S. v. Stewart*, 325 F. Supp. 2d 474 (D. Del. 2004).

Evidence is material, for purposes of Brady claim, only if there is a reasonable probability that were it disclosed to the defense, the result of the proceedings would be different. *U.S.C.A. Const. Amend. 5. Hazel v. U.S.*, 303 F. Supp. 2d 753 (E.D. Va. 2004).

Evidence is "material," requiring prosecutor to disclose it under Brady, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Morrow v. Dretke*, 367 F.3d 309 (5th Cir. 2004).

To assert successful Brady claim, defendant must show that: (1) evidence favorable to defendant (2) was suppressed by government and (3) therefore defendant was prejudiced. *U.S.C.A. Const Amend V, XIV. Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002).

The Brady rule encompasses both exculpatory and impeachment evidence. *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003).

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Brady rule requiring prosecution to disclose exculpatory evidence requires exculpatory evidence to be material, such that there is a "reasonable probability" that, had the evidence been disclosed to the defense, the outcome would have been different, and reasonable probability means a probability sufficient to undermine confidence in the outcome. *U.S. v. Jones*, 399 F.3d 640, 2005 FED App. 0102P (6th Cir. 2005).

In order to establish a Brady violation, a defendant must show (1) that the government suppressed evidence, (2) that the evidence was favorable to his defense, and (3) that the evidence was material to an issue at trial. *U.S. v. Tadros*, 310 F.3d 999 (7th Cir. 2002).

Brady requires disclosure only of evidence that is both favorable to the accused and material either to guilt or to punishment. U.S.C.A. Const Amend XIV. *Moore v. Casperson*, 345 F.3d 474 (7th Cir. 2003).

A reasonable probability of a different result is shown, thus establishing materiality element of Brady claim, when the government's evidentiary suppression of Brady material undermines confidence in the outcome of the trial. *U.S. v. Gillaum*, 355 F.3d 982 (7th Cir. 2004).

A reasonable probability of a different result is shown, thus establishing materiality element of Brady claim, when the government's evidentiary suppression of Brady material undermines confidence in the outcome of the trial. *U.S. v. Gillaum*, 372 F.3d 848 (7th Cir. 2004).

In the context of a claim under Brady, that the government suppressed evidence, that the evidence was exculpatory, and that the evidence was material either to guilt or to punishment, materiality is to be determined not by a sufficiency of the evidence test, but rather by consideration of what the government's case would have looked like if the defense had access to the suppressed evidence; materiality is not established through the mere possibility that the suppressed evidence might have influenced the jury. *U.S. v. Carman*, 314 F.3d 321 (8th Cir. 2002).

To establish "materiality" in the context of Brady, the accused must show there is a reasonable probability that if the allegedly suppressed evidence had been disclosed at trial the result of the proceeding would have been different. *Mandacina v. U.S.*, 328 F.3d 995 (8th Cir. 2003).

Due process violation occurs whenever the government suppresses or fails to disclose material exculpatory evidence. *U.S. v. Chase Alone Iron Eyes*, 367 F.3d 781 (8th Cir. 2004).

Evidence is material, for purposes of a Brady claim, if there is a reasonable probability that the disclosure of such evidence would have led to a different result at trial. *U.S. v. Fox*, 396 F.3d 1018 (8th Cir. 2005).

Brady violations are cause for reversal if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S. v. Vieth*, 397 F.3d 615 (8th Cir. 2005).

Evidence is material under Brady if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; the critical question, however, is whether the defendant received a trial resulting in a verdict worthy of confidence. *U.S. v. Almendares*, 397 F.3d 653 (8th Cir. 2005).

Under the Brady rule, the government has a duty to disclose to a defendant, upon request, information that is favorable to an accused where the evidence is material to either guilt or punishment. *U.S. v. Bergonzi*, 216 F.R.D. 487 (N.D. Cal. 2003).

Defendant's right to discover exculpatory evidence under Brady does not include the unsupervised right to search through the government's files, nor does the right require the prosecution to deliver its entire file to the

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defense; rather, Brady obligates the government to disclose only favorable evidence that is material. *U.S. v. Jordan*, 316 F.3d 1215 (11th Cir. 2003).

If the Government fails to disclose material evidence under Brady and Giglio, that is a constitutional violation which requires an affected conviction to be set aside; however, it is possible for such a Brady or Giglio violation to affect fewer than all the counts in a multi-count case. *U.S. v. Lyons*, 352 F. Supp. 2d 1231 (M.D. Fla. 2004).

In determining whether evidence was material with regard to the prosecution's duty to disclose evidence favorable to the defense, the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond to a defense request for such evidence might have had on the preparation or presentation of the defendant's case. *In re Steele*, 85 P.3d 444 (Cal. 2004).

Evidence is "material," as element of State's Brady duty to disclose material exculpatory evidence, 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, which is a probability sufficient to undermine confidence in the outcome. *U.S.C.A. Const. Amend. 14. State v. Sells*, 82 Conn. App. 332, 844 A.2d 235 (2004).

Evidence is "material" for Brady purposes 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. *Cook v. U.S.*, 828 A.2d 194 (D.C. 2003).

Undisclosed exculpatory evidence is material if, evaluated in the context of the entire record, it creates a reasonable doubt that did not otherwise exist. *Com. v. Castro*, 438 Mass. 160, 778 N.E.2d 900 (2002).

Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

"Exculpatory evidence" is evidence which creates a reasonable doubt about the defendant's guilt. *State v. Hutton*, 595 S.E.2d 876 (S.C. Ct. App. 2004).

Defendant was not entitled to new trial based on alleged Brady violation for state's failure to disclose exculpatory evidence concerning murder victim's criminal history and violent character until voir dire, where, for two months between trial and hearing on motion for new trial, defendant failed to produce any witnesses to substantiate claims. *Gutierrez v. State*, 85 S.W.3d 446 (Tex. App. Austin 2002), reh'g overruled, (Oct. 3, 2002).

§ 7. Records regarding victim

The court in the following case held that the federal prosecutor's failure to disclose the victim's criminal record did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The United States Supreme Court in *U. S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), held that the prosecutor's failure to tender the second-degree-murder victim's criminal record to the defense did not deprive the defendant of a fair trial under Brady where it appeared that the record was not requested by the defense counsel and gave no rise to an inference of perjury, the trial judge remained convinced of the defendant's guilt beyond a reasonable doubt after considering the criminal record in the context of the entire record, and the trial judge's firsthand appraisal of the entire record was thorough and entirely reasonable.

A "reasonable probability of a different result," as required to establish prejudice necessary to Brady violation, means that the overall effect of the undisclosed evidence would undermine confidence in the trial's outcome. *U.S.C.A. Const Amend XIV. Mathis v. Berghuis*, 202 F. Supp. 2d 715 (E.D. Mich. 2002).

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COMMENT:

As noted supra § 2[a], the standard of materiality expressed in *Agurs* required to find constitutional error under *Brady* was altered by the Supreme Court in *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

2. Physical Evidence and Test Results

§ 8. Tangible objects and crime scenes

[a] Held material

The court in the following case held that the federal prosecutor's suppression of the audio portion of a videotape constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new sentencing hearing for the defendant.

The court in *U.S. v. Gregory*, 983 F.2d 1069 (6th Cir. 1992), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, held that the government committed a *Brady* violation by withholding exculpatory information relating to the quantity of marijuana for which the defendants were being sentenced where during discovery, the government provided the defendants with the video portion of a videotape showing officers destroying the marijuana patches, and the defendants requested the audio portion of the tape, but the government declined, asserting that the audio portion was irrelevant. At the defendants' sentencing hearing, the government produced the audio portion of the tape. A detective's voice on the tape estimated the number of marijuana plants to be between 45 and 50, whereas earlier in the sentencing hearing, another detective testified that he counted 112 plants. After hearing the tape, the defendants inquired whether the detective heard on the tape was available to testify, and were told that he was not, and the district court sentenced the defendants on the basis of 112 plants. The court found that the suppressed audiotape was material, since if the government had provided the audio portion of the tape to the defendants earlier, the defendants could have attempted to prove that the lower estimate was more reliable than the higher count, and at a minimum, they could have called the detective heard on the tape to explain how he arrived at an estimate so much lower than the other detective's count. Since the court found that the government withheld material exculpatory information relating to the defendants' punishment, it vacated the defendants' sentences and remanded for resentencing so that they could have an opportunity to develop the basis for the lower plant estimate.

[b] Held not material

The courts in the following cases held that the federal prosecutor's failure to disclose evidence of the tangible objects and crime scenes in question did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The court in *U.S. v. Lau*, 828 F.2d 871, 23 Fed. R. Evid. Serv. (LCP) 881 (1st Cir. 1987), denial of habeas corpus aff'd by, 39 F.3d 1166 (1st Cir. 1994), held that the government's failure in a prosecution for importation of cocaine to produce taped conversations between the defendant and government agents in which the defendant stated that he strongly opposed any drug dealing and that he suspected someone was using the plane to transport drugs did not constitute a *Brady* violation.

The court in *Maravilla v. U.S.*, 901 F. Supp. 62 (D.P.R. 1995), aff'd without published op, 95 F.3d 1146 (1st Cir. 1996), cert. denied, 520 U.S. 1202, 117 S. Ct. 1564, 137 L. Ed. 2d 710 (1997), held that suppressed evidence of a bullet found near the murder victim's body was not material, and thus no *Brady* violation occurred in the defendant's prosecution for robbery and other offenses related to the killing. The court found that the bullet, which appeared to have been used in target practice with a nearby can, was found over 2 1/2 years after

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the murder, and the ballistics did not pertain to the main thrust of the government's case.

The court in *U.S. v. Phillip*, 948 F.2d 241, 34 Fed. R. Evid. Serv. (LCP) 441 (6th Cir. 1991), held that a videotaped interview with the six-year-old brother of the child victim was not material for Brady purposes, in that it was not admissible as evidence and contained no information leading directly to favorable, admissible evidence. The court found that any exculpatory statements by the brother on the videotape could be useful to the defendant only if offered for their truth, and, thus, they would be inadmissible hearsay, and further, the statements were not admissible for impeachment purposes, because the brother did not testify at the trial.

Prosecution's failure to produce log book did not constitute Brady violation, absent any evidence showing reasonable probability that outcome of murder trial would have been different had prosecution produced log book. *Davis v. Mitchell*, 110 F. Supp. 2d 607 (N.D. Ohio 2000).

Government did not violate its Brady obligation to disclose material, favorable evidence to defense when it failed to provide information regarding payments made to informant who testified at trial, given district court's pretrial determination that such evidence was irrelevant to defendant's trial. *U.S. v. Cruz-Velasco*, 224 F.3d 654 (7th Cir. 2000), reh'g and reh'g en banc denied, (99-2425)(Sept. 13, 2000).

The court in *U.S. v. Pedraza*, 27 F.3d 1515 (10th Cir. 1994), appeal after remand, 73 F.3d 374 (10th Cir. 1995), held that the government's alleged failure to turn over tapes of some of the phone calls between an informant and the drug defendants was not a Brady violation warranting a mistrial, absent convincing evidence that any undisclosed tapes contained evidence that would have altered the outcome of the trial.

The court in *U.S. v. Sneed*, 34 F.3d 1570 (10th Cir. 1994), held that evidence of a taped conversation between an undercover federal law enforcement officer and a securities fraud suspect was not material to the prosecution of the defendant for securities fraud and, thus, the government's failure to disclose the taped conversation to the defendant pursuant to a discovery request did not violate Brady where the securities fraud suspect was not involved with the defendant's securities fraud scheme.

Drug defendant was not denied due process, despite government's inability to produce audible tapes of defendant's encounter with confidential informer, and informer's subsequent statement, absent showing of bad faith or that recordings were only means to prove defendant's innocence; multiple witnesses could have testified to contents of conversations. *U.S.C.A. Const Amend 5. U.S. v. Smith*, 118 F. Supp. 2d 1125 (D. Colo. 2000).

The court in *U.S. v. Arango*, 853 F.2d 818 (11th Cir. 1988), held that evidence of the government's illegal search of the defendant's apartment was not material in the narcotics prosecution, for purposes of the claim that the failure to disclose that evidence violated due process, since it was reasonably probable that pretrial disclosure of the government's warrantless entry into one defendant's apartment would not have resulted in a different jury verdict as to any of the defendants, and that entry could not have been used for impeachment or credibility purposes.

Investigating officer's failure to disclose that she overlooked a rusted gun later found in the vehicle from which defendant fled, or that she had been subjected to disciplinary proceeding for submitting erroneous item descriptions of her investigation, was not so serious that there would have been a reasonable probability that the suppressed evidence would have produced a different result in prosecution for assault with a deadly weapon (ADW) so as to trigger Brady or Jencks Act sanctions, where only evidence of the assault was testimony of other officers, who identified defendant as person who shot at one of them, and retrieved operable pistol from defendant's flight path. 18 U. S.C.A. § 3500. *Bell v. U.S.*, 801 A.2d 117 (D.C. 2002).

§ 9. Psychiatric evaluation

The court in the following case held that the federal prosecutor's suppression of the results of the psychiatric

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evaluation of the defendant constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant.

The court in *U.S. v. Spagnoulo*, 960 F.2d 990 (11th Cir. 1992), held that the narcotics defendant was entitled to a new trial on the basis of a *Brady* violation resulting from the government's failure to provide the defense with the results of the psychiatric evaluation of the defendant performed at a pretrial detention facility after his unprovoked attack on another inmate recommending that no disciplinary action be taken against the defendant because a mental disorder characterized as paranoid delusional thinking motivated the assault. The court found that the report could have fundamentally altered the defense strategy and raised serious questions concerning the defendant's competence to stand trial.

§ 10. Fingerprint reports

The courts in the following cases held that the federal prosecutor's failure to disclose a fingerprint report did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

Department of Justice solicitation for research proposals directed at validating the reliability of latent fingerprint identification evidence was not material and therefore withholding of solicitation by the government did not violate *Brady*; in view of other evidence favorable to the government about the reliability and operation of latent fingerprint identification, there was not a reasonable probability that the outcome of the trial would have changed had such evidence been admitted substantively to undermine government's claim that latent fingerprint identification was reliable or to impeach government's principal fingerprint expert witness at trial. *U.S. v. Mitchell*, 365 F.3d 215 (3d Cir. 2004).

The court in *U.S. v. Lawrence*, 1988 WL 32242 (E.D. La. 1988), an unpublished opinion, denied the defendant's motion that he was deprived of due process of law in violation of *Brady* because the government suppressed a fingerprint analysis report that indicated that his fingerprints were not found on the truck or weapon involved in the attempted theft. The court found that the defendant's contention that the alleged suppression of fingerprint analysis was *Brady*, material was belied by the defendant's testimony at trial that he had pulled on the door of the truck and placed his gun on the ground prior to the arrival of the police, and thus the presence or absence of the defendant's fingerprints on either the gun or the truck on a fingerprint analysis report was immaterial to his conviction.

The court in *U.S. v. Sumner*, 171 F.3d 636 (8th Cir. 1999), held that in a robbery prosecution under 18 U.S.C.A. § 2111, involving the taking of the victim's automobile, no *Brady* violation occurred in the prosecutor's failure to disclose that the fingerprint analysis of an envelope found in the car failed to match the defendant's prints; in light of testimony of the victim and two other witnesses that the defendant attacked the victim and left with her car, the court found that there was no reasonable probability that the verdict would have been different had the results of the fingerprint analysis been made known to the defendant prior to trial.

§ 10.2. Ballistics reports

The following authority adjudicated whether the failure of a federal prosecutor to disclose allegedly exculpatory ballistics reports violated due process.

Government's failure to provide defendant charged with carjacking with ballistics reports that would support his theory that shooting was accidental did not deprive defendant of fair trial, even if such reports existed, where intent element of carjacking statute was met regardless of whether shot that killed victim was accidental. 18 U.S.C.A. § 2119. *Resto-Diaz v. U.S.*, 182 F. Supp. 2d 197 (D.P.R. 2002).

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§ 10.5. Polygraph results

It has been held that the state did not err in failing to disclose to the defendant the results of a polygraph examination.

Prosecutor's failure to reveal to murder defendant the results of a polygraph examination administered to person who accompanied defendant to murder scene did not violate Brady, though the defense trial theory was that the other person was the murderer and defendant maintained that such person failed his polygraph examination, as the evidence was not shown to be favorable in that the record did not reveal whether such person in fact failed his polygraph examination or what statements he made were judged to be untruthful, and in any event the polygraph results were not material to either guilt or punishment because polygraph results are inadmissible, even for impeachment purposes, in Virginia, and it was unlikely that trial counsel's strategy would have been significantly different had they learned that such person failed the polygraph examination. *Goins v. Angelone*, 226 F.3d 312 (4th Cir. 2000).

Brady violation did not occur in murder case when state failed to disclose in discovery lie detector test results of its primary corroborating witness; since witness passed the test, the evidence was not favorable to the defendant, and the evidence was disclosed during trial. *Pantazes v. State*, 141 Md. App. 422, 785 A.2d 865 (2001).

3. Identification of People Other Than Defendant

§ 11. Third party

The court in the following case held that the federal prosecutor's failure to disclose the identity of a third party did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

The court in *U.S. v. Ortiz-Miranda*, 931 F. Supp. 85 (D.P.R. 1996), held that the prosecution did not violate Brady in failing to disclose to the defendant in a narcotics conspiracy prosecution the draft of the probable cause affidavit prepared by the agent for the arrest of a third party who allegedly had the alias of "Cano Beeper," which alias the identification witness had attributed to the defendant, or to produce the final page of the criminal history report indicating that the computer database showed that no one other than the third party had that alias, as such evidence, collectively, would not have affected the outcome of the trial with any probability. The court found that the witness had visually identified the defendant, the information in the affidavit did nothing to exculpate the defendant, the alias had a meaning similar to that of a nickname shown in the defendant's criminal history, and other evidence linked the defendant with a criminal organization.

Failure of government to identify potential witness to capital murder defendant and to provide him with copy of notes taken in interview with witness did not constitute Brady violation such as would entitle defendant to new trial; co-defendant's statement to witness that he "would kill whoever the f---" he wanted to kill, made in heat of confrontation with another inmate, provided no information as to any specific motive on part of co-defendant in murders and no information regarding defendant's involvement in murders, statements to witness did not indicate that co-defendant acted alone or that defendant was not involved, statement had no impeachment value, and evidence of defendant's guilt was overwhelming. *U.S. v. Higgs*, 2004 WL 835795 (4th Cir. 2004).

Mistakes in police reports, by which defendant's companion, rather than defendant, was identified as the person found in possession of large amounts of cash when stopped by drug interdiction agents, were both inculpatory and exculpatory, thus requiring government to disclose the mistakes to defense under Brady rule; fact that two separate police reports contained an identical error as to a critical piece of evidence raised opportunity to attack the thoroughness and good faith of the investigation, and mistakes constituted textbook examples of impeachment evidence. *U.S. v. Howell*, 231 F.3d 615 (9th Cir. 2000).

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§ 12. Informant

The court in the following case held that the federal prosecutor's failure to disclose the identity of an informant did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

The court in *U.S. v. Hayes*, 120 F.3d 739 (8th Cir. 1997), held that the prosecution did not violate *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), in a bank robbery prosecution by refusing to disclose the identity of the confidential informant who provided to the authorities the names of three possible suspects for the robbery, none of whom was either defendant. The court found that the defendants made no showing that the disclosure of this informant's identity was material to the outcome of their case, as they were provided with the names, addresses, dates of birth, social security numbers, and criminal histories of each suspect identified by the informant, they offered no explanation concerning why the information provided was insufficient or what more they expected to learn from the informant, and there simply was no showing to indicate a reasonable probability that disclosure of this informant's identity would have changed the outcome of the trial.

B. Impeachment Evidence

§ 13. Generally

[a] Held material

The courts in the following cases held that the federal prosecutor's suppression of evidence impeaching the credibility of witnesses constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant.

The United States Supreme Court in *Giglio v. U. S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), held that where the government's case depended almost entirely on the testimony of a witness who was named as a coconspirator but was not indicted, and without it there could have been no indictment and no evidence to carry the case to the jury, such witness' credibility was an important issue in the case, and evidence of any understanding or agreement as to future prosecution would be relevant to such witness' credibility and the jury was entitled to know of it. Thus, the government's failure to disclose an alleged promise of leniency made to its key witness in return for his testimony constituted a violation of due process and required a new trial.

On remand from the United States Supreme Court's holding in *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), that evidence withheld by the government is "material," as would require the reversal of a conviction under *Brady*, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of proceeding would have been different, the court in *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986), held that the Federal Government's failure to disclose to the defendant that its two key witnesses were paid by the Bureau of Alcohol, Tobacco and Firearms to conduct an investigation of the defendant deprived the defendant of a fair trial, where such evidence could have been used by the defendant to show possible bias on the part of the witnesses and to show that they lied under oath when they indicated that they were not rewarded for testifying.

The court in *U.S. v. Latham*, 874 F.2d 852 (1st Cir. 1989), held that the government was obligated to provide the defendant with tape recordings of the drug transactions with the officers, as the issue of the officers' credibility was material to the outcome of the trial.

Under *Brady* requirement to disclose favorable evidence to an accused, "favorable evidence" includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness. *U.S. v. Jackson*, 345 F.3d 59 (2d Cir. 2003).

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The materiality test under Brady is not met, as to the government's omission of exculpatory evidence, unless the non-disclosure of evidence undermines confidence in the outcome of the trial, which can occur if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Walker v. U.S.*, 306 F. Supp. 2d 215 (N.D. N.Y. 2004).

Under Brady, government has a constitutional duty to disclose favorable evidence to the accused where such evidence is material either to guilt or to punishment; favorable evidence includes evidence that is useful to impeach the credibility of a government witness, and touchstone of materiality is a reasonable probability of a different result. U.S.C.A. Const. Amend. 5. *U.S. v. Stewart*, 323 F. Supp. 2d 606, Fed. Sec. L. Rep. (CCH) ¶ 92861 (S.D. N.Y. 2004).

Brady duty to disclose favorable evidence that is material either to guilt or punishment covers not only exculpatory material, but also information that could be used to impeach a key government witness. U.S.C.A. Const. Amend. V. *U.S. v. Thompson*, 349 F. Supp. 2d 369 (N.D. N.Y. 2004).

The court in *U.S. v. Perdomo*, 929 F.2d 967 (3d Cir. 1991), held that the criminal record of the key prosecution witness was exculpatory and material, for purposes of requiring disclosure under Brady, as illustrated by fact that an acquittal resulted in a case where the criminal history was available regarding the same key prosecution witness. The court found that the fact that the jury had an opportunity to evaluate the credibility of the witness due to other damaging testimony concerning government payments and prior drug usage did not render the criminal history information immaterial.

The court in *U.S. v. Pelullo*, 105 F.3d 117 (3d Cir. 1997), on remand to, 6 F. Supp. 2d 403 (E.D. Pa. 1998), aff'd, 173 F.3d 131 (3d Cir. 1999), held that not only did the government's failure to disclose the rough notes of a Federal Bureau of Investigation (FBI) agent taken during the interview with the defendant, rough notes of an Internal Revenue Service (IRS) agent taken during the interview with the defendant, and a series of FBI surveillance tapes of the home of the reputed Mafia boss constitutes a Brady violation in a prosecution for wire fraud, as the withheld evidence could have been utilized by the defendant during his first trial to undermine the government's case by way of impeaching the testimony of three government witnesses, but the government's nondisclosure of such potential impeachment evidence, which was both favorable to the defense and material, required reversal of the conviction for wire fraud. The court found that each piece of withheld evidence could have been used by the defense to undermine the credibility of government witnesses, the testimony of the government witnesses was the linchpin of the government's case, and the jury very well could have reached a different verdict had the defendant been armed with the impeachment evidence.

The court in *U.S. v. Galvis-Valderamma*, 841 F. Supp. 600 (D.N.J. 1994), held that in a prosecution for conspiracy to possess and distribute heroin, the prosecutor's failure to disclose a report containing the postarrest statements of each defendant and the statements made by the arresting officer to the special agent indicating that the bag of heroin found in the automobile driven by the defendant was not actually in plain view violated the defendants' rights under the Brady doctrine, and thus warranted a new trial. The court found that the statements directly contradicted the officer's trial testimony and were exculpatory, the prosecutor had actual knowledge of the report and constructive knowledge of the special agent's statements prior to trial and, even though there was substantial evidence of the defendant's guilt introduced at trial, the undermining of the officer's credibility could have created a reasonable doubt.

The court in *U.S. v. Fenech*, 943 F. Supp. 480 (E.D. Pa. 1996), held that the government's failure to reveal an information card indicating that the informant's motivation for co-operating with the government was monetary, was a Brady violation, where the government's case rested to a large degree on the testimony of the informant, the credibility of the informant was crucial to the prosecution, and the defense would have been in a much stronger position to impeach the credibility of the informant if the government had provided the defense with the information card prior to trial.

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The court in *U.S. v. Patrick*, 985 F. Supp. 543 (E.D. Pa. 1997), *aff'd* without published op., 156 F.3d 1226 (3d Cir. 1998), an unpublished opinion, held that the undisclosed documents in question were material because there was a reasonable probability that, had these documents been disclosed to the defendant, the result of his trial would have been different. After collectively reviewing the undisclosed documents in light of the entire trial record, the court concluded that there was a reasonable probability that the outcome of the trial would have been different because the documents would have provided the defendant with information that could have been used to impeach one of the main prosecution witnesses. The court found that the undisclosed documents, if they had been disclosed and used effectively by the defendant's trial counsel, could have made the difference between a conviction and acquittal for the defendant because the undisclosed documents provided the defendant with information that could have been effectively used to impeach the witness' credibility, which could have tipped the scales in favor of the defendant in light of the record of the case, since the evidence against the defendant was anything but overwhelming.

The court in *U.S. v. Kelly*, 35 F.3d 929 (4th Cir. 1994), held that the government's affidavit for the search warrant for the victim's residence, for purposes of an Internal Revenue Service investigation of the victim, contained material evidence that seriously undermined the victim's credibility and, thus, the government's failure to produce the affidavit to the defendant was a Brady violation requiring reversal for a denial of due process. The court found that the evidence against the defendant was not overwhelming and the question of guilt depended on the credibility of the defendant and the victim. The Court also held that the government's failure to produce a letter written by the victim was a Brady violation requiring reversal for the denial of the defendant's due process rights, in light of the material nature of the letter on the critical issue of the victim's credibility concerning the kidnapping charge, as the victim admitted in the letter that she had feigned illness to remain on sick leave, which together with other evidence could have shown that she defrauded her employer and others to remain on paid sick leave for nine months while working in other capacities.

Impeachment evidence falls within dictates of Brady rule requiring disclosure of exculpatory evidence. *Hillman v. Hinkle*, 114 F. Supp. 2d 497 (E.D. Va. 2000), appeal dismissed, 238 F.3d 412 (4th Cir. 2000).

Although evidence that key prosecution witness had received a reduced sentence in exchange for favorable testimony in a prior prosecution was exculpatory for Brady purposes, failure to disclose such evidence did not violate Brady; given fact that both of petitioner's attorneys were aware of witness' assistance in the previous case prior to trial, there was no reasonable probability that, had the prosecution disclosed such information sooner, the result of petitioner's murder trial would have been different. *U.S.C.A. Const. Amend. XIV. Lovitt v. True*, 330 F. Supp. 2d 603 (E.D. Va. 2004).

The court in *U.S. v. Fisher*, 106 F.3d 622, 46 Fed. R. Evid. Serv. (LCP) 546 (5th Cir. 1997), held that the government's failure to disclose a law enforcement agency's report which contradicted the testimony of the government witness was a Brady violation, warranting a new trial, as the witness was the key witness against the defendant on the count on which the defendant was convicted, and the witness' believability was critical to the jury's finding of guilt on that count, such that disclosure of the report would have made a different result reasonably probable.

The court in *U.S. v. Minsky*, 963 F.2d 870 (6th Cir. 1992), *reh'g denied*, (Aug. 20, 1992), held that under Brady, the government improperly refused to disclose the witness' statements made to FBI agents on routine investigation forms, in which the witness stated that he conferred with a third party about the scheme in which the witness and the defendant were involved. The court found that without the statements on the investigation forms, the defense could not understand the significance of the results of a polygraph examination given to the witness, as the defense had no way of knowing that the witness claimed to have told the third party of the alleged scheme and that the third party had denied the conversation, and the jury might have disbelieved the witness' entire testimony if it had learned of his false statements to the FBI.

The court in *Schledwitz v. U.S.*, 169 F.3d 1003, 51 Fed. R. Evid. Serv. (LCP) 352, 1999 FED App. 81P (6th

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Cir. 1999), held that the government violated its Brady disclosure obligations by failing to disclose that its key witness was involved in investigating the defendant, was convicted of mail fraud, and interviewed potential witnesses in the case against him, where the government presented the key witness as a "neutral and disinterested" expert, when, in fact, the witness had been actively and intimately involved in the investigation against the defendant. Had the defense team known that the witness investigated the defendant for years, it would have sought to elicit that fact on cross-examination, and such impeachment would have dissipated the false impression that the witness was not a garden-variety, neutral expert, but an active investigator involved in the case.

Government's disclosure obligation under Brady extends to impeachment evidence, as well as to exculpatory evidence. *U.S. v. Ridley*, 199 F. Supp. 2d 704 (S.D. Ohio 2001).

The court in *U.S. v. Boyd*, 55 F.3d 239 (7th Cir. 1995), held that the trial court did not abuse its discretion by granting a new trial based on the government's failure, in violation of *Brady v. Maryland*, to reveal to the defense either the drug use and drug dealing by prisoner witnesses during the trial or the "continuous stream of unlawful" favors the prosecution gave those witnesses. The court found that there was a reasonable probability that the jury would have acquitted the defendants on at least some counts had it disbelieved the testimony by those witnesses, which the jury might have done if the witnesses had not testified falsely about their continued use of drugs and/or if the government had revealed the witness' continued use of drugs and favors that the prosecution extended.

The court in *U.S. v. Burnside*, 824 F. Supp. 1215 (N.D. Ill. 1993), held that the suppressed information regarding continuing drug use and substantial undisclosed benefits provided to key government co-operating inmate witnesses was material evidence for Brady purposes, as it appeared that the lead prosecutor suppressed the information in bad faith to improve the government's chances of victory in the defendants' trial on RICO and narcotics charges for supplying illegal drugs to a Chicago street gang. Thus, the court held that a new trial for the defendants convicted of RICO and narcotics charges for supplying illegal drugs to the Chicago street gang was the proper remedy for the prosecutorial misconduct in failing to disclose information relating to the continuing illegal drug use by the key government co-operating inmate witnesses during the period of incarceration and postarrest, postplea co-operation with the government.

The court in *U.S. v. Andrews*, 824 F. Supp. 1273 (N.D. Ill. 1993), held that by failing to disclose evidence of drug-testing results and the discipline of government witnesses while in protective custody, as well as evidence regarding the conduct of and benefits conferred on the witnesses while in custody that might reflect on their credibility, the government prosecutors deprived the defense counsel of a reasonable opportunity to challenge the witnesses' credibility and to rebut misstatements during trial as to the conduct of the witnesses while in custody, in violation of due process, and the defendants were entitled to a new trial inasmuch as such evidence was material to the central defense strategy of attacking the government witnesses' credibility.

The court in *U.S. v. Griffin*, 856 F. Supp. 1293 (N.D. Ill. 1994), held that the government's failure to disclose unit log books from the correctional facility which contained evidence of illegal drug acquisition and illegal drug use by the co-operating government witnesses around the time of their testimony and its failure to disclose taped conversations involving the co-operating witnesses over the United States Attorney office's phone line revealing substantial drug trafficking was Brady material that should have been produced by government counsel. Even though the defendant was entitled to a new trial, the court held that the case should be dismissed based on the exercise of prosecutorial discretion that the case should not go forward.

The court in *U.S. v. O'Conner*, 64 F.3d 355 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Oct. 16, 1995), held that a Brady violation occurring when the government failed to inform the defendant of threats by one government witness against another and attempts to influence a second government witness' testimony was reversible error with respect to the convictions on those substantive drug counts and conspiracy counts where the testimony of those government witnesses provided the only evidence. The court found that the evidence of threats, combined with undisclosed statements from interview reports, could have caused the jury to disbelieve the government witnesses.

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Prosecutors' duty to turn over all exculpatory evidence to criminal defendants includes evidence going to the credibility of a government witness, such as promises that may have been made to that witness. *U.S. v. Rushing*, 313 F.3d 428 (8th Cir. 2002).

To establish a Brady violation, a defendant must show that: (1) prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material. *U.S. v. Mansker*, 240 F. Supp. 2d 902 (N.D. Iowa 2003).

The court in *U.S. v. Shaffer*, 789 F.2d 682 (9th Cir. 1986), held that evidence regarding the government witness in a prosecution for a narcotics and income tax violation was material and should have been disclosed to the defendant who requested exculpatory information, and failure to disclose the impeachment evidence regarding the key government witness undermined confidence in the trial outcome, where the government allegedly failed to disclose the fact that the witness was a paid informant in a separate heroin operation, and the full benefits and promises that the witness received in exchange for his co-operation, including the government's failure to initiate asset forfeiture proceedings to acquire assets gotten through drug profiteering and the failure to enforce the witness' civil tax liability for unpaid taxes. Thus, the court held that since the government did not adequately disclose information which could have been used to impeach the credibility of the government witness whose testimony was critical to the conviction of the defendant, a new trial was warranted.

The court in *U.S. v. Brumel-Alvarez*, 991 F.2d 1452, 125 A.L.R. Fed. 675 (9th Cir. 1992), reh'g denied, (Apr. 22, 1993), held that the information in a memorandum written by a government witness, which the government failed to disclose to the defendants in a drug trafficking conspiracy, was "material" for purposes of establishing a Brady violation. The court found that the information in the memorandum indicated that the government informant was running the investigation and was in a position to manipulate Customs, the Drug Enforcement Agency (DEA), and the defendants, and given this information, the jury might have thought that the government's arguments that the informant was reliable were incredible and might have focused more on the arguments that tended to show that the informant might have lied. The court thus held that the government's withholding of the memorandum violated the defendants' right to due process under the Brady Rule since the memorandum was relevant to the informant's credibility.

The court in *U.S. v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), held that where the defense counsel had made a Brady request about whether the key witness signed a co-operation agreement, and a later request for a missing witness instruction foundered because the defense counsel was unaware of the agreement, the government was required under Brady to disclose its existence, since the evidence was favorable to the accused because it might have convinced the court to give the instruction, and the failure to do so was a material violation of Brady. The requested instruction would have told the jury that the key witness was not only available, but that the prosecution could compel his appearance if it so chose, and this might have led the jury to infer that his testimony would have been unfavorable to it. Even if the court refused to give the instruction, evidence of the agreement would have strengthened the defense counsel's argument to the jury that his live testimony would have explained away his hearsay testimony. The court found a "reasonable probability" that, had evidence of the co-operation agreement been disclosed, the result would have been different, and the evidence was therefore material. In light of the prosecutorial misconduct in the case, the court vacated the judgment of conviction and remanded for the district court to determine whether to retry the defendants or dismiss the indictment with prejudice as a sanction for the government's misbehavior.

The court in *U.S. v. Maya-Azua*, 30 F.3d 140 (9th Cir. 1994), a case not recommended for full text publication and which may be cited only in accordance with Rule 36-3 of the Ninth Circuit, reversed the defendant's convictions for conspiracy to possess with intent to distribute cocaine and possession with intent to distribute and distribution of cocaine based on the government's failure to disclose evidence that impeached the government's critical witness, a confidential informant, as required by Brady. The court found that the essential elements of the government's case against the defendant rested on the testimony of the confidential informant, and on his credibility. The prosecutor failed to disclose a file containing a report showing that the confidential informant

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falsely claimed to border officials that he was a United States citizen, and that the officials released him into the custody of a DEA agent without prosecution. The court held that the result of the proceeding would have been different if the information in the confidential informant's file had been disclosed, as the evidence that he lied to border officials and then used his position as an informant for the DEA to avoid prosecution was strong impeachment evidence, as it demonstrated his propensity to lie to government agents, and his dependency on the DEA.

The court in *U.S. v. Steinberg*, 99 F.3d 1486, 45 Fed. R. Evid. Serv. (LCP) 1138 (9th Cir. 1996) (disapproved of on other grounds by, *U.S. v. Foster*, 165 F.3d 689 (9th Cir. 1999)), held that the withheld exculpatory evidence which could have been used to impeach the key witness was sufficiently material to create a reasonable probability of a different result had the evidence been disclosed and, thus, established a Brady violation and required a new trial. The court found that although the informant's credibility was explored through questions relating to his plea agreement, the informant was the key witness whose testimony was not otherwise corroborated, and the withheld evidence showed that the informant was engaged in ongoing criminal activities during the time he was acting as a government informant in the case, and that he owed the defendant money. The court also held, however, that the government's Brady violation for failure to disclose evidence that affected the credibility of the key witness was not so grossly shocking and so outrageous as to violate the universal sense of justice and, thus, did not rise to a level requiring dismissal of the indictment.

A panel of the Ninth Circuit in *U.S. v. Wood*, 112 F.3d 518 (9th Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 36-3 of the Ninth Circuit, after finding in *U.S. v. Wood*, 57 F.3d 733 (9th Cir. 1995), appeal after remand, 112 F.3d 518 (9th Cir. 1997), that the Food and Drug Administration's (FDA) Investigational New Drug applications (INDs) relative to gamma hydroxybutrate and gamma hydroxybutyric acid sodium salt (GHB) were Brady material that the government had a duty to disclose and the failure to do so denied due process of law to the defendant charged with a conspiracy to defraud the FDA by obstructing its function of ensuring that prescription drugs are safe and effective and dispensed pursuant to a prescription from a licensed practitioner and with aiding and abetting his codefendant in distributing GHB without labeling that stated the manufacturer, distributor, and quantity, and determining that Food and Drug Administration's (FDA) Investigational New Drug applications (INDs) relative to gamma hydroxybutrate and gamma hydroxybutyric acid sodium salt (GHB) were Brady material that should have been provided by the prosecution, and remanding to the district court to determine the materiality of the INDs, which held that the INDs were not material to the defendant's conviction on the GHB counts, [FN77] disagreed with the district court's finding of immateriality and reversed the defendant's conviction on the charged counts, the court found that the defendant's felony convictions depended on whether the jury believed his expert or the government's experts, and the undisclosed INDs would have helped the defendant to impeach one of the government's experts with "a reasonable probability of a different result." Thus, the reviewing court held that while the undisclosed material did not prove the defendant's innocence it did meet the threshold of Brady materiality as it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Mistakes in police reports, by which defendant's companion, rather than defendant, was identified as the person found in possession of large amounts of cash when stopped by drug interdiction agents, were both inculpatory and exculpatory, thus requiring government to disclose the mistakes to defense under Brady rule; fact that two separate police reports contained an identical error as to a critical piece of evidence raised opportunity to attack the thoroughness and good faith of the investigation, and mistakes constituted textbook examples of impeachment evidence. *U.S. v. Howell*, 231 F.3d 615 (9th Cir. 2000).

Brady encompasses impeachment evidence as well as exculpatory evidence. *U.S. v. Antonakas*, 255 F.3d 714, 57 Fed. R. Evid. Serv. 266 (9th Cir. 2001).

Impeachment evidence is favorable Brady/Giglio material when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence. *U.S. v. Blanco*, 392 F.3d 382 (9th Cir. 2004).

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Prosecution's Brady obligation to disclose to the accused material evidence favorable to the accused extends to impeachment evidence, and to evidence that was not requested by the defense. *U.S. v. Park*, 319 F. Supp. 2d 1177 (D. Guam 2004).

The court in *U.S. v. Scheer*, 168 F.3d 445 (11th Cir. 1999), in reversing the conviction of the defendant for misapplication of bank funds and making false statements for purpose of influencing a financial institution, held that the prosecutor's threatening remark to the key prosecution witness constituted material impeachment evidence that could have substantially undermined the critical value of the witness' testimony, and thus the government's failure to disclose this incident to the defendant sufficiently undermined the court of appeals' confidence in the integrity of verdict to warrant reversal, though the witness testified that he was not influenced by the prosecutor's threat, and there was other evidence against the defendant, where other witnesses gave less conclusive and noncumulative testimony, the threatened witness was central to the government's case, and his credibility was the focal point of the case.

The court in *U.S. v. Smith*, 77 F.3d 511 (D.C. Cir. 1996), held that the dismissal of superior court charges against the prosecution witness, as part of a plea agreement in federal court, was material and, therefore, should have been disclosed to the defendant under the due process clause, and thus warranted a new trial, even though the prosecutor disclosed other dismissed charges and other impeachment evidence was thus available, and whether the witness was intentionally concealing the agreement. The court found that armed with full disclosure, the defense counsel could have pursued a devastating cross-examination, challenging the witness' assertion that he was testifying only to "get a fresh start" and suggesting that the witness might have deliberately concealed other favors from the government.

The court in *U.S. v. Cuffie*, 80 F.3d 514 (D.C. Cir. 1996), held that undisclosed evidence that the prosecution witness, who testified that the defendant paid him to keep drugs in his apartment, lied under oath in a previous court proceeding involving the same drug conspiracy was "material" for Brady purposes, and thus warranted a new trial, where the witness was impeached on the basis that he was a cocaine addict and a co-operating witness, but not based on the prior perjury, and where the witness' testimony was an essential part of the prosecution's case since it established the only direct connection between the defendant and the drugs found in the search of the witness' apartment.

Government's constitutional duty to disclose material evidence favorable to a criminal defendant in time for the defendant to make effective use of it at trial extends to evidence that could be used to impeach the credibility of a government witness. *Ginyard v. U.S.*, 816 A.2d 21 (D.C. 2003).

If a court finds that a reasonable probability exists that had evidence been disclosed to defense, result of proceeding would have been different, then such evidence is material under Brady, and its suppression from the defendant results in constitutional error thereby warranting a new trial. *U.S.C.A. Const. Amend. XIV. Turney v. State*, 759 N.E.2d 671 (Ind. Ct. App. 2001).

State's failure to disclose prior statements of witness, in which witness stated she learned from defendant's girlfriend that defendant had taken victim into woods, hit victim on head, and shot victim in the head, constituted Brady violation; statement was inconsistent with witness's prior statement that defendant told her he killed victim by hitting her in the head, and thus was favorable to defendant for impeachment purposes. *State v. Tate*, 880 So. 2d 255 (La. Ct. App. 2d Cir. 2004).

To establish a Brady violation, the defendant must establish that: (1) the State possessed evidence, including impeachment evidence, favorable to the defense; (2) the defendant did not possess the evidence nor could he have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different. *U.S.C.A. Const Amend XIV. State v. DuBray*, 2003 MT 255, 317 Mont. 377, 77 P.3d 247 (2003).

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The state's duty to disclose encompasses impeachment evidence as well as exculpatory evidence. *State v. Holadia*, 149 N.C. App. 248, 561 S.E.2d 514 (2002), writ denied, review denied, 562 S.E.2d 432 (N.C. 2002).

The duty of the state to produce evidence favorable to the accused can encompass impeaching material as well as exculpatory evidence. *State v. Chalk*, 816 A.2d 413 (R.I. 2002).

Impeachment evidence, as well as exculpatory evidence, is included within the scope of the Brady rule. *Potter v. State*, 74 S.W.3d 105 (Tex. App. Waco 2002).

[b] Held not material

The courts in the following cases held that the government's failure to disclose impeachment evidence did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus did not entitle the defendant to a new trial.

The court in *U.S. v. Sanchez*, 917 F.2d 607 (1st Cir. 1990), held that the government's failure to reveal that its informant received payments from state investigators for similar services was not the type of newly discovered evidence that would have required a new trial in a drug conspiracy prosecution, where the informant was extensively cross-examined about payments he received from federal agencies in connection with federal investigations, where the newly discovered payments by state investigators were small in comparison to the federal payments, where the defense made no specific pretrial discovery request for payments received by the informant from state or local sources in unrelated cases, and where the evidence was merely cumulative.

The court in *U.S. v. Perkins*, 926 F.2d 1271 (1st Cir. 1991), reh'g denied, (Mar. 19, 1991), held that the government's nondisclosure of an in camera submission which could have been used to impeach the prosecution witness during the prosecution on drug charges did not require reversal of the convictions where the nondisclosed evidence was of marginal materiality, was cumulative of other more powerful evidence revealed to the defense and used by it to impeach the witness, the witness was the lesser of two principal witnesses whose testimony was bolstered by tapes and other evidence, and the defendant was aware of the witness' status as a government informant.

The court in *Barrett v. U.S.*, 965 F.2d 1184 (1st Cir. 1992), dismissal of postconviction relief aff'd, 178 F.3d 34 (1st Cir. 1999), held that a memorandum and related documents about a pending murder indictment against the prosecution witness in Arkansas and the possibility of a plea arrangement in exchange for the witness' agreement to testify against the defendant were cumulative and were not material to the defendant's voir dire examination of the witness, and, thus, due process was not violated by the government's failure to disclose the memorandum and documents. The court found that at the voir dire the defendant elicited the pending murder indictment in Arkansas, but relinquished the opportunity to examine the witness concerning any agreement or understandings or hopes for leniency.

The court in *U.S. v. Stern*, 13 F.3d 489 (1st Cir. 1994), held that a witness' testimony before the grand jury that he did not have any knowledge of a payment and performance bond for a government contract, which took on the character of impeachment evidence when the witness testified at trial that the defendant asked the witness to forge the bond, could not conceivably have altered the outcome of the defendant's trial on charges relating to counterfeit of the bond, even if the grand jury testimony were made available to the defendant before trial, and, thus, the government's failure to disclose such testimony did not constitute a Brady violation warranting reversal. The court found that the jury acquitted the defendant on the counterfeiting count despite the witness' direct inculcation of the defendant, and the knowledge element of the count of uttering a counterfeit bond was confirmed by the direct testimony of another witness and the defendant's conduct.

The court in *U.S. v. Brimage*, 115 F.3d 73 (1st Cir. 1997), cert. denied, 118 S. Ct. 321, 139 L. Ed. 2d 248 (U.S. 1997) and cert. denied, 118 S. Ct. 321, 139 L. Ed. 2d 248 (U.S. 1997), held that evidence that the charge

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against the informant was reduced because the informant's sister worked as an informant for state police in the drug case was not material to the guilt of the defendants against whom the informant testified, and thus, the government's failure to disclose the allegedly impeaching information did not constitute a Brady violation, where the defendants knew prior to the trial that the informant was arrested and charged with cocaine trafficking, that the charge was reduced and that the informant was sentenced to time served and evidence other than the informant's testimony supported the defendants' convictions.

The court in *U.S. v. Cunan*, 152 F.3d 29 (1st Cir. 1998), held that the anticipated witness' claimed memory loss, which prevented him from testifying in the money laundering prosecution that he handed the defendant envelopes of cash in exchange for checks, was not "material" evidence that government had to disclose under Brady; the court found that the witness did not retract his statements that he laundered money through the defendants' business, the evidence had impeachment value only if the witness testified, and it was unlikely the defendants would call the witness themselves.

The court in *U.S. v. Rodriguez*, 162 F.3d 135, 50 Fed. R. Evid. Serv. (LCP) 1030 (1st Cir. 1998), reh'g and suggestion for reh'g en banc denied, (Jan. 20, 1999) and cert. denied, 119 S. Ct. 2034, 143 L. Ed. 2d 1044 (U.S. 1999), held that the government's alleged failure to disclose to the defendant evidence that the government witness, who testified that she was a financial consultant, actually made her living as a prostitute, or evidence that, at the time she testified, the witness was charged with operating a motor vehicle without a license, did not warrant a new trial under Brady; the court found that other evidence of the witness' past, including drug use and prostitution, put the jury on notice about the witness' tendency to commit perjury, the thrust of the witness' testimony was corroborated by others, and there was no reasonable possibility that evidence of a traffic citation would have influenced the verdict.

While government should have informed defense that one of its witnesses had been promised favorable treatment in related state court proceedings in exchange for his testimony, notwithstanding that this promise was never reduced to writing, government's failure to disclose this impeachment evidence was not prejudicial, where witness had admitted full extent of his arrangement with government during cross-examination. *U.S. v. Soto-Beniquez*, 356 F.3d 1 (1st Cir. 2004).

Suppressed impeachment evidence is immaterial under Brady if evidence is cumulative or impeaches on a collateral issue. *U.S.C.A. Const Amend V. Conley v. U.S.*, 415 F.3d 183 (1st Cir. 2005).

Evidence in narcotics conspiracy case allegedly withheld by government concerning prosecution witness's aliases, fraudulent transactions, and involvement in drug dealings was immaterial, precluding finding of Brady violation, where record contained fertile ground for attack on witness's credibility and defense attorney mounted such attack. *Reyes-Vejerano v. U.S.*, 117 F. Supp. 2d 103 (D.P.R. 2000).

The court in *U. S. v. Provenzano*, 615 F.2d 37 (2d Cir. 1980), held that assuming *arguendo* that all of the material sought by the defendant in the conspiracy prosecution was the subject of specific requests for production and was properly producible by the government, where the information related solely to the motivation of a single government witness, whose testimony helped identify the defendant's voice on a tape recording, but did not otherwise bear on evidence of the defendant's illegal activities, the failure of the government to produce the material was not violative of due process in that there was no reasonable likelihood that it would have affected the outcome of the trial.

The court in *U. S. v. Provenzano*, 615 F.2d 37 (2d Cir. 1980), relied on the *Agurs* standards of materiality,

The court in *U.S. v. Helmsley*, 985 F.2d 1202, 71 A.F.T.R.2d (P-H) ¶ 93- 1010 (2d Cir. 1993), held that no Brady v. Maryland violation occurred in a prosecution for income tax violations, despite the defendant's claim that the government made insufficient disclosure of materials concerning the defendant's accountant, with whom the government allegedly made a "deal." The court found that the prosecutor stated that the decision not to

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prosecute the accountant was reached independently of any concern for the defendant's case, and the defendant showed no more than a slightly enhanced basis for challenging the accountant's credibility, which was already substantially attacked at trial.

The court in *U.S. v. Gambino*, 59 F.3d 353, 42 Fed. R. Evid. Serv. (LCP) 813 (2d Cir. 1995), held that although a letter implicating the government witness in narcotics trafficking was Brady material that should have been made available to the defense in the racketeering prosecution, the failure to disclose the letter did not violate due process and did not require a new trial. The court found that the disclosure of the letter would not have affected the result of the defendant's trial, since the witness was impeached with his plea agreement and criminal record. The Court also determined that a Brady violation occurred when the government failed to disclose a tape recording of the government witness instructing another witness to lie to the grand jury did not require a new trial in the racketeering prosecution. The Court found that the disclosure of the tape would not have changed the result of the trial, since the witness was cross-examined about his criminal history, including 19 murders.

While the court in *U.S. v. Payne*, 63 F.3d 1200 (2d Cir. 1995), held that the affidavit in which the prosecution witness, who was facing charges arising out of the same drug offenses, stated that she never conspired with anybody to sell drugs and never sold drugs from a particular apartment was relevant for Brady purposes where the defense counsel attempted to impeach her by showing her incentive to implicate the defendant as a means of gaining the government's support for a lesser sentence in her own case and the affidavit would have added concrete evidence that she previously lied under oath with respect to some of the questions which the jury was to decide, the court held that the failure of the government to disclose to the defense the fact that the prosecution witness filed an affidavit in court stating that she never conspired with anyone to sell drugs did not require reversal where her testimony was only a fraction of the evidence linking the defendant to the narcotics dealing.

The court in *U.S. v. Wong*, 78 F.3d 73 (2d Cir. 1996), held that a new trial was not warranted based on newly discovered evidence that, the defendant claimed, showed that the codefendant received an undisclosed consideration for testifying against the defendant of an unusually low bail figure set for the codefendant's cousin, who subsequently fled the country. The court found that even if the bail figure was unusually low, the defendant could not establish a cause and effect relationship between the codefendant's co-operation agreement and the setting of the bail amount, which occurred five months earlier, and the evidence was cumulative of the impeachment evidence presented at the trial of the codefendant's interest and bias, including his written agreement with the government.

The court in *U.S. v. Amiel*, 95 F.3d 135 (2d Cir. 1996), held that suppressed evidence that may have been used to impeach government witnesses was immaterial in the mail fraud prosecution of artwork distributors, precluding the finding of a Brady violation, where the impeachment evidence was cumulative of the information disclosed during cross-examination and independent evidence tied each defendant to the criminal conduct.

The court in *U.S. v. Zagari*, 111 F.3d 307, 46 Fed. R. Evid. Serv. (LCP) 1437, 27 *Env'tl. L. Rep.* 20992 (2d Cir. 1997), held that evidence relating to the government witness' alleged insanity and neo-Nazi leanings was not material to the defendants' convictions, for purposes of a Brady claim. The court found that the jury had information with which to evaluate the witness' credibility, and, as to the convicted counts, the jury did not rely entirely on the witness' testimony.

The court in *U.S. v. Orena*, 145 F.3d 551 (2d Cir. 1998), cert. denied, 119 S. Ct. 805, 142 L. Ed. 2d 665 (U.S. 1999), held that evidence that the coconspirator who was also a government informant previously lied to the Federal Bureau of Investigation about his involvement with several murders was not "material evidence" under Brady, and thus, the government's failure to disclose that evidence did not warrant a new trial in the murder prosecution, despite the claim that the defendants could have used such evidence to impeach the credibility of the coconspirator's out-of-court statements that were admitted at trial; the court found that there was substantial evidence independent of the coconspirator's statements to link the defendants to the murders, including testimony from an accomplice witness that the defendants openly boasted that they had succeeded in murdering the victim,

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and the defendants already possessed devastating evidence with which to assail the coconspirator's credibility

The court in *U.S. v. Austin*, 1999 WL 627671 (2d Cir. 1999), an unpublished disposition, an appeal from the defendant's conviction for mail fraud, held that although the evidence of the postal inspector interviews of the person who received the fraudulent payments resulting from the defendant's mail fraud would have tended to discredit a witness' testimony that the defendant knew the recipient of the funds, held that such evidence could not have affected the verdict, and thus did not find a Brady violation. The court noted that the question whether the defendant met the recipient of the funds did not bear in any significant way on the defendant's role regarding the fraudulently mailed loan applications.

Defendant, who was convicted of conspiracy and possession of cocaine and cocaine base, failed to show that there was reasonable probability that disclosure of impeachment evidence at pretrial suppression hearing regarding confidential government informant's behavior would have resulted in suppression of cocaine seized upon defendant's arrest in reliance on informant's data, as required to support claim that government's violation of defendant's Brady rights resulted in prejudice; even if Brady applied to pretrial suppression hearings, government had probable cause to arrest defendant, and informant was known to be reliable and was not likely to be impeached by behavior evidence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(1)(A, B), 21 U.S.C.A. § 841(a), 21 U.S.C.A. § 841(b). *U.S. v. Barker*, 69 Fed. Appx. 497 (2d Cir. 2003).

The court in *Moses v. U.S.*, 1998 WL 255401 (S.D.N.Y. 1998), an unpublished opinion, rejected the defendant's contention that his due process rights were violated as a result of the government's failure to disclose evidence that could be used to impeach the testimony of the DEA agent. The United States conceded that the United States Attorney's Office commenced an investigation into allegations concerning misconduct of certain members of the DEA, the allegations against the DEA agent were that in March 1987, he and another agent beat up two defendants and, along with others, broke into a safe without the owner's consent, and the Assistant United States Attorney did not disclose any information regarding these allegations to the defendant. Since the defendant's role in the conspiracy, however, was overwhelmingly established by the testimony of his coconspirators, and the government presented evidence concerning the surveillance of the transaction through a DEA source other than the DEA agent in question, the court held that the Brady/Giglio material withheld would not have undermined the most essential evidence presented by the government in its case.

Government's failure to produce purely cumulative impeachment material did not violate Brady. *U.S. v. Davidson*, 308 F. Supp. 2d 461 (S.D. N.Y. 2004).

The court in *U.S. v. Adams*, 759 F.2d 1099, 17 Fed. R. Evid. Serv. (LCP) 1244 (3d Cir. 1985), held that a new trial was not merited on the theory that the government's failure to disclose the government witness' participation in a robbery violated *Brady v. Maryland*, since the information was merely impeaching and almost certainly would not have produced an acquittal, and thus the failure to disclose was harmless.

The court in *U.S. v. Pflaumer*, 774 F.2d 1224 (3d Cir. 1985), held that the prosecution's failure to disclose Brady material, consisting of information that the government witness received a promise of use immunity in return for information and testimony, did not warrant a new trial in a prosecution for mail fraud and conspiracy to commit mail fraud. The court found that other evidence of the defendant's guilt was substantial, the prosecution did not rely on the government witness' testimony in his closing argument, and the defense counsel used the witness' testimony in his closing argument as supportive of the defendant's defense.

CAUTION:

The United States Supreme Court in *United States v. Pflaumer*, 473 U.S. 922, 105 S. Ct. 3550, 87 L. Ed. 2d 673 (1985), vacated the Third Circuit's original opinion in the Pflaumer matter, in light of its opinion of *United States v. Bagley*, 469 U.S. 1084, 105 S. Ct. 587, 83 L. Ed. 2d 697 (1984). The Oxman court held that the promise of use immunity was "significant impeachment evidence" and determined its materiality under *U. S. v.*

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Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). The Oxman court held that the prosecutor should have appreciated that the disclosure of the existence of substantial benefits conferred on all of the government's principal incriminatory witnesses might have led the jury to doubt their truthfulness, and concluded that this gave rise to a substantial basis for claiming materiality of the use immunity agreement. On remand to the Third Circuit in light of the new Bagley standard of materiality, the circuit held in *U.S. v. Pflaumer*, 774 F.2d 1224 (3d Cir. 1985), that since the standard of "materiality" announced in Bagley is significantly different from the one that was previously applied in the case, the circuit had to review the record, the findings of the district court, and the contentions of the parties to determine whether, under the Bagley standard, the government's failure to disclose that use immunity granted to the government's witness would have engendered a reasonable probability that the result of the defendant's trial would have been different.

The court in *U.S. v. Hill*, 976 F.2d 132, 36 Fed. R. Evid. Serv. (LCP) 732 (3d Cir. 1992), held that the prosecutor's failure to supply the defendant with the grand jury testimony of two federal agents prior to trial did not constitute a material Brady violation where the defendant had access to hundreds of pages of reports compiled by the agents, the testimony of the agents before the grand jury tracked those reports nearly verbatim, and access to the agents' testimony would not have permitted the defendant to engage in any meaningful additional impeachment of his coconspirator's trial testimony concerning the defendant's presence at several drug transactions.

The court in *U.S. v. Thornton*, 1 F.3d 149 (3d Cir. 1993), held that the prosecutor's failure to disclose Drug Enforcement Administration (DEA) payments to the co-operating witnesses did not require a new trial even though the information not disclosed fell within the Brady rule and should have been disclosed, in light of the showing that the defendant was convicted on the basis of the strength of the government witnesses. The court found that there was no reasonable probability that the outcome of the trial would have been different if the DEA payments had been disclosed.

The court in *U.S. v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), held that in the defendant's trial for wire fraud based on the diversion of funds, a Brady violation, resulting from the prosecutor's failure to divulge a memorandum detailing the interview with the witness which set forth facts inconsistent with the witness' testimony, did not warrant reversal. The court found that the violation did not undermine confidence in the outcome of the trial, inasmuch as some inconsistencies in dates would not devastate the thrust of the witness' testimony on the diversion of the funds.

The court in *U.S. v. Veksler*, 62 F.3d 544, 79 A.F.T.R.2d (P-H) ¶ 97-886 (3d Cir. 1995), held that evidence of a grand jury investigation was not "material," so its nondisclosure could not be a Brady violation, though the defendant contended that the undisclosed evidence could have led the jury to conclude that the witness' testimony was designed to further his own interests in connection with the ongoing grand jury investigation, where the witness was unaware of the ongoing nature of the investigation and never asked the government to intercede on his behalf in connection with any such investigation.

Government's failure to divulge tapes allegedly relevant to key prosecution witness' motive to falsify his connection to defendant to secure a reduced sentence or a financial windfall did not impair the integrity of the trial as a whole or put the case in such a different light so as to undermine confidence in the verdict; that evidence would have been merely cumulative since government disclosed to defendant a wealth of impeachment materials concerning witness, and thus defendant's attorney was not precluded from pursuing any theory of impeachment with respect to witness. U.S.C.A. Const Amend XIV. *U.S. v. Milan*, 304 F.3d 273 (3d Cir. 2002).

The court in *U.S. v. Hankins*, 872 F. Supp. 170 (D.N.J. 1995), held that cumulative evidence of inconsistencies in the van owner's testimony regarding the use of the van to transport and sell drugs was not sufficient to require a new trial even though the prosecutor's failure to turn over the file to the defendant was a clear Brady violation. The court found that the jury could totally disregard the owner's testimony and still have sufficient evidence to convict

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The court in *U.S. v. Gonzalez*, 938 F. Supp. 1199, 45 Fed. R. Evid. Serv. (LCP) 924 (D. Del. 1996), judgment aff'd without published op, 127 F.3d 1097 (3d Cir. 1997), cert. denied, 118 S. Ct. 1099, 140 L. Ed. 2d 154 (U.S. 1998), held that undisclosed Federal Bureau of Investigation (FBI) documents containing allegations about one of its former chemist's sloppy work environment and failure to follow FBI protocol for forensic analysis was not Brady material warranting a new trial in a prosecution for the interstate transportation of an explosive device where the former chemist testified as a government expert about the construction of the bomb recovered from the crime scene. The court found that the chemist's testimony was not critical to the government's case, because how the bomb was constructed was never disputed, and the case against the defendant was overwhelming.

The court in *U.S. v. Terry*, 1997 WL 438831 (E.D. Pa. 1997), an unpublished opinion, held that while the evidence about the FBI agent in question was (1) suppressed by the prosecution, and was (2) favorable to the defense, the evidence was not material. The court found that disclosure of the agent's besmirched reputation within the FBI would not have created a "reasonable probability" of a different result, and, therefore, while the allegations levied against the agent were serious, and the better course by the government would have been to disclose this information, there was no basis for vacating the conviction and sentence under Brady.

The court in *U.S. v. Ellis*, 121 F.3d 908, 47 Fed. R. Evid. Serv. (LCP) 729 (4th Cir. 1997), cert. denied, 118 S. Ct. 738, 139 L. Ed. 2d 674 (U.S. 1998), held that while the undisclosed report of the FBI interview of the witness implicating others in the robbery was favorable to the defendant, both as exculpatory and impeachment evidence, it was not material, and its nondisclosure did not violate Brady, where the report was consistent with the witness' testimony at trial that she initially lied to the FBI to protect her brother and the defendant, the witness was already subject to considerable impeachment, and there was additional testimonial evidence linking the defendant to the robbery.

The court in *U.S. v. Nwankwo*, 2 F. Supp. 2d 765 (D. Md. 1998), appeal dismissed, 173 F.3d 426 (4th Cir. 1999), held that the government's failure to disclose, in a trial for conspiring to distribute heroin, that no co-operating witness was ever prosecuted for perjury did not rise to the level of a Brady violation, as any such evidence was not material. The court found that further impeachment of the witnesses, with evidence that the government never brought a prosecution for perjury against a co-operating witness, would not, within a reasonable probability, produced a different result.

The court in *U.S. v. Coleman*, 11 F. Supp. 2d 689 (W.D. Va. 1998), held that, even assuming that the government's failure to find and then disclose a government witness' perjury conviction constituted a Brady violation, the error was harmless, as the witness' conviction and release occurred more than 10 years prior to his testimony, and therefore his conviction was presumptively inadmissible, and even if the interests of justice would have warranted admission of the conviction, a new trial would still be unwarranted because the conviction was not material.

The court in *Hall v. U.S.*, 30 F. Supp. 2d 883 (E.D. Va. 1998), appeal dismissed, 1999 WL 587893 (4th Cir. 1999), held that the prosecutors' failure to disclose materials regarding an alleged discrepancy in the witnesses' testimony as to whether the defendant was the sole supplier of narcotics, was not a Brady violation, even though such information would have been favorable to the defendant in impeaching the witnesses, considering that such information was not material to the defendant's guilt or punishment, that there was voluminous testimony from other witnesses on the defendant's narcotics activities, and that the prosecutors' interview notes sought by the defendant were not verbatim and had not been adopted or approved by the witnesses.

Brady and its progeny do not create a general constitutional right to discovery in a criminal case, and no due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial. U.S.C.A. Const Amend XIV. *U.S. v. Le*, 306 F. Supp. 2d 589 (E.D. Va. 2004).

In *U. S. v. Irwin*, 661 F.2d 1063 (5th Cir. 1981), the court held that although in responding to the defense's

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request for specific information as to payments to the informant the prosecution did not reveal payments of approximately \$60 to \$70 as reimbursement for expenses, such did not require reversal on Brady grounds as the informant's misstatement on the stand was relatively insignificant, probably unintentional, and perhaps not even heard as such by the drug investigator and the small point that might be scored by questioning the investigator about his failure to reveal the untruth in the informant's testimony would not be sufficient either to impeach the investigator or affect the result and the evidence supporting the finding of guilt was not dependent on an assessment of the investigator's credibility.

Assuming without deciding that Brady required the government to reveal the confidential informant's criminal record, even though the confidential informant did not testify, in order to permit his impeachment as a hearsay declarant, the court in *U.S. v. Abadie*, 879 F.2d 1260 (5th Cir. 1989), reh'g denied, (Sept. 7, 1989), held that automatic reversal was not required, as the defendants failed to show how they would have been able to use the confidential informant's record of arrests and indictments at trial and thus failed to show the materiality of the withheld information since none of the arrests and indictments resulted in a conviction.

The court in *U.S. v. Washington*, 44 F.3d 1271 (5th Cir. 1995), held that the prosecution's failure to disclose evidence that the detective asked the Texas Parole Board to stop its revocation proceedings against the confidential informant did not violate Brady. The court found that considerable other evidence was presented to the jury to show that the informant may have been biased or may have had an interest in testifying for the government, and the detective was a relatively insignificant witness.

The court in *U.S. v. Scott*, 48 F.3d 1389, 42 Fed. R. Evid. Serv. (LCP) 440 (5th Cir. 1995), reh'g and suggestion for reh'g en banc denied, 56 F.3d 1387 (5th Cir. 1995), held that the defendant did not establish that his conviction should be reversed because the government concealed materially favorable evidence from him in violation of Brady in the form of the transcript of the informant's sentencing which revealed that the informant was mistaken as to the severity of the sentence he faced unless he agreed to help the government investigation. The court found that because the informant could reasonably have believed, at time he agreed to aid in the investigation, that he faced a minimum of 10 years' imprisonment, evidence that the trial judge found differently at his sentencing hearing would not have affected the informant's credibility.

The court in *U.S. v. Aubin*, 87 F.3d 141, 78 A.F.T.R.2d (P-H) ¶ 96-5311 (5th Cir. 1996), reh'g and suggestion for reh'g in banc denied, 100 F.3d 955 (5th Cir. 1996) and cert. denied, 519 U.S. 1119, 117 S. Ct. 965, 136 L. Ed. 2d 850 (1997), held that the prosecution's failure to disclose impeachment evidence of the prosecution witnesses, in the prosecution of the defendant for bank fraud, did not violate the Brady rule requiring the disclosure of exculpatory evidence, as the court found that impeachment evidence was presented as to the witnesses, such that additional such evidence would have been merely cumulative.

The court in *U.S. v. Sotelo*, 97 F.3d 782, 45 Fed. R. Evid. Serv. (LCP) 1054 (5th Cir. 1996), reh'g denied, (Nov. 20, 1996) and cert. denied, 519 U.S. 1135, 117 S. Ct. 1002, 136 L. Ed. 2d 881 (1997) and cert. denied, 520 U.S. 1149, 117 S. Ct. 1324, 137 L. Ed. 2d 486 (1997), held that no reasonable probability existed that the result of the drug prosecution of multiple defendants would have been different had the government timely disclosed that the government witness who testified in the drug prosecution was still involved in drug trafficking at the time he testified, and reversal of the convictions was not warranted under Brady, where only two of the defendants were implicated in the witness' testimony, and the transaction involving those two defendants about which the defendant had testified was monitored by federal agents, who corroborated the witness' testimony.

The court in *U.S. v. Lowder*, 148 F.3d 548 (5th Cir. 1998), held that a government file regarding the narcotics activities of a third party was not material evidence under Brady, as the mere fact that a third party participated in the marijuana trade did not speak to the defendant's guilt or innocence of the drug crimes, and even if the information could have been used to impeach the agent, who testified that nobody moved marijuana the way the defendant claimed the third party did, the court did not raise a reasonable probability that the result of the proceeding would have been different, given the strength of the government's case against the defendant.

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Expert witness's testimony that distance between muzzle of gun to victim's wound was few inches was not material in murder trial and, thus, prosecution's alleged suppression of testimony did not amount to Brady violation; muzzle-to-wound distance of few inches, rather than few feet, did not make it any more likely that co-defendant, who had been accidentally been wounded, shot gun at victim from sitting position rather than defendant from standing position. *Clark v. Johnson*, 227 F.3d 273 (5th Cir. 2000).

State did not violate Brady rule by failing to disclose that defendant's daughter was under felony indictment when she testified for prosecution at guilt/innocence phase of capital murder trial; evidence was not material, since indictment would not have been admissible to impeach, absent any representation by daughter that she was not in trouble with the law, or deal between prosecution and daughter for her testimony. *Dowthitt v. Johnson*, 230 F.3d 733 (5th Cir. 2000).

The court in *U.S. v. Boykins*, 915 F.2d 1573 (6th Cir. 1990), denial of postconviction relief aff'd by, 72 F.3d 129 (6th Cir. 1995), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, held that the defendant failed to show a reasonable probability that the outcome of the trial would have been different if the jury had been informed that the prosecution's witness was co-operating in exchange for not being prosecuted instead of an expectation of a reduced sentence. The court found that the defense attorneys repeatedly raised the issue of an alleged agreement before the jury and the jury had the opportunity to judge the witness' credibility in that regard, and the court accordingly rejected the defendant's Brady argument because even if there was an agreement which was not disclosed, the failure to disclose it was not "material" for purposes of the due process clause.

The court in *U.S. v. Miller*, 161 F.3d 977, 1998 FED App. 344P (6th Cir. 1998), cert. denied, 119 S. Ct. 1275, 143 L. Ed. 2d 369 (U.S. 1999), held that a handwriting report that was inconclusive as to whether the defendant wrote a threatening note placed on the windshield of one of the witnesses in his case did not fall within Brady, as it was not material to the case, despite the contention that the note was possible impeachment evidence because if the note had been written by one of the witnesses testifying against the defendant, it would have discredited the witness' testimony that the witness was threatened by the defendant, as further undermining of the credibility of any of the witnesses was not likely to change the outcome of the case where the defendant's counsel elicited testimony from each witness about committing perjury in a past trial, as well as evidence about a variety of prior bad acts, including drug use and trafficking.

Even taken together, alleged Brady violations regarding impeachment evidence did not create a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *U.S.C.A. Const. Amend. 5. U.S. v. Stewart*, 5 Fed. Appx. 402 (6th Cir. 2001), cert. denied, 122 S. Ct. 156 (U.S. 2001).

Undisclosed impeachment evidence of government witness was not material, for purposes of Brady claim, since attack of witness's credibility using undisclosed evidence would not have raised reasonable probability that results of proceeding would have been different, in light of overwhelming evidence of defendant's guilt. *U.S. v. Winston*, 55 Fed. Appx. 289 (6th Cir. 2003).

Defendant failed to establish Brady violation based on allegation that government failed to disclose a deal it made with witness in exchange for her testimony, where defendant merely pointed out fact that government did not revoke witness' probation despite her admitted probation violation, and that government witness changed story that she had planned to give to the jury, but about which she never actually testified. *U.S. v. Benton*, 64 Fed. Appx. 914 (6th Cir. 2003).

Any Brady violation in government's failure to disclose to defendant, before his cross-examination of his domestic partner, her prior statement contradicting her trial testimony, did not deprive defendant of his right to a fair trial; there was no reasonable probability that the outcome of the trial would have been different inasmuch as partner's testimony was not the only evidence which convicted defendant, her other testimony was corroborated

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by an independent witness, and defendant was able to use her statement effectively at trial. *U.S. v. Stamper*, 91 Fed. Appx. 445 (6th Cir. 2004).

The court in *U.S. v. Xheka*, 704 F.2d 974, 12 Fed. R. Evid. Serv. (LCP) 1764 (7th Cir. 1983), held that although the government violated its obligations under Brady to disclose that an employee of the defendants charged with violation of a statute providing punishment for malicious damage or destruction of a building by means of an explosive, would give exculpatory testimony impeaching the credibility of a key government witness, the defendants were not entitled to a reversal of their convictions since that testimony was not "material" in that the jury chose to believe the government witness despite a wealth of impeaching evidence.

The court in *U.S. v. Jackson*, 780 F.2d 1305, 19 Fed. R. Evid. Serv. (LCP) 1383 (7th Cir. 1986), held that the prosecution's failure to disclose the key witness' employment relationship with the oil company did not violate the due process rights of the defendants charged with mail fraud in connection with their alleged theft of fuel oil where the defendants were not accused of stealing fuel from the witness' employer and other evidence calling the witness' credibility into question was provided.

The court in *U.S. v. Herrera-Medina*, 853 F.2d 564, 26 Fed. R. Evid. Serv. (LCP) 491 (7th Cir. 1988), reh'g denied, (Sept. 9, 1988) and postconviction relief granted, 1988 WL 142226 (N.D. Ill. 1988), held that the government's failure to disclose what portion of the money paid to the government informant was for the reward and what portion was for reimbursement of expenses did not constitute a Brady violation since such evidence was not "material," in the sense that, given the significant amount of impeachment evidence admitted against the informant, there was no reasonable probability that, had the amount of the reward been disclosed to the defense, the result of the proceeding would have been different.

The court in *U.S. v. Veras*, 51 F.3d 1365 (7th Cir. 1995), reh'g denied, (June 21, 1995), held that although the prosecution should have disclosed under Brady that the police officer who testified against the defendant was being investigated for fraud involving money used to pay informants, the information would not have made a difference in the result of the trial, as required to entitle the defendant to a new trial, since the officer denied the allegations, and the defendant could not have introduced extrinsic evidence to support the allegations.

The court in *U.S. v. Maloney*, 71 F.3d 645 (7th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Mar. 15, 1996), held that a statement made by a former client of the attorney/witness, that the attorney told the client to lie on the client's habeas petition, would have been merely cumulative impeachment evidence if introduced in the racketeering and conspiracy case against the county judge, and the county judge thus was not entitled to a new trial based on the prosecutor's failure to disclose the statement to the county judge. The court found that the attorney/witness admitted that he took witness recantation statements while suspecting that the witnesses was intimidated into making the statements, as well as taking statements with full knowledge of their falsity.

The court in *U.S. v. Silva*, 71 F.3d 667 (7th Cir. 1995), held that the prosecution was not required under Brady to disclose to the defense the "sordid" background of its confidential informant who told its agents that large quantities of cocaine were sold at the defendant's automobile repair shop. The court found that the informant only served to initiate the criminal investigation, but provided no evidence for trial, and thus evidence to impeach the informant would have been inadmissible.

The court in *U.S. v. Gonzalez*, 93 F.3d 311 (7th Cir. 1996), held that undisclosed evidence impeaching a government witness, a confidential informant, would not have changed the outcome of the trial, and thus, did not warrant a new trial on the narcotics charges, where the government produced, prior to trial, a quantity of impeachment materials relating to the witness, there was independent corroborating evidence of the defendants' guilt, and there was no evidence of entrapment.

The court in *U.S. v. Hartbarger*, 148 F.3d 777, 49 Fed. R. Evid. Serv. (LCP) 783 (7th Cir. 1998), reh'g and

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suggestion for reh'g en banc denied, (July 20, 1998) and cert. denied, 119 S. Ct. 1117, 143 L. Ed. 2d 112 (U.S. 1999), held that the government's failure to turn over allegedly impeaching evidence did not entitle the defendant to a new trial on charges arising from the burning of a cross on the property of an interracial couple and their children; the court found that evidence that the government witness was threatened with prosecution for the same crimes if he continued to refuse to testify under the Fifth Amendment, that he received cab fare in addition to the standard witness' fee, and that the FBI made an offer "to put in a good word" for the witness regarding the charges pending against him would have had little or no impeachment value, and the impeachment of that witness would not have benefited the defendant in any event.

The court in *U.S. v. Ducato*, 968 F. Supp. 1310 (N.D. Ill. 1997), aff'd on other grounds, 148 F.3d 824 (7th Cir. 1998), held that evidence that the government witness conspired to defraud the coconspirator's client in an unrelated case was not material to the defendant's narcotics prosecution, as required to support a Brady claim. The court found that the witness' testimony was only part of the overwhelming case against the defendant, the witness was already been impeached at trial, and the allegedly suppressed evidence would only further impeach his testimony.

The court in *U.S. v. Willis*, 43 F.Supp.2d 873 (N.D.Ill. 1999), held that the alleged racist comments made by a supervisor of the Drug Enforcement Administration (DEA) during an investigation of drug conspiracy charges against the African-American suspects were not admissible or material in the subsequent conspiracy prosecution, and therefore, the government's failure to disclose evidence regarding such comments did not amount to a Brady violation; the court found that the defendants failed to prove that such comments resulted in prejudice to them, and the comments were not specific enough to render them material.

Cumulative evidence may properly be excluded in a criminal prosecution, even if it constitutes impeachment material under Brady. *U.S. v. Carter*, 313 F. Supp. 2d 921 (E.D. Wis. 2004).

The court in *U.S. v. Risken*, 788 F.2d 1361 (8th Cir. 1986), held that the prosecutor's failure to disclose, in a prosecution for witness tampering arising out of the defendant's attempts to hire a government informant to kill a grand jury witness, that the informant understood that he might be compensated for testifying against the defendant was error, but only harmless error, where the informant's testimony was strongly corroborated by tape recordings of conversations with the defendant.

The court in *U.S. v. Peltier*, 800 F.2d 772, 21 Fed. R. Evid. Serv. (LCP) 1017 (8th Cir. 1986), held that the fact that the prosecution withheld evidence favorable to the defendant which would allow the defendant to cross-examine the government's ballistic expert more effectively concerning a .223 casing found in the trunk of the car of the murdered FBI agent did not create a reasonable probability that the defendant would be acquitted if the evidence were disclosed and, thus, did not entitle the defendant to a new trial. The court also found that the fact that the prosecution withheld evidence favorable to the defendant that would allow the defendant to cross-examine certain government witnesses more effectively concerning inconsistencies in the ballistic evidence introduced at trial, such that the jury might give additional weight to the fact that there was more than one weapon like the murder weapon used on the day in question, did not create a reasonable probability that the defendant would be acquitted if the evidence were disclosed and, thus, did not warrant a new trial.

The court in *U.S. v. Roberts*, 848 F.2d 906 (8th Cir. 1988), reh'g denied, (July 14, 1988), held that the failure to disclose exculpatory Brady material, whereby the robbery defendant could impeach his accomplice who testified for the prosecution, was not reversible error where the availability of the evidence would not materially add to the effectiveness of the cross-examination of the accomplice.

The confidence of the reviewing court in *Drew v. U.S.*, 46 F.3d 823 (8th Cir. 1995), in the outcome of the proceeding was not undermined by the omission of medical records of the mental illness of the government witness alleged to be improperly suppressed by the prosecution, and the records were not so "material" that their alleged suppression violated the defendant's due process rights, where even without the medical records the

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defense effectively cross-examined the witness with respect to her treatment for drug addiction and attempted suicide, and the only novel fact revealed by the records was that the witness was diagnosed as having a "personality disorder" the bearing of which on the witness' credibility was not immediately apparent.

The court in *U.S. v. O'Conner*, 64 F.3d 355 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Oct. 16, 1995), held that a Brady violation occurred when the government failed to inform the defendants of threats by one government witness against another witness and attempts to influence the testimony of a second government witness was not reversible error with respect to the conviction of two defendants on conspiracy counts where other substantial evidence corroborated those government witnesses' testimony and linked the defendants to the conspiracy and there was no reasonable probability that the impeachment evidence would have altered the outcome.

The court in *U.S. v. Jones*, 160 F.3d 473 (8th Cir. 1998), held that the government did not violate its Brady obligation to disclose material, exculpatory impeachment evidence when it failed to disclose a witness' plea agreement and alleged improprieties surrounding his sentencing proceedings; the court found that the witness did not agree to testify against the defendants until after he was sentenced and incarcerated, the defendants were aware of the government's promise of a sentence reduction and cross-examined the witness on that subject, and a wealth of other testimony was used to obtain the convictions.

The court in *U.S. v. Claiborne*, 765 F.2d 784, 85-2 U.S. Tax Cas. (CCH) ¶ 9821, 18 Fed. R. Evid. Serv. (LCP) 1131, 56 A.F.T.R.2d (P-H) ¶ 85-6264 (9th Cir. 1985), held that in a prosecution for willfully underreporting taxable income, the prosecution's failure to deliver government summaries of interviews with the defendant's accountant pursuant to the defendant's general request for exculpatory information did not justify a new trial where disclosure of the summaries would not create any reasonable doubt, in that the defendant already had access to the most damaging impeachment evidence contained in the summaries, and the same result would be obtained even if the request were specific.

COMMENT:

The dissenting opinion from the order denying a hearing en banc to rehear *U.S. v. Claiborne*, 765 F.2d 784, 85-2 U.S. Tax Cas. (CCH) ¶ 9821, 18 Fed. R. Evid. Serv. (LCP) 1131, 56 A.F.T.R.2d (P-H) ¶ 85-6264 (9th Cir. 1985), reported at *U.S. v. Claiborne*, 781 F.2d 1325 (9th Cir. 1985), pointed out that the panel's Brady analysis ignored *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), announced six days before *Claiborne*. While under *Bagley*, since 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, and a "reasonable probability" is a probability sufficient to undermine confidence in the outcome, the dissenting opinion observed that the panel should have decided whether suppression of the interview material "undermined confidence in the outcome of the trial." Instead, as the dissenting opinion pointed out, the panel employed a two-part test: whether the evidence would have "created a reasonable doubt" or whether it "might have affected the outcome" of the trial. The dissenting opinion believed that ample evidence from the record supported the conclusion that suppression of the material undermined confidence in the trial outcome since the subject of the impeachment material was a key witness in the government's case, and evidence that a significant number of his clients' files had been discarded, directly contradicting his earlier testimony, would certainly have undermined his credibility sufficiently for the jury to conclude that the defendant had testified truthfully. Thus, according to the dissenting opinion from the refusal of the Ninth Circuit to rehear this case en banc, the defendant's conviction should have been reversed because the government withheld Brady impeachment evidence of one of its key witnesses.

The court in *U.S. v. Polizzi*, 801 F.2d 1543, 21 Fed. R. Evid. Serv. (LCP) 1257 (9th Cir. 1986), held that the government's failure to disclose an FBI agent's interview notes with a witness, even if required by Brady, did not constitute reversible error, since the defendant indicated that he would have used the notes to impeach the witness and, as impeachment evidence, the notes were merely cumulative, particularly in light of the thorough and

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convincing impeachment of the witness.

The court in *U.S. v. Marashi*, 913 F.2d 724, 90-2 U.S. Tax Cas. (CCH) ¶ 50482, 31 Fed. R. Evid. Serv. (LCP) 262, 71A A.F.T.R.2d (P-H) ¶ 93-3898 (9th Cir. 1990), held that the nondisclosure of Internal Revenue Service interview notes did not constitute a Brady violation on the theory that the nondisclosure prevented the defendant in an income tax evasion case from effectively impeaching the government's star witness, where the virtually identical statement contained in other interview notes were disclosed to the defendant, so that the nondisclosed notes contained merely cumulative impeachment evidence and thus were not Brady material.

The court in *U.S. v. Kearns*, 5 F.3d 1251 (9th Cir. 1993), appeal after remand, 61 F.3d 1422, 42 Fed. R. Evid. Serv. (LCP) 1067 (9th Cir. 1995), held that the due process clause was not violated by the prosecution's failure to disclose the informant's written agreement and certain details of the witness' criminal record. The court found that although testimony did not fully bring out the extent of the time pressure on the informant, she testified that she was under time pressure to fulfill an agreement with the police, and evidence was provided to the defense regarding the witness' criminal history.

The court in *U.S. v. Croft*, 124 F.3d 1109, 47 Fed. R. Evid. Serv. (LCP) 1048 (9th Cir. 1997), held that the refusal of the defendants' request for the government's notes concerning the dates and content of meetings between government's agents and the government's co-operating witnesses was not a Brady violation, as there was no showing of materiality, despite the contention that the notes would have been useful to impeach the witnesses and to assist in an attack on the integrity of the investigation, as the government turned over 8,000 to 10,000 pages of Jencks materials to one defendant, and both defendants impeached the government witnesses with inconsistent statements numerous times.

The court in *U.S. v. Ordaz Ruiz*, 168 F.3d 503 (9th Cir. 1999), an unpublished table disposition, [FN78] in declining to reverse the defendant's conviction for conspiracy to distribute and possess with intent to distribute methamphetamine in violation of 21 U.S.C.A. § 846, denied his motion for a new trial on the basis of newly discovered evidence regarding the primary informant, as the defendant did not establish that the new evidence was material. The court found that although the evidence of the primary informant's impropriety in other contexts may have fatally impeached him as a witness, the government's case primarily relied on transcripts of conversations in which the defendant established his involvement, and after reviewing the record and transcript, the court found no evidence of the defendant's guilt that would be undermined by further impeaching the informant's character. Thus, the court held that the outcome of the trial likely would not have changed, even with the new evidence.

The court in *U.S. v. Herman*, 1999 WL 519004 (9th Cir. 1999), an unpublished disposition, held that a new trial was not warranted for the defendant, convicted of a violation of 18 U.S.C.A. § 1958 for use of interstate commerce facilities in the commission of a murder-for-hire, where the defendant alleged that the prosecution suppressed exculpatory Brady evidence which allegedly showed that, due to her co-operation with the Federal Government, the prosecution witness received favorable treatment from state authorities with respect to pending state forgery charges. The court held that although the Brady material uncovered by the defendant would have facilitated the impeachment of the prosecution's witness, there was no reasonable probability that the outcome of the trial would have been different had the information been disclosed to the defendant. The court found that the government would likely have minimized any impeachment of the witness' credibility by demonstrating that she was unaware of any special consideration. Moreover, in light of the weight of the other direct evidence implicating the defendant in the murder-for-hire scheme, the court found that it was not reasonably probable that the appellant's ability to impeach the witness would have altered the verdict, as in addition to the witness' testimony, the government presented audiotapes of several telephone conversations between the defendant and the witness discussing the plan to murder the intended victim, and after the investigators faked the intended victim's death, the witness met the defendant at a motel in Phoenix and brought "proof" of the murder, which included photographs of the intended victim's "dead" body, her driver's license, and her checkbook; the government admitted into evidence an audiotape and videotape of this meeting in which, after calmly reviewing the "proof" and listening to the witness recount the gruesome details of the murder, the defendant made numerous

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incriminating statements. The court thus concluded that although the witness' testimony was certainly helpful to explain some of the background and provide context for the tapes, the government's case did not rest solely on circumstantial evidence and the witness' credibility, and in view of the substantial amount of other direct evidence of the defendant's guilt, there was no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.

Tape recording of interview between prisoner and investigators for district attorney's office, in which prisoner asserted that state's witness committed perjury when he testified in another, unrelated criminal case, was not material to defendant's guilt or punishment, and thus did not trigger state's duty to disclose exculpatory evidence to defense, as evidence would have been merely cumulative of other evidence that defense presented to impeach witness. *Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002).

Defendant could not prove Brady violation without showing that any withheld materials would have been of exculpatory or of impeachment value. *U.S.C.A. Const Amend V. U.S. v. Jones*, 56 Fed. Appx. 416 (9th Cir. 2003).

Even though government violated its Brady obligations in criminal conspiracy prosecution by not disclosing material regarding cooperating witness prior to trial, including evidence that he was international dealer in illicit substances, which constituted exculpatory material and impeachment material that government intentionally suppressed, reversal was not warranted; jury had heard testimony regarding possible life sentence witness faced for his crimes, and more evidence would do little to exculpate defendants on theory that they were witness' dupes, in light of other evidence, including techniques defendants used to evade authorities. *U.S. v. Rosen*, 94 Fed. Appx. 567 (9th Cir. 2004).

District court did not have to dismiss indictment or order new trial based on prosecution's alleged Brady violation, in failing to disclose that government had acted illegally in procuring "green card" for prosecution witness, where this evidence was cumulative of other impeachment evidence presented by defendant and thus did not prejudice him in his attempts to discredit witness' testimony, and where evidence, while perhaps indicating lengths to which government would go in order to obtain conviction, did not in any way undercut evidence of his predisposition to commit narcotics offenses, so that prosecution's failure to disclose evidence did not prejudice his entrapment defense. *U.S. v. Ross*, 372 F.3d 1097 (9th Cir. 2004).

The court in *U. S. v. Jackson*, 579 F.2d 553 (10th Cir. 1978), held that a new trial was not warranted for the failure to inform the defendants of an alleged \$300 payment to the unindicted coconspirator by agents of the Drug Enforcement Administration where there was nothing in the trial transcript or papers and files on the case reflecting the \$300 payment to the unindicted coconspirator and the situation was not one involving concealed information nor, for that matter, information not discoverable during the course of the trial itself.

The court in *U.S. v. Page*, 808 F.2d 723 (10th Cir. 1987), held that the failure of the prosecution to reveal that the informant had been arrested for burglary and assault with a deadly weapon did not justify a new trial where the defendant proved at trial that the informant had been convicted of seven felonies.

The court in *U.S. v. Buchanan*, 891 F.2d 1436 (10th Cir. 1989), held that evidence of a personal relationship between the petitioner's former wife and the investigator for the Bureau of Alcohol, Tobacco and Firearms (BATF) would not have raised a reasonable doubt as to guilt and was not material under Brady in a prosecution for the manufacture and possession of an unregistered firearm and conspiracy, even though the sensational nature of the evidence could have affected the verdict. The court found that the investigator testified that the firebomb used to destroy the trailer of the former wife's mother constituted a firearm under federal law, and the former wife's testimony was not necessary to convict.

CAUTION:

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The court in *Buchanan* relied on the holding of the Supreme Court in *U. S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), that the standard of materiality required to set aside a conviction on Brady grounds varies with the specificity of the defendant's request and the conduct of the prosecutor, which was superseded by the Supreme Court in *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The court in *U.S. v. DeLuna*, 10 F.3d 1529, 87 Ed. Law Rep. 428 (10th Cir. 1993), held that the government's failure to provide the defendant with a copy of the indictment against a witness, which was dismissed, did not result in a Brady violation, since the evidence was not material. The court found that the indictment would not have enabled the defendant to more effectively impeach the witness regarding his bias or interest in testifying for the government, and the record suggested that the defense counsel knew the substance of the indictment.

The court in *U.S. v. Fleming*, 19 F.3d 1325, 76 A.F.T.R.2d (P-H) ¶ 95-7578 (10th Cir. 1994), held that the alleged Brady violations arising from the government's withholding of evidence of similar schemes perpetrated by the participants in a sham transaction against other firearms dealers were not material, in a prosecution arising from a failure to pay the transfer tax under the National Firearms Act, where the defendant received investigatory statements and grand jury testimony before the trial, the defense counsel spent several days with the case agent and the entire prosecution file, and the participant was questioned during the trial about his involvement in similar schemes.

The court in *U.S. v. Hughes*, 33 F.3d 1248 (10th Cir. 1994), held that although information regarding the arresting officer's allegedly unstable mental condition at the time of the arrest, which information the government did not relay to the defendant, would have been favorable impeachment evidence for the defendant, the evidence was not material and, thus, there was no Brady violation given the great deal of inculpatory evidence presented in addition to the arresting officer's testimony, including a tape-recorded conversation between the defendant and the arresting officer during the stop in which the defendant admitted he was transporting drugs, that the substance in the trunk of his vehicle was methamphetamine, and the defendant attempted to bribe the arresting officer.

The court in *U.S. v. Campos*, 72 F.3d 138 (10th Cir. 1995), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.3 of the Tenth Circuit, held that undisclosed exculpatory evidence, which would have impeached a key government witness, which included a memo, written by a FBI special agent, revealing that the government would recommend granting the witness probation for co-operating in the FBI's public corruption investigation, details of the witness' plea bargain concerning tax evasion charges, and a tape of the interior of the witness' topless nightclub, did not violate Brady because there was no reasonable probability that the outcome of the trial would have been different if the defense had possessed the information, as the court found that there was abundant evidence incriminating the defendant apart from the in-court testimony of the witness in question.

The court in *U.S. v. Molina*, 75 F.3d 600, 43 Fed. R. Evid. Serv. (LCP) 1089 (10th Cir. 1996), held that the mere fact that prosecution witnesses entered into plea agreements after the defendant's trial was not evidence that the plea agreements were secretly reached prior to the witnesses' testimony and improperly withheld from the defense in violation of Brady.

The court in *U.S. v. Johnson*, 117 F.3d 1429 (10th Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.3 of the Tenth Circuit, held that the government's failure to disclose evidence that the arresting officer's credibility was questioned at two earlier federal suppression hearings and that a number of suspects arrested by the officer were not prosecuted, allegedly because there were questions concerning the legality of the arrests, did not deny the defendant due process at the suppression hearing, as had this evidence been disclosed, there was not a reasonable probability that the outcome of the suppression hearing would have been different. The court found that at the defendant's suppression hearing, the outcome did not rest solely on the credible testimony of the arresting officer, but instead, was predicated on the untruthful nature of the defendant's representations to the officers involved in his arrest.

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Government's alleged failure to disclose impeachment evidence regarding arresting officer, including officer's demotion, information that the officer was defendant in a civil rights action, and a collection of five cases in which defendant during the course of his patrol duties, detected the odor of illegal drugs emanating from a suspect's vehicle, did not constitute Brady violation, in drug trafficking prosecution, where defendant had knowledge of all such impeachment evidence prior to trial. *U.S. v. Arnulfo-Sanchez*, 71 Fed. Appx. 35 (10th Cir. 2003).

Defendant did not show that government investigator's notes and reports of interviews with witnesses were material, so as to compel their disclosure under Brady; even assuming that interview notes would reveal additional inconsistencies in witness statements, defendant did not discuss the nature of the inconsistencies or whether they would be substantially impeaching so that they might make the difference between conviction and acquittal. Fed. Rules Cr. Proc. Rule 16(a)(2), 18 U.S.C.A. *U.S. v. Daniels*, 195 F.R.D. 681 (D. Kan. 2000).

The court in *U.S. v. Burroughs*, 830 F.2d 1574 (11th Cir. 1987), held that the government's failure to disclose information about the purported belief of its star witness that if he did not testify his wife would go to jail and their children would be placed in a state home did not entitle the defendants, in a prosecution for possession of heroin with intent to distribute, to a mistrial and a new trial on Brady grounds. The court found that not only was there no indication that the government had any advance knowledge of the witness' purported belief, but the additional information was not material to a determination of the defendants' guilt in that numerous witnesses corroborated much of the star witness' testimony and the star witness was impeached through other means.

The court in *U.S. v. Newton*, 44 F.3d 913 (11th Cir. 1994), held that the government's Brady violation, with regard to evidence tending to impeach the government witness' testimony concerning an uncharged murder in which the defendant was allegedly involved, did not affect the verdict in the prosecution of the defendant for drug trafficking offenses and, accordingly, did not warrant a new trial where the record was replete with proof of the defendant's involvement in the four crimes with which he was charged without regard to that witness' testimony.

The court in *U.S. v. Mejia*, 82 F.3d 1032 (11th Cir. 1996), held that the government's alleged failure to disclose that its confidential informant was permitted to take part of his payment from the government out of the country without filing the required paperwork, that the informant was given free lodging during the course of the investigation, that the informant failed to pay taxes on the money given to him for his co-operation, and that the informant previously was paid for his work on other cases, did not violate Brady. The court found that the government disclosed that the informant was paid for his work, and the information allegedly withheld was brought out on cross-examination, and thus there was no reasonable probability that the outcome of the trial would have been different had the information been disclosed.

To state a Brady claim, a defendant must show: (1) that the government possessed evidence favorable to the defendant, including impeachment evidence; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. U.S.C.A. Const. Amend. 5. *U.S. v. Hansen*, 262 F.3d 1217 (11th Cir. 2001).

The court in *U.S. v. Graham*, 83 F.3d 1466, 44 Fed. R. Evid. Serv. (LCP) 778 (D.C. Cir. 1996), held that the government's failure to disclose the deposition of the government witness in which he recounted his participation in several drug-related murders and the results of a polygraph test in which he admitted committing two murders, but allegedly gave several deceptive responses when asked about the involvement of others did not violate the Brady disclosure requirements, since the polygraph results would not have significantly aided impeachment in that the witness already admitted on direct examination to deceptions in other contexts and to participating in three murders.

The court in *Johnson v. U.S.*, 537 A.2d 555 (D.C. 1988), held that the government's failure to disclose the

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juvenile record of the government's witness did not violate the defendant's due process rights as defined by *Brady v. Maryland*. The court found that the records were not "material" because it was unlikely that their disclosure would have affected the outcome of the trial inasmuch as the witness was only one of seven eyewitnesses, in addition to the victim, and each of them testified positively to the defendant's participation in the assault. Moreover, both the jury and defense counsel had an independent awareness of the circumstances implying the bias of the witness and his questionable credibility.

While the prosecution is under a duty to disclose impeachment material that is favorable to a defendant, prosecution is not under an affirmative duty to disclose material that supports its witness' testimony and thus undermines a charge of recent fabrication. *People v. Banks*, 249 Mich. App. 247, 642 N.W.2d 351 (2002).

To establish a *Brady* violation mandating a new trial, defendant must prove: (1) that state possessed evidence favorable to the defendant, which may include impeachment evidence; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Todd v. State*, 806 So. 2d 1086 (Miss. 2001).

Impeachment evidence is considered exculpatory evidence for purposes of *Brady*. *Haygood v. State*, 127 S.W.3d 805 (Tex. App. San Antonio 2003), reh'g overruled, (Jan. 5, 2004).

§ 14. Effect on decision to plead guilty

[a] Held material

The courts in the following cases held that the government's suppression of evidence impeaching the credibility of witnesses constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus entitled the defendant to withdraw a guilty plea.

The court in *U.S. v. Millan-Colon*, 829 F. Supp. 620 (S.D.N.Y. 1993), order aff'd on other grounds, 17 F.3d 14 (2d Cir. 1994), held that undisclosed information regarding the government's narcotics-related corruption investigation of the police officers involved in the investigation of the drug conspiracy was material to the defendants' decisions to plead guilty, and so entitled them to withdraw their guilty pleas, where the corruption investigation turned up evidence making incredible some of the government's assertions in its opening statement, brought into question the integrity of the undercover buys on which the drug conspiracy case hinged, and eliminated one of the government's key witnesses.

The court in *Banks v. U.S.*, 920 F. Supp. 688 (E.D. Va. 1996), held that *Brady/Giglio* evidence consisting of information regarding conjugal visits which federal agents allowed the government informant to receive, was "material" and the prosecution's failure to disclose it rendered the drug defendant's guilty plea invalid. The court found that the information could have been used by the defendant to attack the credibility of the informant and agents, who arranged the "sting" operation, and there was a reasonable probability that the information would have convinced the defendant to take the case to trial, particularly as the defendant's words and actions were only criminal when seen in context, which could only be supplied for the jury by the informant and agents.

[b] Held not material

The courts in the following cases held that the government's failure to disclose impeachment evidence did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to vacate his guilty plea.

The United States Supreme Court in *U.S. v. Ruiz*, 122 S. Ct. 2450 (U.S. 2002), held that federal prosecutors

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are not required to disclose impeachment information relating to informants or other witnesses before entering into a binding plea agreement with a criminal defendant. The decision reverses the Ninth Circuit, which, in effect, held that a guilty plea is not "voluntary" unless prosecutors first make the same disclosure of impeachment information that would have been required if the defendant had insisted upon a trial. The case involved a defendant who was offered a "fast track" plea bargain after immigration agents found marijuana in her luggage. The prosecutors' "fast track" plea agreement acknowledged the government's continuing duty to turn over information establishing the defendant's factual innocence, but required that she waive the right to receive impeachment information relating to any informants or other witnesses, as well as information supporting any affirmative defenses. When the defendant refused to agree to the later waiver, the prosecutors withdrew the plea offer. Defendant was later indicted and ended up pleading guilty. At sentencing, she sought the same two-level downward departure that the government had offered in the plea bargain. The district court denied the request, and defendant appealed. In vacating the district court's determination, the Ninth Circuit in *U.S. v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), cert. granted, 122 S. Ct. 803, 151 L. Ed. 2d 689 (U.S. 2002), held that the government's constitutional obligation to make certain impeachment information available before trial entitles defendants to the same information prior to entering into a plea agreement and prohibits waiver of the right to the information. Justice Breyer, writing for the Supreme Court, disagreed. Although the fair trial guarantee of the Fifth and Sixth Amendments provide that defendants have the right to receive exculpatory impeachment material for trial, as stated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant who pleads guilty foregoes a fair trial and various other constitutional guarantees. Impeachment information is special in relation to the fairness of a trial, not in respect to whether a plea is voluntary. Justice Breyer found it particularly difficult to characterize such information as critical, given the random way in which it might, or might not, help a particular defendant. Justice Breyer also noted the absence of legal authority providing significant support for the Ninth Circuit's position. To the contrary, the Supreme Court had found that the Constitution, with respect to a defendant's awareness of relevant facts, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension on defendant's part, such as to the quality of the state's case, the admissibility of a confession, or a potential defense. It was difficult to distinguish, in terms of importance, Justice Breyer said, these varying forms of permissible ignorance and a defendant's ignorance of grounds for impeachment of potential witnesses at a future trial. Due process considerations also argued against the "right" that the Ninth Circuit found. The added value of the impeachment information is often limited, as it depends on defendant's independent awareness of the details of the government's case. In any event, the "fast track" plea bargain provided for full disclosure of all information related to factual innocence. Moreover, the Ninth Circuit's rule might seriously interfere with the government's interest in securing guilty pleas by disrupting ongoing investigations and exposing prospective witnesses to serious intimidation and harm. Finally, the additional requirement of the "fast track" plea agreement, that the defendant waive her right to information regarding any affirmative defenses raised at trial, did not violate the constitution. The need for that information was also more closely related to the fairness of a trial than to the voluntariness of the plea.

The court in *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998), held that there was no reasonable probability that the additional information, which was not disclosed by the federal prosecutor permitting an inference that the government's key witness committed perjury at past trials, by testifying that he gave narcotics trafficking in order to join an organized crime family, would have changed the jurors' minds, and hence there was no reasonable probability that possession of such additional information would have led the defendant to elect to plead not guilty and to proceed to trial, thus precluding the defendant from vacating his guilty plea.

COMMENT:

The court in *Avellino* did not reach the defendant's contention that the Federal Government should have been charged with constructive knowledge of the evidence gathered in a prior state investigation prior to the Federal Government's plea agreement with the defendant, in part because that evidence was present in the office of an assistant United States attorney in the very district in which the defendant's case was contemporaneously being

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prosecuted, since the undisclosed information did not meet the test for Brady materiality, and there was thus no need to reach the questions of actual or constructive knowledge, and, accordingly, no need for a remand.

Defendant has no constitutional right to the disclosure of impeachment information before entering a plea agreement. *U.S. v. Cottage*, 307 F.3d 494 (6th Cir. 2002).

The court in *White v. U.S.*, 858 F.2d 416 (8th Cir. 1988), held that although information, that the government investigator intended to use the minor's burglary arrest--and, implicitly, the influence he might have on its disposition-- as leverage to gain the minor's co-operation in the investigation of the defendant, was not revealed to the defendant prior to entry of his plea, nor was the fact that the minor consistently denied interstate transportation until the minor's meeting with a state prosecutor, the defendant's knowledge of such undisclosed information would not have affected his decision to forego trial, and thus, the failure to disclose the information did not provide a basis to vacate his guilty plea to the charge of transporting a minor across state lines for the purpose of prostitution, where the defendant knew that the minor's credibility could be easily attacked and that the burglary charge was dropped after the minor testified before the grand jury, and numerous state charges were dismissed and other federal charges were not pursued as a result of the plea.

District court's reversal of discovery order requiring government to produce information on informant's activities, to extent that order required reports pertaining to informant's participation in unrelated investigations and redacted names and identifying information of unrelated individuals from reports about informant's past criminal activities, was not a Brady violation; redacted information was neither exculpatory nor impeachment evidence, and although withheld reports would constitute impeachment evidence, they were not material, since informant was cross-examined about his criminal activities and agreement with government. *U.S. v. Si*, 343 F.3d 1116 (9th Cir. 2003).

Impeachment evidence that government withheld in drug prosecution, consisting of amended version of agent's rough notes taken during post-arrest interview of defendant, was not "material" under Brady, and thus failure to disclose evidence did not require reversal of conviction, as there was no reasonable probability that disclosure of evidence would have altered outcome of proceeding. *U.S. v. Guzman*, 89 Fed. Appx. 47 (9th Cir. 2004).

Benefit that prosecution witness received from cooperation with police in another case was exculpatory evidence, but was not material for purposes of Brady claim of due process violation by failing to disclose the information; defense attorneys learned the information and used it during cross-examination, and the jury also was informed that witness had been convicted of 13 felonies. *U.S.C.A. Const Amend XIV. Lovitt v. Warden*, 585 S.E.2d 801 (Va. 2003).

§ 15. Effect on sentencing proceeding

The court in the following case held that the government's suppression of impeachment evidence constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus entitling the defendant to a new sentencing proceeding.

Following defendant's guilty plea, prosecution was not required under Brady to disclose to defendant, prior to sentencing hearing, that the cooperating witness, whom defendant called to give testimony at sentencing hearing, was paid by government for her assistance in investigating and prosecuting defendant. *U.S. v. Kimley*, 60 Fed. Appx. 369 (3d Cir. 2003).

The court in *U.S. v. Weintraub*, 871 F.2d 1257 (5th Cir. 1989), held that impeachment evidence improperly withheld in violation of Brady, which would have allowed the defendant to challenge only the evidence presented as to the amount of narcotics sold, was "material" to the sentence imposed and required remand for a new sentencing proceeding.

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C. Use of False Evidence and Testimony

§ 16. Generally

[a] Held material

The courts in the following cases held that the government's failure to disclose the use of false evidence and testimony to convict the defendant constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus entitling the defendant to a new trial.

The court in *U.S. v. Vozzella*, 124 F.3d 389 (2d Cir. 1997), held that pursuant to *Brady*, convictions for conspiring to extend and collect extortionate loans had to be reversed, due to the government's introduction of alleged loan-sharking records of a purported coconspirator, even though it knew that the records were at least partially false, that the purported coconspirator claimed the records were entirely false, and that no adequate further inquiry was made into the records' veracity, as well as the government's solicitation of testimony about the records and what they represented that was so misleading as to amount to falsity.

A *Brady* claim may arise when the government has introduced trial testimony which was known to be, or should have been recognized as, perjury, when the government has not honored a defense request for specific exculpatory evidence, or when the government has not volunteered exculpatory evidence not requested by the defense, or requested only generally. *U.S. v. Askanazi*, 14 Fed. Appx. 538 (6th Cir. 2001).

The court in *DeMarco v. U.S.*, 928 F.2d 1074 (11th Cir. 1991), held that vacation of the defendant's conviction was required where the prosecutor failed to correct the government's essential witness' perjured testimony that he would receive nothing in exchange for his testimony, and the prosecutor capitalized on that perjured testimony in her closing argument, even though the defense counsel also was aware of the perjury and did not object to it. The *Agurs* standard of materiality that a conviction must be overturned which rests in part on the knowing use of false testimony if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury was satisfied as the court found that the government agreed not to charge the witness with perjury from a different trial and to make his co-operation known to the sentencing court for a reduced sentence, and thus there were compelling facts that the jury should have had in order to properly evaluate the witness' credibility.

The court in *U.S. v. Alzate*, 47 F.3d 1103 (11th Cir. 1995), held that the failure of the prosecutor to correct his statements that there was not another box of cocaine in the room where the defendant was being interrogated was "material" to the defendant's duress defense to a cocaine importing charge, and thus, such failure was a *Brady* violation warranting a new trial. The court found that during interrogation, the defendant made a statement damaging to his duress defense, where the defendant, whose native language was Spanish, attempted to explain his statement by testifying he misunderstood the question by the interrogating officer, who spoke only English, as referring to a second cocaine container in the room, and the prosecutor referred eight times in his closing argument to the defendant's damaging statement.

The court in *U.S. v. Arnold*, 117 F.3d 1308 (11th Cir. 1997), held that the government's failure to produce tapes of conversations between a government witness, confined in a correctional center, and a government agent, with whom the witness was romantically involved, violated *Brady* to the extent that the tapes contained information known to contradict the witness' trial testimony denying any expectation of a reduced sentence and downplaying his desire for assistance from the agent and their discussion of the current case, and to the extent that the tapes included illustrations of the witness' merely "performing" for the prosecution, and included the agent's doubts as to the veracity of two governmental witnesses. The court found that a reasonable likelihood existed that had the evidence been disclosed to the defense, the trial outcome would have been different, and the appellants were thus entitled to a new trial.

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[b] Held not material

The courts in the following cases held that the government's failure to disclose the use of false evidence and testimony to convict the defendant did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus not entitling the defendant to a new trial.

The court in *U.S. v. Gotti*, 171 F.R.D. 19 (E.D.N.Y. 1997), judgment aff'd, 166 F.3d 1202 (2d Cir. 1998), petition for cert. filed, 68 U.S.L.W. 3007 (U.S. June 18, 1999), held that the defendants who were convicted of crimes relating to organized criminal activity were not entitled to a new trial on the basis of newly discovered evidence that the government allegedly knew of a witness' alleged perjury relating to drug dealing, but failed to disclose it. The district court remained convinced of the defendants' guilt beyond a reasonable doubt and remained convinced that there was no reasonable probability of a different result or that the jury might acquit the defendants had it known.

COMMENT:

The court in *U.S. v. Gotti*, 171 F.R.D. 19 (E.D.N.Y. 1997), judgment aff'd without published op, 166 F.3d 1202 (2d Cir. 1998), petition for cert. filed, 68 U.S.L.W. 3007 (U.S. June 18, 1999), relied on the Bagley standard of materiality for impeachment evidence rather than the *Agurs* standard of materiality for the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false.

The court in *U.S. v. Tierney*, 947 F.2d 854, 91-2 U.S. Tax Cas. (CCH) ¶ 50509, 68 A.F.T.R.2d (P-H) ¶ 91-5742 (8th Cir. 1991), reh'g denied, (Dec. 23, 1991), held that even if the government negligently used the perjured testimony of four prosecution witnesses indicating that the defendant participated in a conference telephone call, the defendant failed to show any reasonable likelihood that the false testimony could have affected his conviction of tax offenses, and thus was not entitled to a new trial based on newly discovered evidence that the testimony was false, as the credibility conflict regarding the conference call was just one of many.

The court in *U.S. v. Duke*, 50 F.3d 571, 32 Fed. R. Serv. 3d (LCP) 555 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (May 25, 1995), held that no reasonable likelihood existed that the false testimony of the witness that he had never been arrested or convicted, which the government should reasonably have known was perjured, could have affected the jury's judgment, and the defendant's motion to vacate following his convictions for drug offenses was denied, where the defendant's nephew testified that the money for the drugs came from the defendant, much of the witness' testimony was corroborated by audio and video surveillance, and the credibility of the witness who committed perjury was impeached at trial and the jury was aware of the possibility that self-interest might have influenced the witness.

The court in *U.S. v. Rabins*, 63 F.3d 721 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Oct. 27, 1995), held that the defendant was not entitled to a new trial based on the government's failure to disclose *Brady* material concerning his codefendant's failure of a drug test at the time of his testimony, absent a reasonable likelihood that the false testimony affected the jury's verdict. The court found that the jury knew of the codefendant's prior drug use, and of possible bias from his plea agreement in exchange for the codefendant's testimony, and the testimony was largely cumulative of the testimony of another coconspirator.

Commonwealth's failure to provide murder defendant with evidence that witness had repeatedly denied he had witnessed defendant ingest cocaine and evidence that suggested witness was coerced into testifying that defendant ingested cocaine was not violation of *Brady* due process duty to disclose material exculpatory evidence; defense initiated discussion of defendant's drug use, witness's recanted testimony established only that defendant had used cocaine approximately eight years before the killing, and several experts had testified extensively and cumulatively to defendant's cocaine use. U.S.C.A. Const. Amend. 14; 42 Pa.C.S.A. § 9543(a)(2)(vi). *Com. v. duPont*, 2004 PA Super 364, 860 A.2d 525 (2004).

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III. BELATEDLY DISCLOSED EVIDENCE

A. Exculpatory Evidence

1. Documentary Evidence and Statements

§ 17. Nontestimonial evidence generally

The courts in the following cases held that the government's belated disclosure of the exculpatory nontestimonial evidence in question during the trial did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in *U.S. v. Twomey*, 806 F.2d 1136 (1st Cir. 1986), held that even if the Brady issue had been properly preserved for appeal, the defendant's fifth amendment due process rights were not violated by the trial court's ruling that the government need release certain pieces of exculpatory evidence only 24 hours in advance of testifying by a witness. The court found that the prosecution did not impermissibly delay turning over any exculpatory evidence that even remotely approached the level of significance contemplated in *Bagley*.

The court in *U.S. v. Olmstead*, 832 F.2d 642, 24 Fed. R. Evid. Serv. (LCP) 116 (1st Cir. 1987), held that the delayed disclosure by the government of exculpatory evidence did not deny the defendants--charged with falsely submitting claims for payment for products that failed to meet minimum government standards--a fair trial under the due process principles of *Brady*. The evidence at issue was a memorandum written by a special agent in which he stated that the government's quality assurance representative notified the defendants that all shipments were subject to reinspection at the packaging location. The memorandum was not disclosed to the defense counsel until well into the trial, and the defendants claimed that pretrial disclosure, in accord with the magistrate's discovery order, would have resulted in a different strategy. The court held, however, that where the defense counsel enjoyed a full day after disclosure to reconsider their strategy in light of the new evidence, but made limited use of this evidence in either the cross-examination of the quality assurance representative or in final argument, and it was unclear how early disclosure of the memorandum would have altered the defense strategy, the delayed disclosure did not deny the defendants an opportunity to use the memorandum effectively.

The court in *U.S. v. Soto-Alvarez*, 958 F.2d 473 (1st Cir. 1992), held that the defendant was not denied a fair trial by the prosecutor's withholding, prior to trial, the passport of the witness who claimed to have accompanied the defendant to Venezuela to buy drugs, even though the passport had no stamp for Venezuela, where the defense introduced the passport as a trial exhibit. The court found that the *Brady* rule did not apply since the passport was eventually entered into evidence and the defendant failed to establish that the withholding of the passport until trial prejudiced the defense.

The court in *U.S. v. Innamorati*, 996 F.2d 456, 39 Fed. R. Evid. Serv. (LCP) 112 (1st Cir. 1993), held that the delayed disclosure of an exculpatory notation in a federal agent's notes of an interview with the conspirator in a drug conspiracy did not prejudice the defendant to the extent of requiring a new trial. The court found that the notation was produced early in the trial, prior to the cross-examination of the government's first witness, the notation was difficult to decipher and its exculpatory nature was not immediately apparent, the defendant never asked for a continuance to allow him to investigate the notation, and the defendant did not describe any specific avenue of investigation he would have pursued had the notation been disclosed earlier.

Even assuming that all *Brady/Giglio* information produced in delayed fashion was "material," defendants failed to show how the late production of the information adversely affected their trial strategy or defense; thus, late production did not violate due process or warrant dismissal on grounds of prosecutorial misconduct. *U.S.C.A. Const Amend 14; Fed. Rules Cr. Proc. Rule 16, 18 U.S.C.A. U.S. v. Munoz Franco*, 113 F. Supp. 2d 224 (D.P.R. 2000).

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The court in *U.S. v. Williams*, 132 F.3d 1055, 48 Fed. R. Evid. Serv. (LCP) 777 (5th Cir. 1998), held that the defendant waived any prejudice caused by the government's tardy disclosure of its special agent's investigative notes, by electing to proceed with the trial without taking advantage of the court's offer to grant a continuance so that the defense could review its strategy and examine additional witnesses in connection with the newly disclosed evidence.

There was no reasonable probability, in prosecution for extortion in violation of the Hobbs Act, that outcome of trial would have been different had government disclosed witness's outstanding arrest warrant, and therefore alleged Brady violation was not material and did not warrant a new trial; sufficient corroborating evidence supported jury's verdict. 18 U.S.C.A. § 1951. *U.S. v. Lee*, 88 Fed. Appx. 682 (5th Cir. 2004).

The court in *U.S. v. Walton*, 217 F.3d 443 (7th Cir. 2000), held that in a prosecution for theft from an automatic teller machine (ATM), the government's failure to turn over telephone records relating to its investigation into a prior theft at the same ATM until the second day of trial did not constitute a Brady violation; the judge excluded any evidence relating to the prior ATM theft, and even if the records were material, they were turned over well before the prosecution had finished presenting its case.

The court in *U.S. v. Wright*, 218 F.3d 812 (7th Cir. 2000), an appeal from federal convictions for smuggling and distributing heroin, held that where the prosecutor orally alerted the defense counsel before trial to exculpatory evidence, the fact that the defense counsel did not follow up by obtaining more details could not be treated as a constitutional violation by the prosecutor under Brady.

The court in *U.S. v. Manning*, 56 F.3d 1188, 42 Fed. R. Evid. Serv. (LCP) 562 (9th Cir. 1995), appeal after remand, 145 F.3d 1342 (9th Cir. 1998), held that although an investigative report concerning a possible alternative suspect in the mail bombing incident was exculpatory material, which the government should have disclosed under Brady, the defendant was not prejudiced by the lack of timely disclosure, where the defense counsel was able to discuss this alternative suspect with the government investigator both during cross-examination and again on recross-examination.

The court in *U.S. v. George*, 778 F.2d 556, 19 Fed. R. Evid. Serv. (LCP) 1141 (10th Cir. 1985), held that the defendant in a manslaughter trial was not denied due process or a fair trial by the government's failure to disclose that there was evidence that another person might have committed the killing until after the defendant raised the issue of self-defense, when the defendant received the contended exculpatory material on the evening at the close of the first day of trial in sufficient time to cross-examine each government witness, use material in presentation of his own case, introduce expert testimony concerning the purpose and use of a nunchaku, and effectively weave that evidence into his closing statement in support of reasonable doubt.

The defendant in *U.S. v. Rogers*, 960 F.2d 1501, Fed. Sec. L. Rep. (CCH) ¶ 97735 (10th Cir. 1992), claimed that he filed a specific request for certain documents five years before trial, but they were not produced until the last day of trial, and he was given only three hours to review the documents, and had he been given the documents in a timely manner, he could have reviewed, investigated, and properly developed his defense, and that it was probable that the jury would have reached a different result; the court held, however, that the fact that the documents were received on the last day of the trial does not, in itself, indicate that the defendant did not receive a fair trial, as the record established that the government provided the requested documents to the defendant during the trial, and that the requested evidence was admitted by the court.

The court in *U.S. v. Gonzales*, 35 F. Supp. 2d 849 (D. Utah 1998), held that evidence that a third person was involved in prior crimes with the convicted co-defendant, which the prosecution did not reveal until late in the defendant's armed robbery prosecution, was not obviously exculpatory or clearly supportive of a claim of innocence, and thus was not material evidence subject to disclosure under Brady, where the third person's crimes with the codefendant involved bank robberies other than the credit union robbery in question.

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There is no Brady violation, in which state fails to timely comply with discovery of exculpatory evidence, where the information in question could have been obtained by the defense through its own efforts. *Ward v. State*, 814 So. 2d 899 (Ala. Crim. App. 2000), cert. denied, 814 So. 2d 925 (Ala. 2001) and cert. denied, 122 S. Ct. 1208, 152 L. Ed. 2d 145 (U.S. 2002).

§ 18. Grand jury testimony

The courts in the following cases held that the government's belated disclosure of grand jury testimony during the trial did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in *U. S. v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979), held that in the absence of any showing of prejudice and where the defendants surely knew that a prospective government witness who had appeared before the grand jury under a grant of immunity was a potential witness at trial and might give exculpatory testimony, the government did not violate any duty of disclosure it owed to the defendants under *Brady* when it waited until the day before trial was scheduled to begin to disclose to the defendants the transcript of the witness' grand jury testimony.

The court in *U. S. v. Baxter*, 492 F.2d 150 (9th Cir. 1973), appeal dismissed, 414 U.S. 801, 94 S. Ct. 16, 38 L. Ed. 2d 38 (1973), held that although the government apparently did fail to comply with a pretrial order to provide the defendants with a transcript of a particular person's grand jury testimony at least 24 hours before the trial, since the defense attorney had four days to examine the grand jury's testimony and prepare to cross-examine such a person, the defendants were not denied due process.

The court in *U. S. v. Behrens*, 689 F.2d 154, 11 Fed. R. Evid. Serv. (LCP) 1149 (10th Cir. 1982), held that the defendants, who conceded that *Brady* material, consisting of grand jury testimony and police statements, which the government erroneously treated as *Jencks* material was produced during the course of the trial, had not demonstrated that the delayed disclosure of the evidence deprived them of a fair trial, notwithstanding that their attorneys' trial strategy and cross-examinations might have been enhanced had the exculpatory material been provided earlier, where no showing was made that the presentation of the evidence would have created a reasonable doubt of guilt that did not otherwise exist.

§ 19. Statements of witnesses

The courts in the following cases held that the government's belated disclosure of witness' statements during the trial did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

A delayed disclosure of evidence that is material either to guilt or to punishment under *Brady* or *Giglio* only leads to the upsetting of a verdict when there is a reasonable probability that, had the evidence been disclosed to the defense in a timely manner, or had the trial court given the defense more time to digest it, the result of the proceeding would have been different. *U.S. v. Perez-Ruiz*, 353 F.3d 1 (1st Cir. 2003).

Defendant did not demonstrate a *Brady* violation resulting from government's belated disclosure of exculpatory identification testimony of witness in a prior trial because he was not prejudiced by the government's belated disclosure since defendant's cross-examination of the witness did not suffer from the belated disclosure. *U.S. v. Casas*, 356 F.3d 104 (1st Cir. 2004).

The court in *U.S. v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 17 Fed. R. Evid. Serv. (LCP) 1168 (4th Cir. 1985), held that even if the engineer's testimony that he deliberately underestimated the sewer project's costs and expected the bids to exceed his estimate was exculpatory, its belated disclosure did not constitute reversible error in the prosecution of the defendants for bid rigging, where the exculpatory information was put before the

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jury during the cross-examination of the very first trial witness, and the information was available for use in the defendants' cross-examination of all further governmental witnesses as well as the defendants' case in chief.

The court in *U.S. v. Bencs*, 28 F.3d 555, 94-2 U.S. Tax Cas. (CCH) ¶ 50347, 74 A.F.T.R.2d (P-H) ¶ 94-5271, 1994 FED App. 231P (6th Cir. 1994), held that the government's delayed disclosure of an allegedly exculpatory witness statement was not a Brady violation, where the requested evidence was disclosed during trial, despite the defendant's claim that his trial preparation was hindered and his cross-examination of the witnesses was not as effective as it otherwise would have been.

The court in *U. S. v. Stone*, 471 F.2d 170 (7th Cir. 1972), held that where the government called its witnesses to the stand and the witnesses testified that they could not identify the defendant, the failure of the government to inform the defendant prior to the trial that the witnesses could not identify him did not warrant setting aside the conviction under the holding of Brady in the absence of a showing of prejudice.

The court in *U.S. v. Adams*, 834 F.2d 632 (7th Cir. 1987), held that the government's failure to provide the defendant with a copy of the coconspirator's statement until the second day of the trial on the day before the coconspirator testified for the government did not deprive the defendant of the right to a fair trial and did not require suppression of the testimony or reversal of the conviction, where the defendant did not request a continuance or a recess to make use of the newly disclosed information, where the statement was received prior to the coconspirator's testimony, and where the defendant failed to recall a single witness despite the fact that he was given an opportunity to do so.

The court in *U.S. v. Zambrana*, 841 F.2d 1320, 25 Fed. R. Evid. Serv. (LCP) 55 (7th Cir. 1988), held that the government's failure to disclose the statement by the alleged coconspirator that he never dealt directly with the defendant when he bought and sold drugs until immediately prior to the commencement of the trial and two days before the alleged coconspirator testified did not amount to a violation of due process rights under Brady, absent evidence that the delay in disclosing the statement resulted in prejudice to the defendant's defense.

Even if certain statements made by alleged coconspirators during their plea colloquies constituted evidence favorable to defendant, undisclosed transcripts of plea colloquies as a whole were not "material" to defendant's case, given their overall inculpatory nature and evidence of guilt presented at trial, and therefore government was not required to disclose them pursuant to Brady. *U.S. v. Irerere*, 228 F.3d 816 (7th Cir. 2000).

The court in *U. S. v. Miller*, 529 F.2d 1125, 76-1 U.S. Tax Cas. (CCH) ¶ 9228, 37 A.F.T.R.2d (P-H) ¶ 76-756 (9th Cir. 1976), held that although the statement that an associate of the defendant, who was charged with preparing false income tax returns for clients and aiding in the presentation of false documents to the Internal Revenue Service, made to the effect that the associate prepared the false returns with respect to two clients whose returns were no longer subject of the indictment against the defendant was, in part, exculpatory material and should have been turned over to the defendant, whose main defense was that his associate had prepared all of the false returns, Brady did not require reversal, since unlike Brady, there was no complete suppression of the exculpatory evidence, but rather the appellant learned of the statement at trial, albeit not until towards the close of his defense. Thus, the court's inquiry on appeal was not whether the evidence, if disclosed, might reasonably affect the jury's judgment on some material point, but rather, whether the lateness of the disclosure so prejudiced the appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. Since the trial judge offered the defendant a continuance and to bring the associate in for an interview, but the defendant deemed both not necessary, and since the associate was known to the appellant at all times and the appellant was aware three weeks before trial of a statement implicating the associate, the court did not see how the late disclosure prejudiced the defendant, as this was not a case where the evidence, if promptly disclosed, would have opened the door for the defense to new witnesses or documents requiring time to be marshaled and presented.

The court in *U.S. v. Johnson*, 977 F.2d 1360, 36 Fed. R. Evid. Serv. (LCP) 1165 (10th Cir. 1992), held that in

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a prosecution for, *inter alia*, using or carrying firearms during, or in relation to, a drug trafficking crime and for possession of an unregistered machine gun, in which a witness testified that the defendant had a rifle and the codefendant did not have a gun in his possession, the government did not violate *Brady v. Maryland* even if it failed to inform the defendant that the witness previously spoke with the marshal and stated that the codefendant fired on federal agents with an automatic weapon, as the record indicated that the defendant's counsel was aware of the marshal's conversation with the witness and was provided at trial with a copy of the marshal's synopsis on request.

The court in *U.S. v. Kubiak*, 704 F.2d 1545, 13 Fed. R. Evid. Serv. (LCP) 129 (11th Cir. 1983), *reh'g denied*, 712 F.2d 1419 (11th Cir. 1983), held that the failure of the prosecution to provide the defendant in a timely manner, with an exculpatory statement made by a jointly indicted coconspirator did not violate *Brady*, as the statement of the defendant's coconspirator was discovered and presented at trial, and consequently, the defendant's claim involved a mere delay in the transmittal of information or materials to the defense and not an outright omission that remained undiscovered until after the trial.

The court in *U.S. v. Tarantino*, 846 F.2d 1384, 26 Fed. R. Evid. Serv. (LCP) 164 (D.C. Cir. 1988), appeal after remand, 905 F.2d 458 (D.C. Cir. 1990), held that the government's failure to timely disclose the statements by witnesses that contradicted the version of events as provided by the key governmental witness, did not violate the due process clause of the Fifth Amendment as interpreted in *Brady*. Even though once the defendants obtained the statements of the witness in question, they were perfectly able to impeach his trial testimony if inconsistent, and during that witness' cross-examination or during final argument, the defendant's counsel could have called the jury's attention to any inconsistencies between that witness' version of the events and the key government witness' rendition, the defendant argued that because the material was unavailable for the cross-examination of the key witness, the force of the discrepancies was likely to have been lost on the jury. The court held that this argument was unavailing because witnesses are not impeached by prior inconsistent statements of other witnesses, but by their own prior inconsistent statements. The court then held that the defendant could not establish that had the statements been disclosed earlier, that there was a sufficient probability to undermine confidence in the actual outcome of the trial. Thus, the court found that since earlier discovery of the statements would not have appreciably increased the effectiveness of the cross-examination of the key witness, and because the defense was not foreclosed from arguing any inconsistencies to the jury at a later point in the trial, nothing approaching a *Brady* violation occurred.

The court in *Catlett v. U.S.*, 545 A.2d 1202 (D.C. 1988), held that the government's failure to disclose to the defense a witness who would testify that he knew the defendant, but did not see the defendant in the alley during the crime did not violate *Brady*, even if the court did require the prosecutor to release to the defense the names of any eyewitnesses who knew the defendant before the crime and failed to identify the defendant as a participant. The court found that the defendant became aware of the witness' existence in time to use it fully to his benefit, and did so, and the testimony of four other government's witnesses placed the defendant at the scene of the crime, with three of those witnesses testifying that he had actively participated in the criminal acts.

The court in *Edelen v. U.S.*, 627 A.2d 968 (D.C. 1993), held that the disclosure of *Brady* material, consisting of a statement by a witness tending to exculpate the defendant, before the parties made their opening statements was not a violation of the prosecutor's duty of seasonable disclosure where the defense counsel was able to incorporate the witness' statement into his initial address to the jury, and it appeared that the witness did not provide this information to the prosecutor until the beginning of the trial, and that the prosecutor promptly provided it to the defense.

The court in *Curry v. U.S.*, 658 A.2d 193 (D.C. 1995), held that in a murder prosecution, while the prosecutor's failure to disclose to the defense until the eve of trial, more than 10 months after the indictment, an exculpatory statement made by a witness on the night of the murder violated the *Brady* rule, where the prosecutor admitted that the delay served no legitimate governmental purpose, but was simply an oversight, and in light of the discovery, before the defendant's indictment, that the witness was no longer living at his former address, and

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thus might prove difficult to locate after such delay, the prosecution's violation of the Brady rule was not prejudicial, considering that the police in another state, where a bench warrant for the witness was outstanding since his disappearance, and the witness' landlord, to whom the witness owed back rent, could not find the witness.

2. Physical Evidence and Test Results

§ 19.5. Effect of conflict between Brady rule and Jencks Act

The following authority considered the effect of a conflict between the Brady rule and the Jencks Act upon the duty of a federal prosecutor to disclose before trial evidence concerning a witness statement negating guilt or mitigating the offenses charged. NOTE TO EDITOR: PLEASE PLACE IN IIIA1

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). U.S. v. Acosta, 357 F. Supp. 2d 1228 (D. Nev. 2005).

§ 20. Tangible objects and crime scenes

The courts in the following cases held that the government's belated disclosure of the tangible objects in question during the trial did not constitute a material violation of the due process requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in U.S. v. Stephens, 964 F.2d 424 (5th Cir. 1992), held that the prosecution's delay in providing the defendant with copies of tape recordings of conversations between the defendant and other members of the conspiracy did not constitute a Brady violation, where the defendant had copies of the tapes at trial and was given time to listen to the tapes after jury selection and before the trial began and did not argue that he was unable to put the tapes to effective use due to the delay in providing the tapes.

The court in U.S. v. Deering, 179 F.3d 592 (8th Cir. 1999), petition for cert. filed (U.S. Sept. 1, 1999), held that the defendant, convicted of distributing, possessing with intent to distribute, and aiding and abetting the distribution and possession with intent to distribute, cocaine base, and conspiring to distribute, and to possess with intent to distribute cocaine base, was not entitled to a new trial, as the government did not violate the Brady rule by failing to turn over certain telephone records and photographs before trial, where the government provided the defendant with the documents during the trial, the parties stipulated that the defendant's phone number did not appear in the phone records, and the photographs were admitted in evidence at the defendant's request.

The court in U. S. v. Baxter, 492 F.2d 150 (9th Cir. 1973), appeal dismissed, 414 U.S. 801, 94 S. Ct. 16, 38 L. Ed. 2d 38 (1973), held that where the defendant learned of the existence of the valise and examined its contents at least two weeks prior to the conclusion of the trial for conspiracy to violate narcotics laws, the defendants had sufficient time to examine, evaluate and introduce any evidence they believed would help their case as a result of their examination of the valise so that the government's failure to supply the defendants with the valise earlier did not constitute suppression of the evidence denying due process.

The court in U.S. v. Woodlee, 136 F.3d 1399, 48 Fed. R. Evid. Serv. (LCP) 1156 (10th Cir. 1998), cert. denied, 119 S. Ct. 107, 142 L. Ed. 2d 85 (U.S. 1998), held that the government's failure to reveal the victims had a gun did not constitute reversible error under Brady where during cross-examination of the government's

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first witness, the defense elicited testimony that he had a nine millimeter pistol in his car the night of the shooting. The court found that since the evidence was divulged with the first witness at trial, and each defendant had the opportunity to cross-examine every witness about the gun, and if any defendant felt prejudiced, he could have sought a continuance, and none did, earlier disclosure would not have created a reasonable doubt whether the defendant intimidated, interfered, or injured the victims, as there was ample direct evidence of his guilt, the jury knew about the gun with the first witness, and the defense had a full opportunity to exploit the belatedly disclosed evidence.

§ 21. Scientific experiments

The court in the following case held that the government's belated disclosure of information regarding scientific experiments during the trial did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in *U.S. v. Cardales*, 168 F.3d 548 (1st Cir. 1999), petition for cert. filed (U.S. May 24, 1999), held that the government's failure to disclose pretrial a laboratory report showing that a carpet in the vessel tested negative for marijuana and the chemical found in marijuana, in alleged violation of *Brady*, did not warrant a mistrial, in a prosecution for aiding and abetting possession with intent to distribute marijuana on board a vessel subject to the jurisdiction of the United States, where the defense counsel effectively used the report during the presentation of the defendant's case.

The court in *U. S. v. Goodman*, 457 F.2d 68 (9th Cir. 1972), held that although information regarding scientific experiments that the court ordered the government to release to the defendant was in two instances not furnished to the defendant at the time required, the defendant was not prejudiced by the delay where his counsel was given ample time to examine the information before cross-examination.

§ 22. Fingerprint reports

The courts in the following cases held that the government's belated disclosure of fingerprint reports during the trial did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in *U.S. v. Johnson*, 816 F.2d 918 (3d Cir. 1987), held that the government did not commit a *Brady* violation by failing to provide the defendant with exculpatory fingerprint reports prior to the trial. The court found that the defendant was able to and did make extensive use of the report at trial, and the district court precluded the government from presenting expert testimony concerning the report's significance to minimize the potential for unfairness.

The court in *U.S. v. Clark*, 538 F.2d 1236 (6th Cir. 1976), held that in an armed robbery prosecution, the fact that the defense counsel was not informed by the government until the third day of trial that there was a negative report on a fingerprint which during the trial a government's witness identified as being that of the defendant did not constitute an abuse of due process where the FBI agent disclosed the negative fingerprint report to the defendant himself, where full disclosure of the finding was made on the third day of the trial not only to the defense counsel, but subsequently before the jury, and where the district judge offered the defense counsel either a continuance or mistrial, both of which offers were refused after consultation with the defendant.

The court in *U.S. v. Mack*, 868 F. Supp. 207 (E.D. Mich. 1994), held that the government's failure to give pretrial notice to the trial defense counsel of the negative results of the test of the defendant's hands for luminescent powder used on sham cocaine was not a *Brady* violation requiring a new trial, absent any prejudice to the defendant, as the defense counsel was able to obtain the test results at the close of the government's case and bring the results before the jury.

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The court in *U.S. v. Morgan*, 10 F.3d 810 (10th Cir. 1993), postconviction relief denied, 985 F. Supp. 1020 (D. Kan. 1997), appeal dismissed, 166 F.3d 349 (10th Cir. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.3 of the Tenth Circuit, held that the government did not violate Brady by not making available until the second day of trial the results of fingerprint testing conducted in the case. The court found that inasmuch as the defense counsel himself introduced the evidence before the jury, no showing could be made that there was a reasonable probability of a different result in the trial's outcome.

The court in *U.S. v. Scarborough*, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied, 172 F.3d 880 (10th Cir. 1999), held that the government's late disclosure of exculpatory fingerprint evidence did not warrant dismissal under Brady, even though the material, if disclosed earlier, might have affected the defense strategy, given that the defendant extensively cross-examined the expert regarding the evidence and used it to strong effect in the closing argument, and failed to show that earlier disclosure would have affected the trial's result.

3. Identification of People Other Than Defendant

§ 23. Witnesses

The courts in the following cases held that the government's belated disclosure of the identities of witnesses during the trial did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in *U.S. v. Adames-Santos*, 89 F.3d 824 (1st Cir. 1996), a case not recommended for full text publication and which may be cited only in accordance with Rule 36.2(b)(6) of the First Circuit, held that the government's failure to disclose prior to trial the identity of the confidential informant did not violate Brady, as the court found that the defendant failed to show a reasonable probability that if he had been informed of the informant's identity prior to trial, the result of the proceeding would have been different, as the informant testified on cross-examination that the money he earned as an informant for the Drug Enforcement Administration ("DEA") was his main source of income, and the defendant failed to identify any additional evidence that could have been used to further impeach the witness.

COMMENT:

The court in *Adames-Santos* relied on the Supreme Court's holding in *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977), a case stemming from a state prosecution, that the Brady rule does not require the prosecution to reveal before trial the names of all witnesses who will testify against the defendant.

The court in *U.S. v. Higgs*, 713 F.2d 39 (3d Cir. 1983), held that the government's disclosure to the defendants of the names and addresses of government's witnesses who were offered immunity and/or leniency for their cooperation, as well as the substance of any promises made to the witnesses by the government, could be made the day that the witnesses were to testify and still satisfy Brady without violating the defendant's due process rights since disclosure at that time would fully allow the defendants to effectively use that information to challenge the veracity of the government's witnesses.

Government's failure to turn over list of 28 potential witnesses until late in trial did not constitute Brady violation, where list of potential witnesses was not exculpatory or impeaching, in that government had not interviewed individuals on the list and had no reason to believe such individuals could provide evidence favorable to defendant *U.S. v. Nguyen*, 98 Fed. Appx. 608 (9th Cir. 2004).

B. Impeachment Evidence

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§ 24. Generally

[a] Held material

The court in the following case held that the government's belated disclosure of impeachment evidence during the trial constituted a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, and thus warranted a new trial for the defendant.

That defense counsel allegedly did not perceive any prejudice at trial from government's late disclosure of Brady impeachment evidence pertaining to prosecution's key witness did not establish lack of prejudice to defendant from late disclosure. *U.S. v. Washington*, 294 F. Supp. 2d 246 (D. Conn. 2003).

The court in *U.S. v. Greichunos*, 572 F. Supp. 220 (N.D. Ill. 1983), held that the defendants were entitled to a new trial where the government waited until the eve of the trial to disclose impeachment evidence within the scope of Brady and did not disclose other arguably exculpatory impeachment evidence until after the trial commenced in violation of its agreement to disclose exculpatory evidence "when discovered" and where the defendants were prejudiced with regard to certain material by the delay in receiving the exculpatory impeachment and potentially exculpatory impeachment evidence. The prosecution's witness pled guilty to conspiring to enter a bank to commit larceny, and he testified against the two defendants charged with the same federal offense. A statement supplied to the FBI was not provided to the defendants until after the start of the trial in which the witness, after taking a lie detector test, said that "[t]hey never did catch me, I really got away with it," and the government never produced two applications for life insurance made by the witness after the date of the conspiracy, which were discovered only after one of the undisclosed applications was mistakenly sent into the jury room for the jury's consideration during its deliberations, instead of the application about which the witness testified at trial. While the court recognized that the standard that is applied in the Seventh Circuit when the defendant claims that he did not receive Brady material in a timely fashion is whether the delay prevented the defendant from receiving a fair trial, the court held that where a defendant relied on the government's specific undertaking to disclose exculpatory evidence "when discovered," disclosure on the eve of trial of information, which the government had in its possession for months, is much more likely to prejudice the defendant than where he had no expectation of receiving the evidence at an earlier time. The court nevertheless recognized that the government's breach of its agreement did not in and of itself compel the granting of the defendants' motion for a new trial, as the proper inquiry is still whether the defendant was prejudiced by the delay in receiving the exculpatory impeachment and potentially exculpatory impeachment evidence. The court found that the defendants were utterly unable to make use of the insurance policies, because they did not become aware of them until after the jury began its deliberations, and as for the statement in question, while the defendants received it from the government during trial, and although the defendants' attorneys could have impeached the government's witness with his statement about getting away with the burglary, they indicated that they were reluctant to lay the foundation for that impeachment without knowing whether the person to whom the statement was made was available to be called as a witness should the government's witness deny making the statement. The court thus held that the government's callous disregard of its Brady obligations entitled the defendants to a new trial.

Impeachment evidence is material, and thus must be disclosed under Brady, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001).

To establish a Brady due process violation, a defendant must prove the following: (1) that the government possessed evidence favorable to the defendant, including impeachment evidence; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *U.S.C.A. Const. Amend. 14. Manning v. State*, 884 So. 2d 717 (Miss. 2004).

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[b] Held not material

The courts in the following cases held that the government's belated disclosure of impeachment evidence during the trial did not constitute a material violation of the due process requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, thus precluding a new trial for the defendant.

The court in *U.S. v. Peters*, 732 F.2d 1004, 15 Fed. R. Evid. Serv. (LCP) 1254 (1st Cir. 1984), held that the government's belated disclosure of the chief prosecution witness' grand jury testimony after four days of trial did not violate the defendants' due process rights, where the defendants had two full days, including one nontrial day, in which to prepare to cross-examine the witness with regard to his grand jury testimony, the grand jury testimony contained little exculpatory material, and the defendants' use of the material indicated that they were not prejudiced by the late disclosure.

The court in *U.S. v. Drougas*, 748 F.2d 8, 16 Fed. R. Evid. Serv. (LCP) 1002 (1st Cir. 1984), held that in view of the fact that the government's decision not to prosecute the primary witness in a drug smuggling and conspiracy case for a fraudulently obtained passport was a minor benefit compared to the other crimes for which the witness had received immunity, the impeachment value of the passport violation was minimal at best. The court noted that after the discovery of immunity on the passport charge, the defendants were afforded further cross-examination on the matter, and found that the defendant suffered no prejudice from the government's late disclosure of the nonprosecution agreement. The Court also held that although grand jury transcripts containing the government witness' alleged misidentifications of the defendants and boats used in the drug smuggling operations were not received until four days after cross-examination of the witness began, where the defendants were subsequently given a full opportunity to cross-examine the witness on the alleged misidentifications, no prejudice resulted from the government's late disclosure.

The court in *U.S. v. Ingraldi*, 793 F.2d 408 (1st Cir. 1986), held that the delayed disclosure of Brady material to be used to impeach the government's chief witness did not deprive the defendant of an opportunity to effectively cross-examine the witness where the defense counsel conducted an extremely effective cross-examination and succeeded in using tardily disclosed information to impugn his credibility, especially where the defendant failed to move for a continuance, indicating that he was satisfied that he had sufficient time to use the materials.

The court in *U.S. v. Devin*, 918 F.2d 280, 31 Fed. R. Evid. Serv. (LCP) 1329 (1st Cir. 1990), held that the delay in informing the defense counsel of the psychiatric history of the prosecution's main witness until midway through the witness' first full day of testimony did not deny the defendant a fair trial under the principles of *Brady*. The court found that the delay in disclosing the witness' history did not impair the effective use of the information, hinder the presentation of the defense, result in unfair prejudice, or cause an alteration in the defense strategy.

The court in *U.S. v. Valencia-Lucena*, 925 F.2d 506 (1st Cir. 1991), appeal after remand, 988 F.2d 228 (1st Cir. 1993) and postconviction relief denied, 933 F. Supp. 129 (D.P.R. 1996), held that in a cocaine conspiracy case, the government's failure to turn over evidence of the confidential informant's drug use was not a *Brady* violation where the issue was fully revealed at trial and extensively explored during cross-examination.

The court in *U.S. v. Osorio*, 929 F.2d 753 (1st Cir. 1991), denied the defendant's contention that the "astounding negligence" of the United States Attorney's Office in failing to notify defense counsel--until halfway through trial--that its chief witness was a major drug dealer was so egregious and so prejudicial that he was entitled to a new trial, as the court found that the defendant did not demonstrate the prejudice necessary to entitle him to a new trial, where in response to the delayed disclosure of this impeachment evidence, defense counsel made no objection, motion for dismissal, or motion for a continuance, either at the time he first became aware of it or the next day when it was brought to the court's attention.

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The court in *U.S. v. Jadusingh*, 12 F.3d 1162 (1st Cir. 1994), postconviction relief denied, 1998 WL 264732 (D.P.R. 1998), held that although the government did not disclose the witness' prior misdemeanor drug conviction until just before the start of the first day of trial, there was no Brady violation. The court found that the government did not actually learn of the conviction until that same day, and the witness' other past substance abuse and outstanding traffic violations were fully disclosed during direct and cross-examination of the witness at trial.

The court in *U.S. v. Catano*, 65 F.3d 219, 43 Fed. R. Evid. Serv. (LCP) 88 (1st Cir. 1995), opinion supplemented, 66 F.3d 306 (1st Cir. 1995) and appeal after remand, 94 F.3d 640 (1st Cir. 1996), held that the government's delayed disclosure of notes, that would have allegedly helped the defense impeach a government's witness, until after the witness testified was not a Brady violation in a narcotics prosecution. The court found that the prosecution offered a reasonable explanation of its failure to find the notes earlier, stating that they were in the personal files of the government agent who was away from his office, and the defendants failed to show that the delay prevented them from using the materials.

The court in *U.S. v. Walsh*, 75 F.3d 1 (1st Cir. 1996), held that the defendant failed to show prejudice resulting from the delayed disclosure of calendars that the codefendant, who testified against the defendant at trial, used to refresh her recollection. The court found that although the defendant claimed that earlier receipt of the evidence would have allowed the trial counsel to focus at the outset on alleged inconsistencies between the codefendant's testimony and the calendars, the initial cross-examination did not focus on the codefendant's memory, but on her veracity, and when the codefendant was subject to further cross-examination after the calendars were produced, the defense counsel paid minimal attention to the supposed inconsistencies.

The court in *U.S. v. Collazo-Aponte*, 216 F.3d 163 (1st Cir. 2000), held that the federal prosecution's failure to disclose that the government witness failed to identify the defendant in a pretrial photograph array until the day after the witness testified that the defendant delivered cocaine did not warrant sanctions in the federal drug conspiracy prosecution, though such information was Brady material; the failed identification attempt was subsequently introduced by the prosecution on direct examination and by the defense on cross-examination, and the judge instructed the jury that the failure to identify was relevant to the witness' credibility and that the prosecution had the burden of proving the identity of the defendant.

While government should have informed defense that one of its witnesses had been promised favorable treatment in related state court proceedings in exchange for his testimony, notwithstanding that this promise was never reduced to writing, government's failure to disclose this impeachment evidence was not prejudicial, where witness had admitted full extent of his arrangement with government during cross-examination. *U.S. v. Soto-Beniquez*, 350 F.3d 131 (1st Cir. 2003).

Defendant failed to show prejudice resulting from delayed or nondisclosure of impeachment evidence, and therefore failed to establish a Brady violation; court acted promptly and appropriately to offset any potential harm to defendant with regard to the delayed disclosures, and defendant did not show what inconsistencies, if any, existed between government witness' testimony and his undisclosed testimony in earlier trial. *U.S. v. Casas*, 356 F.3d 104 (1st Cir. 2004).

The court in *U.S. v. Brown*, 582 F.2d 197 (2d Cir. 1978), held that the fact that the prosecution's witness started to "squirm" shortly before trial did not require the government instantly to make such vacillations of the witness known to the defense. The court found that there was no Brady violation especially since the government did not know whether the informant would testify, or what his testimony would be, until he was called and, also, the defendant made no showing of prejudice because of the belated disclosure, in that the defense failed to raise the Brady claim until after the informant testified that his earlier statements naming the defendant as a drug seller were false and nondisclosure had no effect on the defense's theory as described in its opening.

The court in *U.S. v. Barnes*, 604 F.2d 121 (2d Cir. 1979), held that where the alleged inconsistencies between

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the undercover informant's testimony and the report of law enforcement agencies as to the activities of the informant and a defendant on a certain evening were not so great as to be completely contradictory and where, even if the testimony and the report were inconsistent, the law enforcement agent's surveillance report was given to the defendants at the end of the day on which the informant completed his testimony, so that the defendants could recall the informant for further cross-examination or call the agents who had conducted the surveillance or both, and the defense counsel took full advantage of the difference between the informant's testimony and the agent's report in attacking the informant's credibility during summations, there was no Brady violation by reason of the government's failure to disclose the report prior to the day on which the informant testified.

The court in *U.S. v. Sperling*, 726 F.2d 69, 14 Fed. R. Evid. Serv. (LCP) 1542 (2d Cir. 1984), held that even assuming that the government deliberately withheld the tape of a conversation between the informant and the United States attorney where the informant indicated that his primary motive in giving information was to get back at his "former friends," such action did not entitle the defendant to a new trial, where there was ample evidence at trial of the informant's revenge motive, and the tape was thus only cumulative.

The court in *U.S. v. Bejasa*, 904 F.2d 137 (2d Cir. 1990), held that the government's inadvertent failure to produce Brady material, consisting of a file created by a governmental agency on the prosecution witness, until after the witness' testimony did not prejudice the defendant, who had already cross-examined the witness extensively in the areas contained in the file.

The court in *U.S. v. Thai*, 29 F.3d 785, 40 Fed. R. Evid. Serv. (LCP) 1387 (2d Cir. 1994), held that the government's failure to produce a tape recording of the confidential informant's initial interview with police, on a defense's request under Brady for the government to produce all statements by the informant, was not reversible error in a prosecution for murder, robbery, extortion, racketeering, and other crimes in connection with participation in Vietnamese street gang activities, absent prejudice to the defendant, where the fact that the witness lied to law enforcement agents was already before the jury, and the court granted a recess prior to cross-examination of the informant for defense counsel to listen to the tape.

The court in *U.S. v. Pong*, 122 F.3d 1058 (2d Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 0.23 of the Second Circuit, affirmed the district court's finding that the defendants failed to establish a "reasonable probability" that the outcome of the trial would have been different had the government produced the DEA reports in question more quickly. The court found that there was no probability that the delay in producing the reports had any effect on the outcome of the trial, as the reports were produced two days prior to the prosecution's witness taking the stand, and the reports were available to impeach the witness, and in addition, the reports, when produced, did not alter the defense's theory that the witness was a money launderer, and the delay had no effect on the defense strategy.

The court in *U.S. v. Diaz*, 176 F.3d 52 (2d Cir. 1999), petition for cert. filed (U.S. June 28, 1999) and petition for cert. filed, 68 U.S.L.W. 3080 (U.S. July 23, 1999) and petition for cert. filed (U.S. Aug. 2, 1999) and petition for cert. filed (U.S. Aug. 2, 1999) and petition for cert. filed (U.S. Sept. 10, 1999), held that even if evidence that the police detective referred the witness to the FBI was of some impeachment value, [FN79] it merely constituted cumulative impeachment material, and its nondisclosure did not violate Brady, where the defendant, convicted of various offenses related to a street gang's narcotics business, was able to cross-examine the witness extensively about the timing of her decision to co-operate and her reasons for such co-operation.

No Brady violation occurred as a result of the government's failure to disclose to defendants prior to trial that a key prosecution witness lied to the grand jury when he said he was present at victim's murder, where defendants ultimately learned the truth during witness' direct testimony at trial, early enough to make effective use of the information, and government's failure to disclose did not affect the outcome of the case. *U.S. v. Rivera*, 60 Fed Appx. 854 (2d Cir. 2003), cert. denied, 123 S. Ct. 1639, 155 L. Ed. 2d 497 (U.S. 2003).

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The court in *U.S. v. Thomas*, 894 F. Supp. 58 (N.D.N.Y. 1995), held that even if the government's failure to turn over to the defendant until two weeks before the trial information concerning the extent of the informant's drug use and payment by the government could be considered a Brady violation, no new trial was required absent any showing that the defendant was denied a fair trial as a result of the delay because the informant was effectively cross-examined by the defense counsel concerning the payments from the government and his drug habit.

Defendant was not entitled before trial to impeachment material including agreements between government and its witnesses, where he failed to point to special circumstances requiring early disclosure of such material. *U.S. v. Vondette*, 248 F. Supp. 2d 149 (E.D. N.Y. 2001).

Government's pretrial representation that it would disclose impeachment materials three days prior to trial was sufficient to satisfy its Giglio duties. *U.S. v. RW Professional Leasing Services Corp.*, 2004 WL 944845 (E.D. N.Y. 2004).

Government did not violate requirement that it turn over exculpatory or witness impeachment material to defendant, imposed by Supreme Court's Brady decision, when file on confidential informant who accompanied defendant in initial stages of alleged attempt to rob drug dealer was not turned over to defendant until close of government's case in robbery conspiracy trial; absence of background information on informant, which would have been shown by file, was brought out during trial through other means. *U.S. v. Ortiz*, 367 F. Supp. 2d 536 (S.D. N.Y. 2005).

The defendant in *U.S. v. Crawford*, 121 F.3d 700, 80 A.F.T.R.2d (P-H) ¶ 97- 6171 (4th Cir. 1997), a case not recommended for full text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit, alleged that the prosecutor's failure to disclose information about the witness' status as a paid informant for the local police violated the Brady rule where this arrangement was first revealed to the defendant's counsel during the witness' direct examination, but the court held that when disclosure comes late in the game, no due process violation occurs as long as the Brady material is disclosed to the defendant in time for its effective use at trial, and the court found that the defendant's attorney was able to cross-examine the witness on her status as a paid informant and was able to recall her as an adverse defense witness later in the trial. Although, the information about her status as a paid informant was brought out and the defendant's attorney was able to use the information in the closing argument, he argued that he was (1) deprived of the opportunity to further investigate the witness' background for impeachment material; (2) denied the opportunity to explore an entrapment defense; (3) denied the opportunity to explore illegal search and seizure arguments; and (4) was unable to use the information in the opening statement. The court held, however, that the defendant's attorney must show that at least one of these avenues, if he had been allowed to explore it, would have resulted in a reasonable probability of a different outcome, and the court found that he made no such showing.

The court in *U.S. v. McKinney*, 758 F.2d 1036 (5th Cir. 1985), held that the defendant was not prejudiced by the prosecution's tardy disclosure of material relating to the credibility of the government's witness, where the defendant received the material one day before the government's direct examination of that witness and five days prior to cross-examination, and the defendant effectively used the material during cross-examination to thoroughly impeach the witness' credibility.

The court in *U.S. v. McKinney*, 758 F.2d 1036 (5th Cir. 1985), also held that although material bearing on the credibility of the government's witness was effectively suppressed because the defendant did not receive the material until after completion of the cross-examination of the witness, where there was substantial evidence supporting the defendant's conviction on the extortion charges, which was in no way dependent on the credibility of the witness, and the witness' credibility was effectively impeached by thorough cross-examinations when the witness' propensity to lie and to threaten people was fully explored, the suppression did not affect the outcome of the trial so as to warrant reversal of the conviction.

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The court in *U.S. v. Randall*, 887 F.2d 1262 (5th Cir. 1989), reh'g denied, (Apr. 12, 1990) and postconviction relief denied, 1993 WL 70224 (E.D. La. 1993), related reference, 108 F.3d 331 (5th Cir. 1997), held that the government's failure to reveal the confidential informant's cocaine addiction in response to the defense attorney's Brady request did not violate the defendant's due process rights. The court found that the information was disclosed on the first day of trial, and the defendant was permitted to cross-examine the informant on the matter the following day, and the government claimed it only became aware of the evidence two days before trial.

The court in *U.S. v. Garcia*, 917 F.2d 1370 (5th Cir. 1990), reh'g denied, (Dec. 14, 1990), held that the government's failure to disclose information concerning the informant's credibility pursuant to discovery requests did not require reversal of the conviction under a Brady analysis, as the defense suffered no prejudice due to the failure to disclose the information, as the district court itself tested the limits of the informant's credibility, and brought out the fact that the informant was paid by the government, despite the informant's testimony to the contrary.

The court in *U.S. v. Martinez-Perez*, 941 F.2d 295 (5th Cir. 1991), held that the government's failure to make pretrial disclosure of a payment to the airport manager and her husband for information regarding the narcotics defendant's conduct at the airport did not violate the Brady rule. The court found that the payment was disclosed to the defendant and jury during the trial, and there was no reasonable probability that the jury's verdict would have been different had the information been disclosed earlier, especially in light of the relatively unimportant nature of the information vis-a-vis the elements of the offenses.

The court in *U.S. v. Ellender*, 947 F.2d 748, 34 Fed. R. Evid. Serv. (LCP) 395 (5th Cir. 1991), held that although the government did not produce certain letters having impeachment value as to the government's witness until some time after the trial started, the defendants were not prejudiced by any Brady violation where the defendants had copies of the letters six weeks before the witness testified.

The court in *U.S. v. Neal*, 27 F.3d 1035 (5th Cir. 1994), reh'g denied, (Sept. 22, 1994), held that the prosecution's tardy disclosure on the defendant's request of a memorandum criticizing the Drug Enforcement Administration's (DEA) handling of the defendant's drug conspiracy-related operations did not result in prejudice to the defendant so as to constitute a denial of due process under the Brady rule, that exculpatory evidence may not be withheld, where the defendant had the memorandum in advance of its author's testimony, the defendant effectively used the memorandum during cross-examination, and the defendant, in advance of receiving the memorandum, thoroughly questioned several witnesses about the DEA's involvement with the operations.

The court in *U.S. v. Green*, 46 F.3d 461 (5th Cir. 1995), held that the prosecution's failure to disclose before trial that a primary government witness previously made a misidentification did not violate Brady where law enforcement witnesses gave credible testimony as to the defendant's involvement in the cocaine distribution and the entire misidentification theory was fully tried before the jury so that the jury still would have found the defendant guilty regardless of whether the government's witness was discredited, and knowledge of the misidentification would not have changed the defense counsel's strategy to try to get a corroborating witness's testimony for the defendant's claim that he and the person misidentified looked alike.

The court in *U.S. v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997), cert. denied, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (U.S. 1998) and appeal after remand, 169 F.3d 281 (5th Cir. 1999), held that the prosecution did not violate Brady in a federal fraud prosecution by the delay in turning over to the defense notes of an interview with two witnesses who testified for the prosecution. The court found that the reports were provided within the time mandated by the Jencks Act, the defense counsel used the first witness' report to conduct a devastating cross-examination, and the defense counsel were also able to bring out inconsistencies in the second witness' testimony.

The court in *U.S. v. Williams*, 132 F.3d 1055, 48 Fed. R. Evid. Serv. (LCP) 777 (5th Cir. 1998), held that the defendant waived any prejudice caused by the government's tardy disclosure of a special agent's investigative notes, which disclosed the inconsistent statement of a witness, by electing to proceed with the trial without taking

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advantage of the court's offer to grant a continuance so that the defense could review its strategy and examine additional witnesses in connection with the newly disclosed evidence, and the court did thus not find a Brady violation resulting from the tardy disclosure.

When the undisclosed evidence is merely cumulative of other evidence in the record, no Brady violation occurs; similarly, when the testimony of a witness who might have been impeached by undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not material for Brady purposes. *U.S. v. Sipe*, 388 F.3d 471 (5th Cir. 2004).

The court in *U. S. v. Enright*, 579 F.2d 980, 3 Fed. R. Evid. Serv. (LCP) 284 (6th Cir. 1978), held that the prosecution's failure to reveal to the defendant approximately two weeks before trial that the codefendant retracted previously incriminating and inculpatory statements was not prejudicial under Brady since, when the matter was first set forth before the trial judge, the defense counsel was apprised that he could have a full opportunity to interview the codefendant and that the codefendant would be made available for summons as a witness if the defense counsel so desired.

The court in *U.S. v. Lochmondy*, 890 F.2d 817, 29 Fed. R. Evid. Serv. (LCP) 486 (6th Cir. 1989), held that the government's failure to provide defendants with the bank records of the government's witness prior to trial was not a Brady violation that affected the defendants' ability to impeach the witness, although the witness indicated during pretrial interviews that he may have made a false statement on a bank loan application concerning his occupation where the defendants were given access to such records during the trial.

The court in *U.S. v. Frost*, 914 F.2d 756, 31 Fed. R. Evid. Serv. (LCP) 1081 (6th Cir. 1990), held that the defendants were not denied a fair trial by the prosecution's withholding of Brady material, where the court noted that defendants received the FBI reports, the claimed Brady material withheld, in time for cross-examination and offered to give defense counsel more time to examine the reports, if they wished, before cross-examination of the government's witnesses.

The court in *U.S. v. Katsakis*, 976 F.2d 734 (6th Cir. 1992), denial of postconviction relief aff'd by, 19 F.3d 1433 (6th Cir. 1994), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, held that the United States did not withhold evidence favorable to the defendants in violation of Brady and Giglio where the defendants asserted that the prosecution failed to disclose that its witness had an informal agreement with federal authorities immunizing him from federal prosecution in exchange for his testimony before a federal grand jury. In the proceedings in the district court, while the prosecution gave no indication that its witness had an agreement with federal authorities, during the course of cross-examination, the witness testified that he had a "verbal agreement" with federal authorities. Since counsel for the defendants were given the opportunity to cross-examine the witness regarding the existence and extent of the agreement, the court found that this was not a case where the defendants were denied the right to present vital impeachment evidence to the jury, and the fact that counsel were given a day to prepare this information for impeachment purposes made the defendants' claim of a due process violation particularly weak, and accordingly, the court held that the prosecution's failure to disclose its agreement with its witness did not deprive the defendants of a fair trial under Brady.

The court in *U.S. v. Phibbs*, 999 F.2d 1053, 38 Fed. R. Evid. Serv. (LCP) 881 (6th Cir. 1993), reh'g denied, (Oct. 4, 1993), held that the government did not violate its obligation to provide exculpatory information under Brady by its delay in providing the informant's prison records to the defense, where the government eventually provided such records to the defense just before the informant was cross-examined, and the records were exploited accordingly.

The court in *U.S. v. Carter*, 124 F.3d 200 (6th Cir. 1997), cert. denied, 118 S. Ct. 869, 139 L. Ed. 2d 766 (U.S. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 24(c) of the Sixth Circuit, denied the defendant's contention that the prosecution's belated disclosure of

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conflicting statements made by the key government's key witness prejudiced his ability to prepare a defense and prevented him from receiving a fair trial under Brady. The court found that the prosecution's delayed disclosure of the information concerning the witness' statements did not deny the defendant a fair trial, as the defendant had the relevant statement well before the witness took the stand and the trial transcript showed that the district court invited the defendant to move for a recess if he felt the need for more time to interview witnesses.

The court in *U. S. v. McPartlin*, 595 F.2d 1321, 4 Fed. R. Evid. Serv. (LCP) 416 (7th Cir. 1979), held that where the government's counsel, during his opening statement in a prosecution arising from the corporation's alleged bribery of city officials, revealed that the principal government's witness, an unindicted corporate officer, embezzled and applied to his own benefit \$375,000 of the money he obtained from the corporation to pay off the city officials, said disclosure of the defalcations of the government witness did not come so late as to violate due process.

The court in *U. S. v. Ziperstein*, 601 F.2d 281, 4 Fed. R. Evid. Serv. (LCP) 838 (7th Cir. 1979), held that although the damaging character of the laboratory requisition documents was subject to serious question, where it was obvious that the ultimate disclosure of the possibility that the documents would impeach the witnesses was made before the close of the trial, and the defendants did not attempt to develop themselves any impeaching inferences from the documents, it could not be said that the government's timing of the disclosure caused any prejudice to the defendants in violation of their due process rights.

The court in *U. S. v. Allain*, 671 F.2d 248, 10 Fed. R. Evid. Serv. (LCP) 71 (7th Cir. 1982), held that the delay of the prosecutor in disclosing to the defendant prior inconsistent statements of the government's witnesses and the favorable treatment received by those witnesses in exchange for their testimony was not violative of due process where the defendant was not prejudiced thereby as evidenced by the ability of the defense counsel to make good use of the impeaching evidence in his vigorous cross-examination of those witnesses.

The court in *U.S. v. Sweeney*, 688 F.2d 1131, 11 Fed. R. Evid. Serv. (LCP) 665 (7th Cir. 1982), held that the defendants' complaint that the nondisclosure of evidence relating to the drug use of several government's witnesses was prejudicial in that the appellants would have used this information to impeach the witnesses was without merit, where the government witnesses and informers were extensively examined by the government and cross-examined by the defendants' counsel concerning their drug use and their deals with the government.

The court in *U.S. v. Perez*, 870 F.2d 1222, 27 Fed. R. Evid. Serv. (LCP) 948 (7th Cir. 1989), held that the government's delay in informing the defendant that the witness was unable to identify him as the purchaser of the car that was tied to the drug transactions at issue in the prosecution did not deny the defendant a fair trial, where disclosure was made in sufficient time to enable the defendant to make use of the information by successfully striking the in-court identification testimony of the witness and cross-examining the witness about his inability to identify the purchaser of the vehicle on two prior occasions.

The court in *U.S. v. Rossy*, 953 F.2d 321 (7th Cir. 1992), held that evidence that the officer who testified for the government made an unsuccessful trip to New York in search of the defendant's alleged employer was not material under Brady, and therefore the government's failure to disclose the evidence to the defendant before the trial on drug charges did not violate due process, where the officer's failure to find the employer did not necessarily prove that the officer's testimony was not credible, the officer was not the sole prosecution witness, and the defense counsel explicitly argued to the jury in closing that the officer's failed search demonstrated that the officer was not credible.

The court in *U.S. v. Higgins*, 75 F.3d 332 (7th Cir. 1996), held that no violation of *Brady v. Maryland* occurred where the prosecutor told the defense counsel six or seven days before the trial that a fingerprint found on the package of cocaine matched the defendant's recorded prints. The court found that the defense counsel interviewed the fingerprint expert and impeached him in cross-examination by pointing to the inconsistency between the expert's initial report, which did not mention any prints, and his testimony, and if counsel needed

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more time, she had only to ask, yet she did not seek a continuance.

Criminal histories of five government witnesses, which constituted favorable impeachment evidence, were not "suppressed" for purposes of Brady rule where discovery of the information did not come too late to make use of it at trial. *U.S. v. Carter*, 65 Fed. Appx. 559 (7th Cir. 2003).

Government did not suppress impeachment evidence regarding prosecution witnesses' criminal histories and arrangements of testimony in exchange for leniency on their own charges, as would support defendants' Brady violation claim, although government disclosed such evidence only during course of fairly complex drug conspiracy trial, where it was no surprise to defense that witnesses had been convicted or faced pending drug-related charges and had been offered leniency in exchange for testimony, and defense therefore had enough time to incorporate government's rolling disclosures regarding impeachment evidence into their cross-examination of each witness. *U.S. v. Knight*, 342 F.3d 697 (7th Cir. 2003).

The court in *U.S. v. Janis*, 831 F.2d 773 (8th Cir. 1987), held that the government's late disclosure of its agreement with the paid informant, who was also the prosecution's principal witness, did not require reversal of the marijuana conviction, as the evidence concerning the agreement was not material, and the late disclosure did not prejudice the defendant.

The court in *U.S. v. Kime*, 99 F.3d 870, 45 Fed. R. Evid. Serv. (LCP) 1278 (8th Cir. 1996), held that in a robbery and drug conspiracy case, the government's failure to disclose evidence of a romantic entanglement between the prosecution witnesses and some of their female jailers did not violate the defendant's due process rights under Brady, though the witnesses apparently received special privileges while in jail, including sexual contact, and the irregularities were not brought to the attention of the defense until midway through cross-examination of the last witness, after the other two witnesses already testified, where the defense extensively cross-examined the witness on the subject, the defense extensively examined one of the offending female corrections officers, and the defense declined to recall the other two witnesses.

The court in *U. S. v. Shelton*, 588 F.2d 1242, 79-1 U.S. Tax Cas. (CCH) ¶ 9189, 43 A.F.T.R.2d (P-H) ¶ 79-600 (9th Cir. 1978), rejected the defendant's complaint that his conviction should be reversed because the government violated *Brady v. Maryland* in that it delayed turning over 500 pages of alleged Brady material until the eve of the trial. The defendant claimed that much of the 500 pages of information turned over to the defense the day before trial impeached the credibility of the government's witness. The court held that since assuming that all of this information was material within the meaning of Brady, the delay in disclosing it only required reversal if the lateness of the disclosure so prejudiced the appellant's preparation or presentation of his defense that he was prevented from receiving his constitutionally guaranteed fair trial. There could be no claim of prejudice in this case insofar as the defendant was enabled to present to the jury favorable or impeaching evidence.

The court in *U.S. v. Davenport*, 753 F.2d 1460, 17 Fed. R. Evid. Serv. (LCP) 622 (9th Cir. 1985), held that because the defendant had access to exculpatory information that one lineup witness was previously been shown a photographic array and made use of it in cross-examining a witness, the prosecution's delay in disclosing that information until after the lineup was held did not amount to a suppression of exculpatory evidence in violation of Brady.

The court in *U.S. v. Browne*, 829 F.2d 760, 23 Fed. R. Evid. Serv. (LCP) 1089 (9th Cir. 1987), held that even though the government failed to release a report prepared prior to the trial by a police officer until several witnesses were called in the defendant's armed bank robbery and use of a weapon in the commission of a felony prosecution, vacation of the conviction was not warranted, where the evidence was not withheld from the defendant throughout the trial, the government apparently first became aware of the report during the trial and proceeded to immediately acquire it for the defendant's attorney on his initial request, and the defendant made effective use of the report to extrinsically impeach the prosecution's key witness.

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The court in *U.S. v. Gordon*, 844 F.2d 1397, 25 Fed. R. Evid. Serv. (LCP) 1076 (9th Cir. 1988), held that the government's failure to make pretrial disclosure of evidence which could be used to impeach the prosecution witness did not violate the Brady due process rights of the conspiracy defendants where the government turned over the evidence to the defense during the trial, at a time when the disclosure was of value to the defendants, and the defendants declined the opportunity to recall the prosecution witness for further cross-examination.

The court in *U.S. v. Juvenile Male*, 864 F.2d 641 (9th Cir. 1988), held that even if impeachment evidence as to a crime committed by the victim, which came out during the trial although after the defendant's cross-examination of the victim, was material, the trial court's consideration of it as the trier of fact precluded the possibility of prejudice to the defendant's case.

The court in *U.S. v. Aichele*, 941 F.2d 761 (9th Cir. 1991), denial of postconviction relief aff'd by, 60 F.3d 835 (9th Cir. 1995), held that the government did not violate Brady with respect to its disclosure of impeachment materials relating to the government's witness where the government provided the defendant with a transcript of its interview with the witness and a copy of the witness' rap sheet before the trial, and the disclosure was made at a meaningful time because the three-week holiday break in the trial gave the defendant an ample opportunity to prepare the in-court examination of the witness.

The court in *U.S. v. Vgeri*, 51 F.3d 876, 41 Fed. R. Evid. Serv. (LCP) 1270 (9th Cir. 1995), held that no Brady violation occurred from the government's disclosure during trial that the informant had been involved in the burglary of the house of the codefendant's female companion, in light of the fact that the defendant was able to cross-examine the informant about the burglary, as the government disclosed the information at a time when it still was of value to the defendant.

The court in *U.S. v. Alvarez*, 86 F.3d 901 (9th Cir. 1996), cert. denied, 519 U.S. 1082, 117 S. Ct. 748, 136 L. Ed. 2d 686 (1997), held that the government's Brady violation in untimely disclosing impeachment evidence relating to the testimony of the surveilling officers was not reversible error, as the prosecutor did in fact disclose the statement to the defense and eventually reviewed the officers' rough notes and turned over those notes that contained the discrepancies, and the defendant was able to cross-examine the investigator fully regarding the discrepancies in his report.

The court in *U.S. v. Zorio*, 124 F.3d 215 (9th Cir. 1997), cert. denied, 118 S. Ct. 1402, 140 L. Ed. 2d 659 (U.S. 1998), a case not recommended for full text publication and which may be cited only in accordance with Rule 36-3 of the Ninth Circuit, held that the prosecution's failure to disclose before trial an immunity agreement between a government's witness and an Assistant U.S. Attorney did not violate the requirements of Brady, since, under the controlling Ninth Circuit precedent, if the disclosure occurs at a time when it is of value to the defendant, and thus does not prejudice the defendant's case, no violation has occurred, and the court found that the defendant has an opportunity to cross-examine the government's witness about the scope of his immunity and his discussions with the prosecutor, and the district court also allowed him to re-examine the witness after reviewing the notes from the prosecution's debriefing. The reviewing court thus found that the defendant had a sufficient opportunity to cure any harm caused by the late disclosure.

Even if impeachment evidence that government initially withheld in drug prosecution, consisting of amended version of agent's rough notes taken during post-arrest interview of defendant, was "material" under Brady, any Brady violation was cured by the fact that government's belated disclosure of the amended notes 22 days before trial occurred at a time when disclosure would still have been of value to defendant. *U.S. v. Guzman*, 89 Fed. Appx. 47 (9th Cir. 2004).

The court in *U.S. v. Alberico*, 604 F.2d 1315 (10th Cir. 1979), held that the defendant was not denied due process by the prosecution's failure to advise him in advance of trial that the person with whom he dealt was an FBI undercover agent, where the identity and involvement of the agent were uncovered during the course of the trial.

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The court in *U.S. v. Johnson*, 911 F.2d 1394 (10th Cir. 1990), held that the government's failure to disclose alleged Brady material relating to the credibility of the government's witness until after the commencement of the trial did not warrant the granting of a mistrial, where the defendant did not allege that the government acted in bad faith, the evidence was merely cumulative of other evidence of the witness' bad character, the defendant did not request a continuance, and the defendant was allowed to cross-examine the witness extensively after the disclosure.

The court in *U.S. v. Adams*, 914 F.2d 1404 (10th Cir. 1990), held that evidence relating to the informant's previous activities as a police informant was not material to the defendant's guilt in a prosecution for the sale of "crack" cocaine and, therefore, the untimely disclosure of the evidence did not violate the Brady rule requiring the production of material exculpatory evidence. The court found that the defendant's guilt was abundantly demonstrated by police officers without the need to rely on anything the informant said, discrepancies developed during cross-examination of the informant and police officers related to the informant's own criminal activities or his activities as an informant in other cases, and the jury was able to evaluate testimony about the drug deal orchestrated by the informant to obtain leniency for himself.

The court in *U.S. v. Young*, 45 F.3d 1405 (10th Cir. 1995), reh'g denied, (Feb. 24, 1995), held that the government's failure to disclose until after the defense rested evidence that would purportedly impeach a government's witness did not deprive the defendant of a fair trial, notwithstanding her contention that there was a significant tactical difference between the government's first putting on damaging evidence or the defendant using such evidence in cross-examination. The court found that the impeachment value of the evidence was marginal, and there was ample other evidence that supported the defendant's convictions.

The court in *U.S. v. Gonzalez-Montoya*, 161 F.3d 643, 50 Fed. R. Evid. Serv. (LCP) 959 (10th Cir. 1998), cert. denied, 119 S. Ct. 1284, 143 L. Ed. 2d 377 (U.S. 1999), held that the prosecutor's failure to timely disclose impeachment evidence, relating to the coconspirator's involvement in the drug transaction that occurred earlier than the coconspirator testified to, was not prejudicial and did not warrant a mistrial in the drug prosecution, as the defendant was given an opportunity to review the new evidence and question the coconspirator about it, but the defense counsel declined to interview the coconspirator or to examine him in front of the jury, and the counsel's reluctance to question the coconspirator about the earlier transaction, for fear of implicating the defendant, would not have abated with additional time to prepare.

The court in *U.S. v. McCrary*, 699 F.2d 1308, 12 Fed. R. Evid. Serv. (LCP) 1311 (11th Cir. 1983), held that the defendant in a prosecution for bribing a public official, aiding and abetting the introduction of contraband into a federal correctional institute, and aiding and abetting the unlawful distribution of a controlled substance, was not denied due process of law under Brady when the government refused to produce the requested evidence concerning certain other prison inmates who were called as government's witnesses. The court found that the suppressed evidence was not material, because while the defendant sought to show that the witnesses ran afoul of regulations, used drugs and that drugs and drug dealings were widespread before the defendant became an inmate, such facts were plainly before the jury at the trial due to the long rein given the defendant's attorney on cross-examination.

The court in *U.S. v. Darwin*, 757 F.2d 1193, 18 Fed. R. Evid. Serv. (LCP) 1215 (11th Cir. 1985), reh'g denied, 767 F.2d 938 (11th Cir. 1985), held that the disclosure by the government that it received information possibly connecting the government's witness to an ongoing drug transaction, which was made after the witness testified, was not untimely, since although the witness completed his testimony, the trial itself was far from over and the defendant could have recalled the witness for further questioning, but chose not to.

The court in *U.S. v. Knight*, 867 F.2d 1285 (11th Cir. 1989), held that in a narcotics prosecution, the defendants failed to demonstrate that the government's disclosure during the trial of the witness' grand jury testimony, which revealed that the witness lied to the grand jury, came so late that it could not be effectively used so as to violate Brady. The court found that after the grand jury testimony was made available to the defendants,

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the defense counsel were given an opportunity to decide when they wanted the witness recalled, had an ample opportunity to prepare for the witness, and conducted an aggressive cross-examination of the witness challenging her credibility and stressing her lack of truthfulness.

The court in *U.S. v. Beale*, 921 F.2d 1412, 32 Fed. R. Evid. Serv. (LCP) 783 (11th Cir. 1991), held that the government's failure to make an earlier disclosure of grand jury testimony identifying its principal witness against the defendant as a supplier of stolen cars to a criminal organization did not amount to a Brady violation, though the defendant claimed that he would have conducted his cross-examination of the witness and his opening statement in a completely different manner had he received the grand jury testimony earlier, where the grand jury testimony was not based on any admission made by the witness, but rather was based on the statement of the codefendant, the defendant succeeded in emphasizing to the jury the fact that the witness was a car thief, and the grand jury testimony was only additional impeachment evidence against the witness and was not substantive proof that, contrary to the witness' testimony, the defendant did not supply the witness with stolen cars. The court found that the defendant failed to show that if the government disclosed the material earlier he probably would have been acquitted.

The court in *U.S. v. Bueno-Sierra*, 99 F.3d 375, 45 Fed. R. Evid. Serv. (LCP) 1346 (11th Cir. 1996), cert. denied, 520 U.S. 1110, 117 S. Ct. 1119, 137 L. Ed. 2d 319 (1997) and cert. denied, 520 U.S. 1161, 117 S. Ct. 1347, 137 L. Ed. 2d 505 (1997), held that as a result of the trial court's remedial measures of recessing for the remainder of the day and allowing additional cross-examination of the government's witness the next morning, the defendants were not prejudiced by the fact that impeachment testimony against the government's witness was not disclosed until the trial had began and, therefore, reversal was not required.

The court in *U.S. v. Paxson*, 861 F.2d 730, 27 Fed. R. Evid. Serv. (LCP) 104 (D.C. Cir. 1988), held that in a prosecution for making false declarations before a grand jury, although the prosecutors violated Brady by unduly delaying the production of information that tended to discredit the testimony of the chief co-operating witness, the trial court properly refused to grant a new trial since the defense received the evidence in time to make effective use of it in cross-examination of the witness at trial.

The court in *Matthews v. U.S.*, 629 A.2d 1185 (D.C. 1993), held that there was no Brady violation based on the failure to disclose before trial the pretrial statements of a witness, where the statements were turned over to the defendant prior to the witness' cross-examination and the witness was recalled to the witness stand after the defense counsel had an opportunity to review the statements, and the defense counsel used the statements to impeach the witness at the trial.

Research References

Total Client-Service Library References

The following references may be of related or collateral interest to a user of this annotation.

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21 Am Jurisprudence 2d, Criminal Law §§ 1269-1274, 1288-1292.

23 Am Jurisprudence 2d, Depositions and Discovery §§ 428-461.

9 Federal Procedure, L Ed, Criminal Procedure §§ 22:1166-22:1182.

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7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:439, 20:455, 20:468.

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Criminal Law ⇨ 273.1(1), 627.8(2,3,6), 627.9(5), 700(1-8), 706(2), 919(1), 938(1), 1139, 1166(10.10), 1171.1(1), 1171.8(1).

Encyclopedias

21 Am Jurisprudence 2d, Criminal Law §§ 784, 785.

16 CJS, Constitutional Law §§ 1055-1057.

22A CJS, Criminal Law §§ 486-490, 494.

Law Review Articles

Jones, The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence 25 U. Mem. L. Rev. 735 (1995).

[FN1]. So well known is the rule of basic constitutional criminal law that the suppression by the prosecution of evidence favorable to an accused on 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, that courts and the bar refer to exculpatory evidence in the hands of the prosecution by the shorthand term "Brady evidence." U.S. v. Paxson, 861 F.2d 730, 27 Fed. R. Evid. Serv. (LCP) 104 (D.C. Cir. 1988).

[FN2]. This annotation excludes cases discussing a federal prosecutor's affirmative duty to disclose evidence favorable to a defendant decided prior to the Supreme Court case of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), as all modern cases in this area are premised on Brady.

[FN3]. See 59 ALR Fed 657.

(Publication page references are not available for this document.)

[FN4]. See *U.S. v. Cargill*, 134 F.3d 364 (4th Cir. 1998), on subsequent appeal, 1999 WL 427929 (4th Cir. 1999), a case not recommended for full-text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit.

[FN5]. See *U.S. v. Monteiro*, 857 F.2d 1479 (9th Cir. 1988) (unpublished disposition).

[FN6]. No Brady violation occurs if the defendant knew, or should have known, the essential facts permitting him to take advantage of any exculpatory evidence. *U.S. v. Morales*, 107 F.3d 5 (2d Cir. 1997), post-conviction relief denied, 25 F. Supp. 2d 246 (S.D.N.Y. 1998) (unpublished opinion).

[FN7]. See *U.S. v. Dillman*, 15 F.3d 384 (5th Cir. 1994), reh'g en banc denied, 20 F.3d 471 (5th Cir. 1994).

[FN8]. While in the ordinary Brady case, it is only after a judgment of conviction that a court reviews the failure of the prosecution to disclose material the defendant argues should have been admitted into evidence, the same standards apply to both an initial decision to disclose and a postconviction determination whether nondisclosure deprived a defendant of due process rights at trial. *U.S. v. Beckford*, 962 F. Supp. 780 (E.D. Va. 1997), related reference, 962 F. Supp. 804 (E.D. Va. 1997).

[FN9]. See *Berger v. U.S.*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *Strickler v. Greene*, 119 S. Ct. 1936 (U.S. 1999).

[FN10]. See, generally, *Strickler v. Greene*, 119 S. Ct. 1936 (U.S. 1999).

[FN11]. See also *Strickler v. Greene*, 119 S. Ct. 1936 (U.S. 1999).

[FN12]. See *U.S. v. Payne*, 63 F.3d 1200 (2d Cir. 1995), postconviction relief denied, 1998 WL 32511 (S.D.N.Y. 1998), reconsideration denied, 1998 WL 71652 (S.D.N.Y. 1998), certification denied, 1998 WL 16083 (S.D.N.Y. 1998) and certification denied, 1998 WL 16083 (S.D.N.Y. 1998).

[FN13]. See *U.S. v. Beasley*, 576 F.2d 626, 78-2 U.S. Tax Cas. (CCH) ¶ 9586, 42 A.F.T.R.2d (P-H) ¶ 78-6360 (5th Cir. 1978), reh'g denied, 585 F.2d 796, 79-1 U.S. Tax Cas. (CCH) ¶ 9107, 42 A.F.T.R.2d (P-H) ¶ 78-6369 (5th Cir. 1978).

[FN14]. See *U.S. v. Vozzella*, 124 F.3d 389 (2d Cir. 1997).

[FN15]. See also *Strickler v. Greene*, 119 S. Ct. 1936 (U.S. 1999).

[FN16]. See also *Strickler v. Greene*, 119 S. Ct. 1936 (U.S. 1999).

[FN17]. See *U.S. v. Blackley*, 986 F. Supp. 600 (D.D.C. 1997).

[FN18]. See *U.S. v. Alberici*, 618 F. Supp. 660 (E.D. Pa. 1985).

[FN19]. See *U.S. v. Vozzella*, 124 F.3d 389 (2d Cir. 1997); *U.S. v. Cargill*, 134 F.3d 364 (4th Cir. 1998), on subsequent appeal, 1999 WL 427929 (4th Cir. 1999), a case not recommended for full text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit; *U.S. v. O'Dell*, 805 F.2d 637 (6th Cir. 1986); *U.S. v. Jackson*, 780 F.2d 1305, 19 Fed. R. Evid. Serv. (LCP) 1383 (7th Cir. 1986); *U.S. v. Duke*, 50 F.3d 571, 32 Fed. R. Serv. 3d (LCP) 555 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (May 25, 1995); *U.S. v. Gonzales*, 90 F.3d 1363, 45 Fed. R. Evid. Serv. (LCP) 226 (8th Cir. 1996), reh'g denied, (Sept. 16, 1996); *U.S. v. Steinberg*, 99 F.3d 1486, 45 Fed. R. Evid. Serv. (LCP) 1138 (9th Cir. 1996) (disapproved of on other grounds by, *U.S. v. Foster*, 165 F.3d 689 (9th Cir. 1999)); *U.S. v. Arnold*, 117 F.3d 1308 (11th Cir. 1997).

(Publication page references are not available for this document.)

[FN20]. See *U.S. v. Arnold*, 117 F.3d 1308 (11th Cir. 1997).

[FN21]. See *U.S. v. Cargill*, 134 F.3d 364 (4th Cir. 1998), on subsequent appeal, 1999 WL 427929 (4th Cir. 1999), a case not recommended for full text publication and which may be cited only in accordance with Rule 36(c) of the Fourth Circuit (suggesting in dicta that the "any reasonable likelihood" standard is less strict than the already defense friendly "reasonable probability" standard); *U.S. v. Alzate*, 47 F.3d 1103 (11th Cir. 1995).

[FN22]. See *U.S. v. Vozzella*, 124 F.3d 389 (2d Cir. 1997).

[FN23]. See also *Strickler v. Greene*, 119 S. Ct. 1936 (U.S. 1999).

[FN24]. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3- 3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall ... make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

[FN25]. See *Myatt v. U.S.*, 875 F.2d 8 (1st Cir. 1989); *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); *U.S. v. Payne*, 63 F.3d 1200 (2d Cir. 1995), postconviction relief denied, 1998 WL 32511 (S.D.N.Y. 1998), reconsideration denied, 1998 WL 71652 (S.D.N.Y. 1998).

[FN26]. See *U.S. v. Johnson*, 117 F.3d 1429 (10th Cir. 1997) (unpublished opinion).

[FN27]. See *U.S. v. Beckford*, 962 F. Supp. 780 (E.D. Va. 1997); *U.S. v. Duke*, 50 F.3d 571, 32 Fed. R. Serv. 3d (LCP) 555 (8th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (May 25, 1995).

[FN28]. See *U.S. v. Cuffie*, 80 F.3d 514 (D.C. Cir. 1996).

[FN29]. See *U.S. v. Amiel*, 95 F.3d 135 (2d Cir. 1996); *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); *U.S. v. Eubanks*, 1997 WL 401667 (S.D.N.Y. 1997), reconsideration denied, 11 F. Supp. 2d 455 (S.D.N.Y. 1998) (unpublished opinion); *U.S. v. Buchanan*, 891 F.2d 1436 (10th Cir. 1989); *U.S. v. Cook*, 1999 WL 155964 (D. Kan. 1999) (unpublished opinion).

[FN30]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN31]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN32]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN33]. See *U.S. v. Hart*, 760 F. Supp. 653 (E.D. Mich. 1991); *U.S. v. Buchanan*, 891 F.2d 1436 (10th Cir. 1989).

[FN34]. See *U.S. v. Amiel*, 95 F.3d 135 (2d Cir. 1996); *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); *U.S. v. Roman*, 1997 WL 695537 (D. Conn. 1997) (unpublished opinion); *U.S. v. Simone*, 1998 WL 54387 (E.D. Pa. 1998), aff'd without published op, 172 F.3d 42 (3d Cir. 1998) (unpublished opinion); *U.S. v. Maloney*, 71 F.3d 645 (7th Cir. 1995), reh'g and suggestion for reh'g en banc denied, (Mar. 15, 1996) and related reference, 1998 WL 748265 (N.D. Ill. 1998).

[FN35]. See *U.S. v. Cuffie*, 80 F.3d 514 (D.C. Cir. 1996).

(Publication page references are not available for this document.)

[FN36]. U.S. v. Phillip, 948 F.2d 241, 34 Fed. R. Evid. Serv. (LCP) 441 (6th Cir. 1991); U.S. v. Kennedy, 890 F.2d 1056 (9th Cir. 1989).

[FN37]. See U.S. v. Kennedy, 890 F.2d 1056 (9th Cir. 1989).

[FN38]. Federal Rules of Evidence Rule 608(b), 28 U.S.C.A.

[FN39]. See U.S. v. Veras, 51 F.3d 1365 (7th Cir. 1995), reh'g denied, (June 21, 1995).

[FN40]. U.S. v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997).

[FN41]. See U.S. v. Manthei, 979 F.2d 124 (8th Cir. 1992), reh'g denied, (Dec. 22, 1992); U.S. v. Boykin, 986 F.2d 270, 37 Fed. R. Evid. Serv. (LCP) 25 (8th Cir. 1993), reh'g denied, (Apr. 21, 1993); U.S. v. Gonzales, 90 F.3d 1363, 45 Fed. R. Evid. Serv. (LCP) 226 (8th Cir. 1996), reh'g denied, (Sept. 16, 1996); U.S. v. Scarborough, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied, 172 F.3d 880 (10th Cir. 1999).

[FN42]. See U.S. v. O'Keefe, 128 F.3d 885 (5th Cir. 1997), cert. denied, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (U.S. 1998) and appeal after remand, 169 F.3d 281 (5th Cir. 1999).

[FN43]. See U.S. v. O'Keefe, 128 F.3d 885 (5th Cir. 1997), cert. denied, 118 S. Ct. 1525, 140 L. Ed. 2d 676 (U.S. 1998) and appeal after remand, 169 F.3d 281 (5th Cir. 1999).

[FN44]. See U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) (footnote 20); U.S. v. Scarborough, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied in unpublished op, 172 F.3d 880 (10th Cir. 1999).

[FN45]. See U.S. v. Walsh, 75 F.3d 1 (1st Cir. 1996); U.S. v. De La Cruz, 996 F.2d 1307, 37 Fed. R. Evid. Serv. (LCP) 1133 (1st Cir. 1993); U.S. v. Devin, 918 F.2d 280, 31 Fed. R. Evid. Serv. (LCP) 1329 (1st Cir. 1990); U.S. v. Diaz, 922 F.2d 998 (2d Cir. 1990); U.S. v. Smith Grading and Paving, Inc., 760 F.2d 527, 17 Fed. R. Evid. Serv. (LCP) 1168 (4th Cir. 1985); U.S. v. McKinney, 758 F.2d 1036 (5th Cir. 1985); U.S. v. Bencs, 28 F.3d 555, 94-2 U.S. Tax Cas. (CCH) ¶ 50347, 74 A.F.T.R.2d (P-H) ¶ 94-5271, 1994 FED App. 231P (6th Cir. 1994); U.S. v. Bailey, 123 F.3d 1381 (11th Cir. 1997).

[FN46]. See U.S. v. Beale, 921 F.2d 1412, 32 Fed. R. Evid. Serv. (LCP) 783 (11th Cir. 1991).

[FN47]. See U.S. v. Glass, 819 F.2d 1142 (6th Cir. 1987) (unpublished opinion).

[FN48]. See U.S. v. Allain, 671 F.2d 248, 10 Fed. R. Evid. Serv. (LCP) 71 (7th Cir. 1982); U.S. v. Kime, 99 F.3d 870, 45 Fed. R. Evid. Serv. (LCP) 1278 (8th Cir. 1996).

[FN49]. See U.S. v. Vgeri, 51 F.3d 876, 41 Fed. R. Evid. Serv. (LCP) 1270 (9th Cir. 1995).

[FN50]. See Sterling v. U.S., 691 A.2d 126 (D.C. 1997).

[FN51]. See U.S. v. Yu, 1998 WL 57079 (E.D.N.Y. 1998) (unpublished opinion); U.S. v. Bissell, 954 F. Supp. 841 (D.N.J. 1996).

[FN52]. 18 U.S.C.A. § 3500(a).

[FN53]. See U.S. v. Scott, 524 F.2d 465 (5th Cir. 1975); U.S. v. Presser, 844 F.2d 1275 (6th Cir. 1988); U.S. v. Hart, 760 F. Supp. 653 (E.D. Mich. 1991) (holding that directly exculpatory material covered by both Brady

(Publication page references are not available for this document.)

and Jencks need not be disclosed until after the witness whose statements are sought has testified on direct examination); *U. S. v. Jones*, 612 F.2d 453 (9th Cir. 1979).

[FN54]. See *U.S. v. Owens*, 933 F. Supp. 76 (D. Mass. 1996); *U.S. v. Gallo*, 654 F. Supp. 463 (E.D.N.Y. 1987); *U.S. v. Ruiz*, 702 F. Supp. 1066 (S.D.N.Y. 1989), decision aff'd, 894 F.2d 501 (2d Cir. 1990); *U.S. v. Starusko*, 729 F.2d 256, 15 Fed. R. Evid. Serv. (LCP) 228 (3d Cir. 1984); *U.S. v. Beckford*, 962 F. Supp. 780 (E.D. Va. 1997), related reference, 962 F. Supp. 804 (E.D. Va. 1997) (adopting a "balancing approach"); *U. S. v. Thevis*, 84 F.R.D. 47 (N.D. Ga. 1979).

[FN55]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN56]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN57]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); *U.S. v. Millan-Colon*, 829 F. Supp. 620 (S.D.N.Y. 1993), order aff'd on other grounds, 17 F.3d 14 (2d Cir. 1994); *Banks v. U.S.*, 920 F. Supp. 688 (E.D. Va. 1996); *U.S. v. Patel*, 1999 WL 675293 (N.D. Ill. 1999), noting that while the Seventh Circuit has not yet ruled on whether Brady protections apply when a defendant has entered a plea before trial, several circuits have held that Brady may be invoked to challenge the voluntariness of a guilty plea; *White v. U.S.*, 858 F.2d 416 (8th Cir. 1988); *Sanchez v. U.S.*, 50 F.3d 1448 (9th Cir. 1995); *U.S. v. Lagoye*, 1995 WL 392542 (N.D. Cal. 1995) (unpublished opinion).

[FN58]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); *U.S. v. Millan-Colon*, 829 F. Supp. 620 (S.D.N.Y. 1993), order aff'd on other grounds, 17 F.3d 14 (2d Cir. 1994); *Banks v. U.S.*, 920 F. Supp. 688 (E.D. Va. 1996); *U.S. v. Patel*, 1999 WL 675293 (N.D. Ill. 1999); *Sanchez v. U.S.*, 50 F.3d 1448 (9th Cir. 1995).

[FN59]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998); *Sanchez v. U.S.*, 50 F.3d 1448 (9th Cir. 1995).

[FN60]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN61]. See *U.S. v. Severson*, 3 F.3d 1005 (7th Cir. 1993), appeal after remand, 49 F.3d 268 (7th Cir. 1995).

[FN62]. See § 5.

[FN63]. See also *Strickler v. Greene*, 119 S. Ct. 1936 (U.S. 1999).

[FN64]. *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN65]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN66]. See *U.S. v. Avellino*, 136 F.3d 249 (2d Cir. 1998), reh'g denied, (Apr. 23, 1998).

[FN67] See *U.S. v. Pelullo*, 14 F.3d 881 (3d Cir. 1994); *U.S. v. Gonzales*, 121 F.3d 928 (5th Cir. 1997), reh'g denied, (Oct. 1, 1997) and cert. denied, 118 S. Ct. 726, 139 L. Ed. 2d 664 (U.S. 1998) and cert. denied, 118 S. Ct. 1084, 140 L. Ed. 2d 141 (U.S. 1998); *U.S. v. Phillip*, 948 F.2d 241, 34 Fed. R. Evid. Serv. (LCP) 441 (6th Cir. 1991); *U.S. v. Amlani*, 111 F.3d 705, 46 Fed. R. Evid. Serv. (LCP) 1422 (9th Cir. 1997), opinion after remand, 169 F.3d 1189 (9th Cir. 1999); *U.S. v. Scarborough*, 128 F.3d 1373, 47 Fed. R. Evid. Serv. (LCP) 1395, 158 A.L.R. Fed. 725 (10th Cir. 1997), postconviction relief denied, 172 F.3d 880 (10th Cir. 1999); *U.S. v. Schlei*, 122 F.3d 944, 48 Fed. R. Evid. Serv. (LCP) 143 (11th Cir. 1997), reh'g and suggestion for reh'g en banc denied, 132 F.3d 1462 (11th Cir. 1997) and cert. denied, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (U.S. 1998); *U.S. v. Cuffie*, 80 F.3d 514 (D.C. Cir. 1996); *In re Sealed Case No. 99-3096*, 185 F.3d 887 (D.C. Cir. 1999).

(Publication page references are not available for this document.)

[FN68]. See *U.S. v. Zagari*, 111 F.3d 307, 46 Fed. R. Evid. Serv. (LCP) 1437, 27 *Envtl. L. Rep.* 20992 (2d Cir. 1997).

[FN69]. See *U.S. v. Zagari*, 111 F.3d 307, 46 Fed. R. Evid. Serv. (LCP) 1437, 27 *Envtl. L. Rep.* 20992 (2d Cir. 1997); *U.S. v. Pflaumer*, 774 F.2d 1224 (3d Cir. 1985).

[FN70]. See *U.S. v. Silva*, 71 F.3d 667 (7th Cir. 1995); *U.S. v. Fernandez*, 136 F.3d 1434 (11th Cir. 1998).

[FN71]. See *U.S. v. Asher*, 178 F.3d 486 (7th Cir. 1999), petition for cert. filed (U.S. Aug. 18, 1999).

[FN72]. See *U.S. v. Devin*, 918 F.2d 280, 31 Fed. R. Evid. Serv. (LCP) 1329 (1st Cir. 1990).

[FN73]. See *U.S. v. Devin*, 918 F.2d 280, 31 Fed. R. Evid. Serv. (LCP) 1329 (1st Cir. 1990).

[FN74]. See *U.S. v. Sarno*, 73 F.3d 1470 (9th Cir. 1995).

[FN75]. See *Schledwitz v. U.S.*, 169 F.3d 1003, 51 Fed. R. Evid. Serv. (LCP) 352, 1999 *FED App.* 81P (6th Cir. 1999).

[FN76]. See *In re Sealed Case No. 99-3096*, 185 F.3d 887 (D.C. Cir. 1999).

[FN77]. As stated in *U.S. v. Wood*, 112 F.3d 518 (9th Cir. 1997) (unpublished disposition).

[FN78]. See 1999 WL 89053 for the text of the opinion.

[FN79]. The court held that a mere referral of a witness to authorities does not constitute favorable impeachment evidence as to the witness under *Brady* and, therefore, is immaterial.

END OF DOCUMENT

AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT (2002)

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(d) 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 mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal....

**ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION,
3RD,**

STANDARD 3-3.11 (1993)

Standard 3-3.11 Disclosure of Evidence by the Prosecutor

1. (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

DISCOVERY OBLIGATIONS OF THE PROSECUTION AND DEFENSE

Standard 11-2.1 Prosecutorial disclosure

(a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, copying, testing, and photographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

(ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

(iv) Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons and of scientific tests, experiments or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(v) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeach any witness to be called by either party at trial.

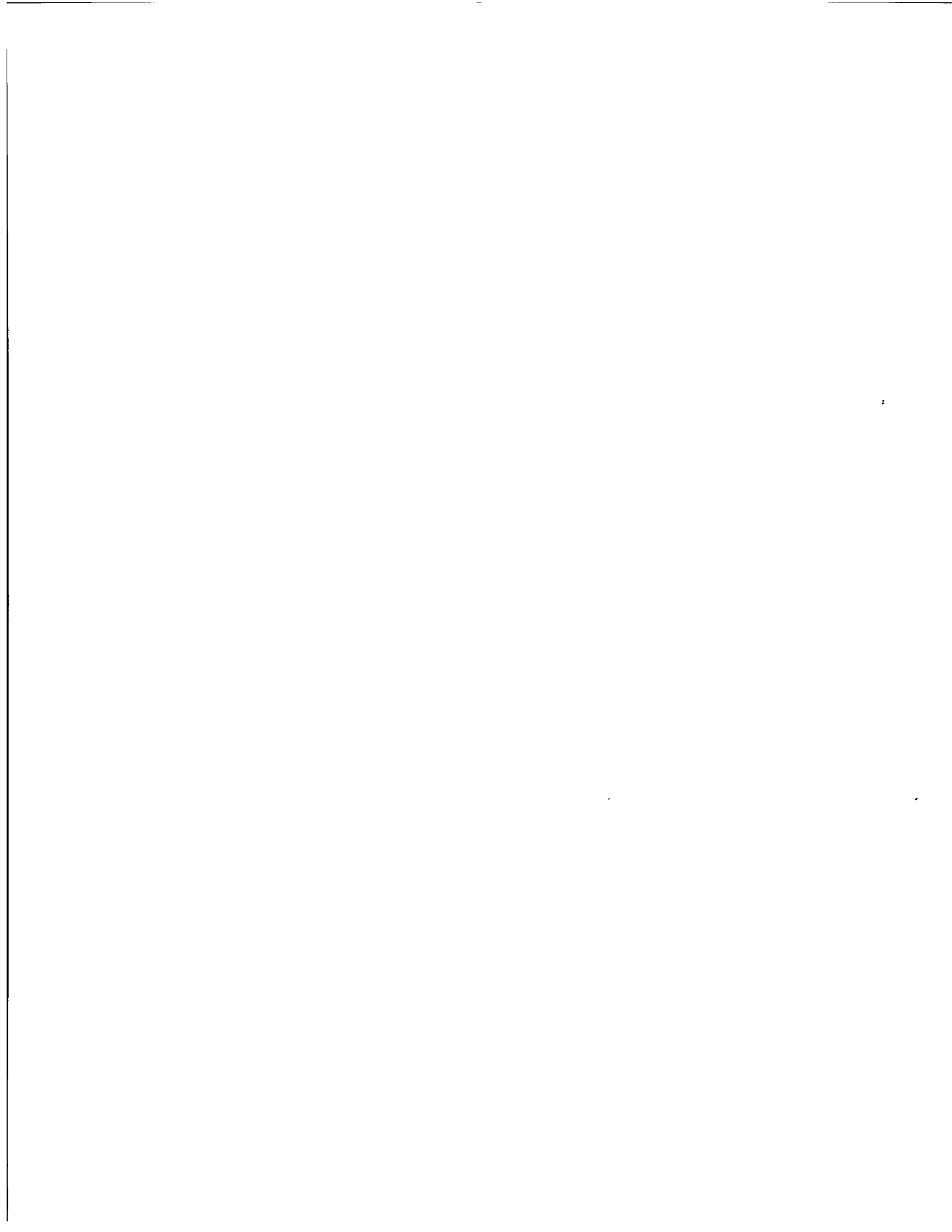
(vii) Any material, documents, or information relating to lineups, showups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

(b) If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.



AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED CODIFICATION OF
DISCLOSURE OF FAVORABLE INFORMATION UNDER
FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

March 2003

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October 14, 2003

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Honorable Ed E. Carnes
United States Circuit Judge
U. S. Courthouse, Room 408
15 Lee Street
Montgomery, Alabama 36104

Re: Advisory Committee on
Federal Rules of Criminal Procedure

Dear Judge Carnes:

I write to you as Chair of the Advisory Committee and I enclose a copy of the American College's paper regarding disclosure of Brady material. This paper was adopted by the College's Board of Regents this year, and I hope that you can include its recommendations on your Committee's agenda for its spring meeting.

Please let me know if you have any questions regarding the College's position on this important subject.

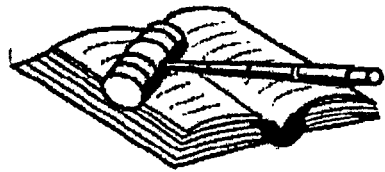
Best regards,

Warren B. Lightfoot

WBL/ds
Enclosure

cc: Robert B. Fiske, Jr., Esquire
Executive Committee
David J. Beck, Esquire
Mr. Dennis J. Maggi

American College
of
Trial Lawyers



PROPOSED CODIFICATION OF
DISCLOSURE OF FAVORABLE INFORMATION
UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

Approved by the Board of Regents
March, 2003

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PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16*

BACKGROUND AND SUMMARY

In the 1963 landmark decision of *Brady v. Maryland*,¹ the Supreme Court held that prosecutors have a constitutional duty to turn over "evidence favorable to an accused. where the evidence is material either to guilt or to punishment."² Four decades later, Federal Rules of Criminal Procedure 11 and 16, which govern federal plea negotiations and criminal discovery respectively, still do not address, let alone require, the government to timely disclose favorable information to the defendant that is material to either guilt or sentencing.

Without a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently and too often disclosed favorable information on the eve, during or after trial or not at all. Timely disclosure of favorable information can greatly impact the plea decision, trial strategy, the presentation of evidence and sentencing.

Since approximately ninety-five percent of federal criminal cases are resolved through pleas of guilty,³ the timely disclosure of information favorable to punishment is particularly important to fair and open plea negotiations and the honest and consistent implementation of the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines"). Information that tends to diminish the degree of the defendant's culpability or Offense Level under the Guidelines can significantly affect a defendant's punishment. Still, prosecutors have recently sought to require defendants to enter into knowing and voluntary plea agreements in which the defendants have not received information favorable to punishment or worse, have been required to waive the constitutional right to exculpatory material without knowing what favorable evidence may exist. This practice threatens to deprive defendants and courts of information critical to a fair and honest sentencing process.

* The principal draftsman of this report was Robert W. Tarun, Chicago, Illinois, assisted by a subcommittee of the Federal Criminal Procedure Committee of the American College of Trial Lawyers consisting of Locke T. Clifford, Greensboro, North Carolina, William F. Manifesto, Pittsburgh, Pennsylvania and Jordan Green, Phoenix, Arizona.

¹ 373 U.S. 83 (1963).

² *Id.* at 87.

³ United States Sentencing Guidelines (U.S.S.G.), Ch. 1, Pt. A.; *Judicial Business of the United States Courts, Annual Report of the Director* (2000) (available at: <http://www.uscourts.gov/judbus2000/contents.html>).

Nothing is more essential to a fair criminal trial or sentence than the disclosure of information favorable to the defendant in sufficient time for the defendant to receive due process as guaranteed by the Fifth Amendment, and effective assistance of counsel as guaranteed by the Sixth Amendment. No defendant should be forced to go to trial or plead guilty without having access to favorable information as to guilt or sentencing. Any system of jurisprudence which fails to require as much condones and "shapes a trial that bears heavily on the defendant"⁴ and lays the groundwork for wrongful conviction of the innocent and unfair sentencing of the guilty.

The proposed amendments to Federal Rules of Criminal Procedure 11 and 16 will ensure that defendants receive the full and consistently applied benefit of the Supreme Court's pronouncements in *Brady* and its progeny. They codify the rule of law first propounded in *Brady v. Maryland*, clarify both the nature and scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information.

This Committee believes that the constitutional mandate of *Brady v. Maryland* has been undermined by varying prosecutorial interpretations of "favorable information," delayed disclosure of this information in both guilt and punishment stages, and recent government plea policies that have the potential to deprive defendants of information essential to the sentencing process. The amendments will not only promote greater fairness and integrity in criminal discovery generally, but also foster earlier, forthright plea negotiations and a more balanced and informed administration of the Guidelines. Specifically, the Committee proposes amendments to Fed. R. Crim. P. 11 and 16 which:

1. define favorable information to an accused;
2. require, upon a defendant's request, that the government disclose in writing within fourteen days, all known favorable information to the defense;
3. impose a due diligence obligation on the government attorney to consult with government agents and locate favorable information; and
4. require disclosure of all favorable information to a defendant fourteen days before a guilty plea is entered.

Part I of this report discusses the background and evolution of the Supreme Court's decision in *Brady v. Maryland*. Part II summarizes federal criminal discovery practice under Rule 16 as it currently exists. Part III discusses Rule 11(e) and federal plea negotiations. Finally, Part IV contains the proposed Rule 11(e)(7) and Rule 16(f) amendments and a discussion of their key provisions.

⁴ 373 U.S. at 87.

I. BRADY v. MARYLAND BACKGROUND

A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.

Justice William O. Douglas
Brady v. Maryland, 373 U.S. 83, 87 (1963)

A. Brady v. Maryland

Brady v. Maryland represented the first time the Supreme Court created a bright-line constitutional duty on the part of prosecutors to turn over "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment[.]"⁵ In *Brady*, the defendant had been convicted of first degree murder and sentenced to death.⁶ Although he had admitted to participating in the crime, Brady maintained that his accomplice had done the actual killing, and therefore asked to be spared the death penalty.⁷ In an attempt to prove as much, Brady's lawyer requested that the prosecution show him several of defendant's accomplice's statements.⁸ Despite this request, a statement in which Brady's accomplice admitted to the actual homicide was not provided.⁹ The government's behavior prompted Justice Douglas to comment:

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. [...] A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.]¹⁰

The Court held "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹¹

⁵ *Id.*

⁶ *Id.* at 84.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 87-88.

¹¹ *Id.* See also *Moore v. United States*, 408 U.S. 786, 794-95 (1972).

B. Brady Evolution

Five major Supreme Court cases since *Brady* have construed the prosecutor's obligation to disclose favorable evidence to a criminally accused. In *Giglio v. United States*,¹² the Court applied *Brady's* mandate to impeachment evidence as well as classically exculpatory evidence.¹³ *Giglio* had been convicted of passing forged money orders, and while his appeal was pending, his attorney learned that the government had failed to disclose a promise of immunity made to its key witness.¹⁴ Chief Justice Burger ordered a new trial as a result of the prosecution's misconduct, stating that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within" the rule of *Brady*.¹⁵

In *United States v. Agurs*,¹⁶ the Court reviewed for *Brady* violations the second-degree murder conviction of a defendant whose sole defense had been self-defense. The defendant had not requested, and the government had not disclosed, evidence that the victim possessed a criminal record which included prior convictions for assault and possession of deadly weapons.¹⁷ The Court found that a prosecutor's constitutional duty to disclose favorable evidence was not limited to situations in which the defendant had specifically requested the evidence.¹⁸ Nevertheless, noting that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"¹⁹ Justice Stevens observed:

[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence.²⁰

¹² 405 U.S. 150 (1972).

¹³ *Id.* at 153-54.

¹⁴ *Id.* at 150.

¹⁵ *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

¹⁶ 427 U.S. 97 (1976).

¹⁷ *Id.* at 101.

¹⁸ See also *United States v. Bagley*, 473 U.S. 667, 682 (1985), discussed *infra* at text accompanying notes 23 through 27, holding that regardless of whether a request had been made, the suppression of material evidence favorable to an accused is unconstitutional.

¹⁹ 427 U.S. at 108.

²⁰ *Id.* at 110-11 (citations omitted).

The Court concluded that undisclosed evidence would be deemed material, and therefore violative of *Brady's* dictates, if it "create[d] a reasonable doubt that did not otherwise exist."²¹ It nonetheless upheld the conviction because the trial judge remained convinced of the defendant's guilt notwithstanding the newly discovered evidence.²²

In *United States v. Bagley*,²³ the Supreme Court revisited the issue of "materiality" and held that undisclosed evidence is "material" for purposes of a *Brady* violation where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."²⁴ Bagley, charged with violations of federal narcotics and firearms statutes, filed a motion requesting "any deals, promises or inducements to witnesses in exchange for their testimony."²⁵ In response, the government provided affidavits from two government witnesses who asserted that their statements had been given without any threats, rewards, or promises of reward.²⁶ Following his conviction, Bagley filed a Freedom of Information Act request with the Bureau of Alcohol, Tobacco and Firearms and learned that the agency had entered into contracts with the two witnesses under which the government had promised to pay them money for their cooperation.²⁷ Finding that the prosecutor's response had misleadingly induced defense counsel into believing the witnesses could not be impeached on the basis of bias, the Court remanded the case to the trial court to decide whether there was a "reasonable probability" that had the evidence been disclosed to the defense, the result might have been different.²⁸

A decade later in *Kyles v. Whitley*,²⁹ the Court, in construing *Brady*, explained that the materiality standard does not require a defendant to demonstrate that disclosure of the suppressed material would have ultimately resulted in his acquittal.³⁰ Instead, such a standard requires a defendant to show that suppression of the relevant evidence caused him to receive a trial which did not "result[] in a verdict worthy of confidence."³¹ In *Kyles*, the defendant faced first-degree murder charges for the alleged shooting of an elderly woman in a grocery store parking lot.³² When his counsel filed a lengthy *Brady* motion requesting "any exculpatory or impeachment evidence," the government responded that there was "no exculpatory evidence of any nature."³³ In fact, however, the prosecution knew of no fewer than seven key pieces of

²¹ *Id.* at 112.

²² *Id.*

²³ 473 U.S. 667 (1985).

²⁴ *Id.* at 682.

²⁵ *Id.* at 669.

²⁶ *Id.* at 670.

²⁷ *Id.* at 671.

²⁸ *Id.* at 684.

²⁹ 514 U.S. 419 (1995).

³⁰ *Id.* at 434.

³¹ *Id.*

³² *Id.* at 423, 428.

³³ *Id.* at 428.

exculpatory evidence, including substantial evidence affirmatively inculcating its star witness.³⁴ After analyzing the prosecution's failure to disclose this evidence, the Court reversed the defendant's conviction and death sentence, finding that "fairness [could not] be stretched to the point of calling this a fair trial."³⁵ The *Kyles* Court held that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."³⁶

In *Strickler v. Greene*,³⁷ the Supreme Court reviewed a prosecutor's failure to disclose in a capital murder case exculpatory materials in police files consisting of detective notes about a key witness and a letter written by the witness.³⁸ Justice Stevens clarified that "there are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."³⁹ Finding that no prejudice had ensued from the non-disclosure, the Court declined to reverse the defendant's conviction.

C. The Special Role of the Prosecutor in Ensuring a Fair Trial

In *Berger v. United States*,⁴⁰ Justice Sutherland outlined the unique role and responsibilities of the federal prosecutor:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.⁴¹

(Emphasis supplied.)

³⁴ *Id.* at 447.

³⁵ *Id.* at 454.

³⁶ *Id.* at 437.

³⁷ 527 U.S. 263 (1999).

³⁸ *Id.* at 266.

³⁹ *Id.* at 281-82.

⁴⁰ 295 U.S. 78 (1935).

⁴¹ *Id.* at 88.

Woven throughout each of the major Supreme Court decisions construing *Brady* has been the theme that responsibility for ensuring the accused receives a fair trial rests not with the judge, jury, defense counsel, police, or some combination thereof, but with the prosecutor. In *Kyles*, the Court made clear that the prosecution has the "responsibility to gauge the likely net effect of all [favorable] evidence and make disclosure when the point of 'reasonable probability' is reached."⁴² This meant, stated the Court, that individual prosecutors are required to learn:

of any favorable evidence known to the others acting on the government's behalf in the case, including the police [... for] since ... the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.⁴³

The *Kyles* Court further observed that:

[u]nless ... the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result. This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence ... And (disclosure) will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.⁴⁴

Both the American Bar Association ("ABA") Standards of Criminal Justice and the Model Rules of Professional Conduct recognize the unique role of the prosecutor and the importance of timely disclosure of favorable evidence to the defense. The ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) provide:

A prosecutor should not intentionally fail to make *timely* disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

(Emphasis supplied)

⁴² *Kyles*, 514 U.S. at 437.

⁴³ *Id.* at 437-38.

⁴⁴ *Id.* at 439 (citations omitted).

The ABA Model Rule of Professional Conduct 3.8(d) (1984) provides:

The prosecutor in a criminal case shall . . . make *timely* disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense.

(Emphasis supplied)

Thus, the two most pertinent ethical guidelines to address criminal discovery make clear that timely disclosure of favorable evidence by the prosecution is essential in a criminal case.

Codification of *Brady v. Maryland* will assist federal prosecutors and law enforcement officers in better understanding the disclosure responsibility, instill far greater confidence that this constitutional obligation is being uniformly satisfied and, above all, work to ensure that wrongful convictions and unlawful sentences do not occur. Because the prosecutor alone can know and weigh what is undisclosed,⁴⁵ he is faced with the serious and possibly conflicting responsibility of deciding what is exculpatory and, if so, whether it should be disclosed to the accused, and finally when to disclose this information. A rule of criminal procedure can only provide welcome guidance in carrying out a responsibility that ensures fair trials and sentencings.

II. FEDERAL DISCOVERY PRACTICE

A. Federal Rule of Criminal Procedure 16 Does Not Address, Let Alone Require, Disclosure of Favorable Information

Unlike the Federal Rules of Civil Procedure, which provide for wide-ranging discovery and disclosure in the form of depositions, disclosure statements, requests for production, inspections and requests for admissions, interrogatories and expert reports, the Federal Rules of Criminal Procedure afford the defendant extremely limited access to government information.

Federal Rule of Criminal Procedure 16 governs discovery in federal criminal cases.⁴⁶ It requires, upon a defendant's request, disclosure of statements made by the defendant within the government's possession, control or custody,⁴⁷ disclosure of the defendant's prior criminal record,⁴⁸ inspection and copying of documents and tangible objects intended to be used by the government at trial or material to the defendant's defense,⁴⁹ inspection of physical and

⁴⁵ *Id.* at 438.

⁴⁶ Fed. R. Crim. P. 16 is reprinted in its entirety in Appendix A.

⁴⁷ Fed. R. Crim. P. 16 (a)(1)(A).

⁴⁸ *Id.* at 16 (a)(1)(B).

⁴⁹ *Id.* at 16 (a)(1)(C).

mental examinations and scientific tests,⁵⁰ and summaries of any expert testimony that the government intends to offer in its case-in-chief.⁵¹ The rule affords the government reciprocal discovery upon its compliance with and request of the defendant.⁵² Rule 16 also imposes a continuing duty to disclose if prior to or during a trial a party discovers additional evidence or material previously requested or ordered and subject to discovery or inspection under the rule.⁵³ Over its fifty-year evolution, Federal Rule of Criminal Procedure 16 has metamorphosed the spectacle of the criminal trial from a game of "blind man's bluff"⁵⁴ into a "serious inquiry aiming to distinguish between guilt and innocence."⁵⁵

Although Rule 16 has gradually expanded the scope of discovery required in criminal cases,⁵⁶ it still does not address, let alone require, the government to timely disclose favorable information to the defendant that is material either to guilt or sentencing. This limited disclosure makes the defense of a federal criminal case especially difficult, considering the government's ability to control the flow of information to the defendant, attributable largely to the close relationships between the prosecutor and law enforcement, and the inability of the defense to compel disclosure.

In addition to disclosure under Rule 16, criminal defense lawyers can try to obtain Brady and Giglio material by filing a motion with the court. Most criminal defense lawyers file a *Brady-Giglio* motion as a matter of course in federal and state court proceedings. Some file a general request for exculpatory evidence while others tailor the discovery motion to the particulars of the case. Types of information not only favorable, but essential, to the defense in a criminal trial and at sentencing include:

- promises of immunity or other favorable treatment to government witnesses;⁵⁷

⁵⁰ *Id.* at 16 (a)(1)(D).

⁵¹ *Id.* at 16(a)(1)(E).

⁵² *Id.* at 16(b).

⁵³ *Id.* at 16(c).

⁵⁴ See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 Wash. U. L. Q. 1, 3 (1990) (citing Justice Douglas' opinion in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958), in which Justice Douglas noted that tools which result in broad discovery "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

⁵⁵ See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L. Q. 279 (1963) (quoting Williams, *Advance Notice of the Defense*, 1959 Crim. L. Rev. (Eng.) 548, 554 (1959)).

⁵⁶ See, e.g., the 1966 Amendment to the Rule (noting that "[t]he rule has been revised to expand the scope of pretrial discovery"), the 1974 Amendment ("Rule 16 is revised to give greater discovery to both the prosecution and the defense."), and the 1993 Amendment ("New subdivisions ... expand federal criminal discovery[.]")

⁵⁷ See *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (conviction reversed where prosecution's key witness lied about the nature of his deal with the prosecution); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for immunity while arguing to jury that witness had no motive to lie); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealed evidence that key witness was coerced into testifying against defendant and/or argued to the jury that no one had threatened the witness); *United States v. Gerard*, 491 F.2d 1300 (9th Cir. 1974) (convictions reversed where defendants were deprived of evidence reflecting promises of leniency).

- prior criminal records of government witnesses;⁵⁸
- prior inconsistent statements of government witnesses regarding the defendant's alleged criminal conduct;⁵⁹
- prior perjury or false testimony of government witnesses;
- monetary rewards or inducements to government witnesses;
- confessions to the crime in question by others;
- information reflecting bias or prejudice by government witnesses against the defendant;
- witness statements that others committed the crime in question;
- information about mental or physical impairments of government witnesses;⁶⁰
- inconsistent or contradictory examinations or scientific tests;⁶¹ and
- the failure of any percipient witnesses to make a positive identification of the defendant.

Brady-Giglio motions, however, often fail to unearth evidence which is critical to the defense. Federal prosecutors, largely keying on the word "exculpatory," have interpreted the *Brady* disclosure obligation in a variety of ways. A number of prosecutors have interpreted *Brady* narrowly and believe that a prosecutor's *Brady* obligation is limited to turning over information that someone other than the defendant has confessed to the crime at issue. Many prosecutors do not focus on the critical language of the *Brady* decision that requires disclosure of evidence that *tends to exculpate* or reduce one's penalty.⁶² Others, knowing of favorable evidence, have tried to predict its effect on the outcome of the case in deciding whether to disclose it. Still others do not view *Giglio* or impeachment material as part of the *Brady*

⁵⁸ See *Carriger v. Stewart*, 132 F.3d 463, 479-82 (9th Cir. 1997) (conviction reversed where prosecution failed to disclose witness's prior criminal history); *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) *cert denied*, 489 U.S. 1032 (1989) (same); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (prosecutor's lack of knowledge of witness' criminal record was no excuse for *Brady* violation).

⁵⁹ See *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994) (kidnapping conviction reversed where government failed to disclose key witness' letter which seriously undermined her credibility); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975) (*Brady* violation found for failure to disclose grand jury testimony contradicting testimony of government witnesses).

⁶⁰ See *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995) (new trial granted where government failed to reveal drug use and dealing by prisoner-witnesses during trial).

⁶¹ See *United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985) (prosecutor's ignorance of ballistics worksheet indicating that gun defendant was accused of firing was inoperable did not excuse failure to disclose); *United States v. Poole*, 379 F.2d 645 (7th Cir. 1966) (conviction reversed where government failed to disclose FBI report of victim's physical examination)

⁶² 373 U.S. at 87.

exculpatory disclosure obligation. And yet others have separated the timing of the disclosure of exculpatory or guilt evidence from the disclosure of mitigating or punishment evidence.

The majority of this Committee's members practice in federal courts, and based on their experiences, believe that across the country federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court and often reply to both general and case-specific *Brady-Giglio* motions with boilerplate responses such as "none known," or "the government is aware of its obligations" - often producing little, if any, favorable information for months, in some cases not until trial is underway and in other cases not at all. Without a procedural rule containing a clear definition of *Brady* material, requiring prosecutors to consult with law enforcement officers, and mandating a firm compliance timetable, the duty to disclose favorable information has become blurred and at best of secondary importance to the explicit discovery obligations and procedures found in Rule 16.

It is anomalous that in civil cases, where generally all that is at stake is money, access to information is assured; however, in contrast, in criminal cases, where liberty is at issue, the defense is provided far less information. More significantly, in a civil case, violation of the discovery rules is punishable in extreme cases by dismissal. There is no comparable sanction in criminal cases. The amendments proposed here are consistent with the unique role of the prosecutor in ensuring that the accused receives a fair trial.

B. Most Local Rules Do Not Fully Address the Disclosure of Favorable Information

Most local rules that address *Brady-Giglio* disclosure obligations neither define the nature and/or scope of favorable information, nor require consultation with law enforcement officers, nor provide clear pre-trial or pre-plea deadlines for disclosure.⁶³ The most notable exception is the District of Massachusetts⁶⁴ which in 1998 promulgated the most extensive local

⁶³ Some local criminal rules require attorneys for the government and defense to confer with respect to a schedule for disclosure and provide that, in the absence of a stipulation, the court may intervene. *See, e.g.*, N.D. Ca. Criminal Local Rule 16-1(a). Many are silent as to *Brady* obligations (*see, e.g.*, E.D. Tn. L.R. 16.2 (Pre-trial Conferences in Criminal Cases); S.D. Tx. Criminal Rule 12 (Criminal Pretrial Motion Practice); S.D. Ca. Criminal Rule 16.1 (Pleadings and Motions Before Trial, Defenses and Objections); and M.D. Ala. L. Cr. R. IV (Arraignment and Preparation for Trial)), or address Federal Rule Criminal Procedure 16 obligations only. *See, e.g.*, E.D. Pa. Criminal Rule 16.1 (Pretrial Discovery and Inspection); D.Wy. L. Cr. R. 16.1. Still others encourage parties to meet and confer on discovery topics beyond Fed. R. Crim. P. 16 but not *Brady* material. *See, e.g.*, N.D. Ill. L. Cr. R. 16.1 (Pretrial Discovery and Inspection). Finally, some federal courts have no local criminal rules. *See, e.g.*, D.S.D. Local Rules of Practice.

⁶⁴ The Southern District of Florida has also promulgated extensive local criminal discovery rules which addresses *Brady* information. *See* S.D. Fla. General Rule 88.10 (requiring the government to disclose, within fourteen days of arraignment, not only the information required under Federal Rule Criminal Procedure 16, but also "all information ... favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland* ... and *United States v. Agurs*," as well as "the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States* ... and *Napue v. Illinois*").

criminal discovery rules in the nation. Massachusetts Local Rule 116.2⁶⁵ was enacted in response to federal prosecutors' indifference to pre-trial discovery obligations.

United States v. Mannarino,⁶⁶ frequently credited with precipitating the enactment of Massachusetts's Local Rule 116.2, decried "a pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities by the United States Attorney's Office."⁶⁷ *Mannarino* addressed a police officer's destruction of a star informant's self-authored narrative of his criminal history, before it could be produced to defendants, and in violation of the Jencks Act.⁶⁸ Calling the case "yet another example of concerted indolence in pursuing disclosure by the United States Attorney's Office and a willful blindness to the failure of its agents who had disclosure duties to fulfill them,"⁶⁹ Judge Woodlock cited a decade's worth of case law detailing "lame," "sloppy," "negligen[t]," "illusory," and "insensitiv[e]" criminal discovery practices by the U.S. Attorney's Office in Boston.⁷⁰ Declining to enter a judgment of acquittal, the court ordered the deposition of the government's key witness to be taken by defense counsel, to be followed by a new trial.⁷¹ *Mannarino* highlights the practice of some prosecutors of ignoring the constitutional obligation to disclose favorable information material to guilt and punishment in a timely fashion.⁷²

The Massachusetts local criminal rules establish a series of "automatic" discovery obligations imposed upon prosecutors and defendants alike.⁷³ The rules also require the government to disclose, under a mandated timeframe, any information that could "cast doubt" on the defendant's guilt, the admissibility or credibility of any evidence, or the degree of the defendant's culpability under the Guidelines.⁷⁴ This information expressly includes, *inter alia*, inducements rendered to government witnesses to testify, criminal records of and cases pending against such witnesses, and the failure of any such witnesses to positively identify the defendant.⁷⁵ The rules further require the government to inform "all federal, state, and local law enforcement agencies formally participating in the criminal investigation" of the local rules'

⁶⁵ Massachusetts Local Rule 116.2 is reprinted in its entirety in Appendix B.

⁶⁶ 850 F. Supp. 57, 59 (D. Mass. 1994).

⁶⁷ *Id.* at 59. See also *id.* at 71 (stating that repeated prosecutorial discovery violations are "of sufficient concern that the District of Massachusetts has determined to review its present local rules governing criminal discovery with a view toward increased prescriptiveness in discovery responsibilities").

⁶⁸ *Id.* at 59. See also 18 U.S.C. § 3500 (Jencks Act).

⁶⁹ 850 F. Supp. at 71.

⁷⁰ *Id.* at 71-72 (citations omitted). The court went on to call the government's current discovery practices "unwilling[]" and "rescusan[.t]," among other adjectives. *Id.* at 72.

⁷¹ *Id.* at 73.

⁷² See, e.g., Moushey, *Hiding The Facts Readout; Discovery Violations Have Made Evidence-Gathering A Shell Game*, Pittsburgh Post-Gazette, November 24, 1998, at A-1; Goldberg, *Your Clients' Brady-Giglio Rights Are Not Protected*, 22 Champion 41 (September/October 1998).

⁷³ See D. Mass. L.R. 116.1-117.1, *infra*, Appendix B. The rules require the government to provide not only all materials required by Fed. R. Crim. P. 16, but also the fruits yielded from any search warrants, electronic surveillance, and investigative identification procedures, as well as the names of all unindicted co-conspirators. See *id.* at 116.1(C).

⁷⁴ *Id.* at 116.2.

⁷⁵ *Id.*

discovery obligations, to obtain from such law enforcement agencies any information they have which would be subject to disclosure, and to require participating law enforcement agencies to preserve their "notes" and other relevant documents.⁷⁶ Finally, Massachusetts Local Rule 1.3 provides that failure to comply with any obligation or direction set forth by the rules of the district may result in dismissal.⁷⁷

III. FEDERAL PLEA PRACTICE

A. Federal Rule of Criminal Procedure 11(e) Does Not Address Let Alone Require Disclosure of Favorable Information

The vast majority of federal criminal cases are resolved by pleas of guilty under Fed. R. Crim. P. 11. Plea agreements are governed by the law of contracts.⁷⁸ Most pleas are negotiated and involve bargained for consideration. The parties - the United States and the defendant(s) - may bargain for particular charges, sentences, sentencing ranges or the application of USSG guidelines, policies, factors or provisions.

Federal Rule of Criminal Procedure 11(e) governs the conduct of the government and the defendant during plea negotiations. Rule 11⁷⁹ establishes guidelines to ensure that a guilty plea is made knowingly and voluntarily.⁸⁰ Before accepting a plea of guilty, a court must address the defendant personally in open court and inform the defendant that he has a right to plead not guilty, the right to be tried by a jury and at that trial he has the right to assistance of counsel, the right to confront and cross examine adverse witnesses and the right against compelled self-incrimination.⁸¹ A waiver of an important constitutional or statutory right must be known and voluntary to be valid,⁸² but Rule 11 does not require the court to specify each and every constitutional right that the defendant waives by pleading guilty.⁸³

A defendant who acknowledges his plea is knowingly and voluntarily entered at his plea hearing must overcome a strong presumption of voluntariness when he subsequently seeks to challenge that plea.⁸⁴ A plea entered into without the benefit of *Brady* information is inherently suspect in this regard. Without *Brady* information, the defendant and counsel may not

⁷⁶ *Id.* at 116.8, 116.9. Massachusetts's local rules promote enforcement by requiring the magistrate and presiding judges to hold at least three pre-trial conferences designed to effect compliance with the local rules.

⁷⁷ D. Mass. L.R. 1.3.

⁷⁸ See *Santobello v. New York*, 404 U.S. 257, 262 (1971).

⁷⁹ Fed. R. Crim. P. 11(e) is reprinted in its entirety as Appendix C.

⁸⁰ Fed. R. Crim. P. 11(c)-(d).

⁸¹ Fed. R. Crim. P. 11(c)(3).

⁸² See *United States v. Mezzanatto*, 513 U.S. 196 (1995).

⁸³ Fed. R. Crim. P. (c)(4). See, e.g., *Brady v. United States*, 357 U.S. 742, 748 (1970) (waiver of the constitutional rights to a trial and to remain silent); *McMann v. Richardson*, 397 U.S. 759, 766 (1970) (waiver of the right to contest the admissibility of evidence the government may have offered against the defendant).

⁸⁴ *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

be able to make informed decisions about whether and when to plead guilty. The common argument that a defendant knows whether he is guilty and whether there is mitigating evidence is simply not true in many cases.⁸⁵ A defendant may not know all the elements of an offense or understand that certain evidence known only to the prosecutor may negate an essential element. Further, a defendant may not know of facts that establish a legal defense and without disclosure a defendant's counsel may not become aware of facts that establish a legal defense.⁸⁶ A defendant with limited mental faculties or a significantly reduced mental capacity may not be able to fully communicate with counsel or appreciate the importance of facts critical to the defendant's guilt or innocence.

The federal circuits are split on whether *Brady* applies to plea negotiations. The Fifth⁸⁷ and Eighth⁸⁸ circuits have held that defendants waive their rights to *Brady* material in pleading. However, the Second,⁸⁹ Sixth,⁹⁰ Ninth⁹¹ and Tenth⁹² circuits have held that *Brady* does apply to guilty pleas. The Ninth Circuit in *Sanchez*, taking the strongest position, has concluded that a plea "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."⁹³

B. Federal Plea Agreement Policies Which Require the Defendant to Waive the Right to *Brady* Material Undermine the Due Process Goal of Ensuring a Fair Sentencing Process

A closely related question is whether a defendant can waive his right to receive *Brady* information. Some United States Attorneys Offices, notably the Southern and Northern District of California, have expressly incorporated into plea agreements a *Brady* waiver. A representative sample states:

The defendant understands that discovery may have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendants agree to waive his right to receive additional

⁸⁵ Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery Waivers"*, 51 Stan. L. Rev. 567 (1999).

⁸⁶ *Id.*

⁸⁷ *Matthew v. Johnson*, 201 F.2d 363 (5th Cir. 2000).

⁸⁸ *Smith v. United States*, 876 F.2d 655 (8th Cir. 1989).

⁸⁹ *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988).

⁹⁰ *Campbell v. Marshall*, 769 F.2d 313 (6th Cir. 1985), *cert. denied* 475 U.S. 1058 (1986).

⁹¹ *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995).

⁹² *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994).

⁹³ 50 F.3d at 1453 (emphasis added).

discovery which may include, among other things, evidence tending to impeach the credibility of potential witnesses.⁹⁴

In *United States v. Ruiz* the Supreme Court held that the Constitution does not require the government to disclose material impeachment evidence to a defendant prior to entering a plea agreement.⁹⁵ In *Ruiz*, the defendant rejected a plea offer from the U.S. Attorney's Office in the Southern District of California which required her to waive her rights to *Brady* material in exchange for a downward departure at sentencing.⁹⁶ The trial court refused to grant the departure following her subsequent guilty plea made without a plea agreement.⁹⁷

The Ninth Circuit in *Ruiz* had found that plea agreements and any waiver of *Brady* rights contained therein "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."⁹⁸ In reversing the Ninth Circuit, the Supreme Court focused on impeachment evidence rather than exculpatory or mitigating evidence. It pointed out that in *Ruiz's* proposed plea agreement, the government had agreed to provide "any information establishing the factual innocence of the defendant."⁹⁹

The difficulty with a complete *Brady* waiver is that a defendant cannot knowingly waive something that has not been made known to him and that may exclusively be in the possession of the government. The Supreme Court has made clear that there must be an "intentional relinquishment or abandonment of a known right or privilege."¹⁰⁰ When a plea is made without the knowledge of all its direct consequences, it may not stand.¹⁰¹

In an analogous situation to the waiver of *Brady* material, many federal prosecutors have insisted that defendants also waive the right to appeal a sentence as part of a plea agreement even though a sentence has yet to be imposed. In this context, a District of Columbia district court held that "a defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant had no knowledge as to what will occur at the time of sentencing."¹⁰²

⁹⁴ Banoun, *Preface: The Year in Review*, reprinted in *White Collar Crime 2000*, at x (ABA 2000) (quoting San Francisco U.S. Attorney's Office plea agreement provision).

⁹⁵ 122 S. Ct. 2450 (June 24, 2002).

⁹⁶ 241 F.3d 1157, 1160-61 (9th Cir. 2001).

⁹⁷ *Id.* at 1161.

⁹⁸ *Id.* at 1164 (quoting *Sanchez*, 50 F.3d at 1453).

⁹⁹ *Id.* at 2451-2452.

¹⁰⁰ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹⁰¹ *Brady v. United States*, 397 U.S. 742 (1970).

¹⁰² *United States v. Raynor*, 989 F. Supp. 43 (D.D.C. 1998). *But see United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990) (permitting waiver of sentence appeals).

In sum, the bargaining leverage of the United States in plea negotiations is enormous. The government drafts the plea agreement, usually dictates the factual basis for the plea and often pronounces *de facto* office plea policies, e.g., that the defendant must waive his right to all *Brady* material or his right to appeal a sentence. There is no compelling reason to ignore or make a defendant waive his constitutional right to information favorable to guilt or sentencing. Indeed, any policy that discourages disclosure of exculpatory material may well encourage prosecutors to elicit guilty pleas improperly.¹⁰³

IV. BRADY V. MARYLAND AND FEDERAL SENTENCING

Even though *Brady v. Maryland* explicitly requires disclosure of favorable information relevant to punishment, prosecutors frequently focus only on favorable information relevant to the guilt or trial phase and view a defendant's decision to plead as extinguishing the right to favorable evidence.¹⁰⁴ Ironically, *Brady* involved a situation in which favorable evidence as to punishment and not guilt was at issue. Disclosure of favorable evidence as to punishment is arguably even more critical today as a result of the United States Sentencing Guidelines.

A comprehensive review of the United States Sentencing Guidelines' structure and methodology is beyond the purpose and scope of this report. However, there is no doubt that federal prosecutors wield enormous influence in determining what sentence a convicted defendant receives under the Guidelines. In particular, government attorneys at the outset calculate the offense level which is designed to "measure the seriousness of the crime."¹⁰⁵ They routinely formulate the specific offense characteristics such as an offense involving sophisticated means¹⁰⁶ or a loss exceeding certain dollar levels¹⁰⁷ that can significantly increase the defendant's period of incarceration. They frequently argue that for offenses committed by more than one participant, the court should consider the defendant's aggravating¹⁰⁸ or mitigating¹⁰⁹ role in the offense. In each of these instances, government attorneys may have access to, and in some cases the only access to, favorable information that diminishes the defendant's culpability or lowers the offense level under the Guidelines.

For example, witnesses may differ in describing the role of a defendant as a manager, supervisor, organizer or leader¹¹⁰ - designations that can greatly affect the ultimate sentence. Similarly, government witnesses may dispute whether the loss claimed by the United

¹⁰³ *Sanchez*, 50 F.3d at 1453.

¹⁰⁴ Joy & McMunigal, *Disclosing Exculpatory Material in Plea Negotiations*, 15 FALL Crim. Just. 41 (2001).

¹⁰⁵ Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutor Indiscipline*, 29 Stetson L. Rev. 79 (1999).

¹⁰⁶ U.S.S.G. § 3B1.1(b)(8)(C).

¹⁰⁷ U.S.S.G. § 2B1.1(b)(1).

¹⁰⁸ U.S.S.G. § 3B1.1.

¹⁰⁹ U.S.S.G. § 3B1.2.

¹¹⁰ U.S.S.G. § 3B1.1.

States was "reasonably foreseeable pecuniary harm,"¹¹¹ and the final calculation of the actual losses in fraud cases similarly affects a sentence.¹¹² Because witnesses who have provided exculpatory evidence to the government are less likely to make themselves available to the defendant or his counsel, there is a serious risk that absent disclosure by the prosecution, the defense may never learn of material exculpatory evidence that would mitigate the offense or reduce the punishment.

Timely disclosure of favorable information can not only diminish the degree of the defendant's culpability or Offense Level under the Guidelines, its receipt or the government's certificate in writing that none exists, can lead to an earlier decision to plead guilty whereby he receives credit for that plea by the court.¹¹³ Thus, when the government denies a defendant *Brady* information at an early stage of the process, it may well deny him the opportunity to prove to the government that a lesser sentence is fair based on evidence in the government's possession and that he is also then entitled to receive significant credit for acceptance of responsibility in timely pleading to the offense.

V. PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16 AND OFFICIAL COMMENTARY

A. Proposed Amendment to Rule 16

Fed. R. Crim. P. 16(f)

(f) Information Favorable to the Defendant as to Guilt or Punishment.

(1) Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing all information favorable to the defendant which is known to the attorney(s) for the government or to any government agent(s), law enforcement officers or others who have acted as investigators from any federal, state or local agencies who have participated in either the investigation or prosecution of the events underlying the crimes charged. Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: a) exculpate the defendant; b) adversely impact the credibility of government witnesses or evidence; c) mitigate the offense; or d) mitigate punishment.

(2) The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant within the files or knowledge of the government; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

¹¹¹ U.S.S.G. § 3B1.1, Commentary 2.

¹¹² U.S.S.G. §2B1.1(B)(1).

¹¹³ See U.S.S.G. § 3E1.1 (Acceptance of Responsibility).

Official Commentary

This amendment is intended to codify and clarify the prosecutor's obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and *Kyles v. Whitley*, 514 U.S. 419 (1995). These Supreme Court precedents and others require the prosecutor to provide to the defense not only directly exculpatory evidence (*Brady*) but also evidence impeaching the credibility of the Government's witnesses (*Giglio*); not only evidence specifically requested by the defense (*Brady*) but also that which is not requested (*Agurs*); not only evidence relevant to guilt or innocence (*Giglio*) but also evidence relevant to sentencing (*Brady*); and not only evidence known to the prosecutor (*United States v. Bagley*, 473 U.S. 667 (1985)) but also evidence known to agents of law enforcement (*Kyles*). Proposed Rule 16(f) creates a necessary analytical and procedural framework for the prosecution to carry out its constitutional responsibilities.

Examples of favorable information include but are not limited to: promises of immunity (*see, e.g., United States v. Butler*, 567 F.2d 885 (9th Cir. 1978)); prior criminal records (*see, e.g., United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) and *United States v. Owens*, 933 F. Supp. 76, 87-88 (D. Mass. 1996)); prior inconsistent statements of government witnesses (*see, e.g., United States v. Payne*, 63 F.3d 1200, 1210 (2d Cir. 1995)); *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1975)); information about mental or physical impairment of government witnesses (*see, e.g., United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995)); inconsistent or contradictory scientific tests (*see, e.g., United States v. Fairman*, 769 F.2d 386 (7th Cir. 1985)); pending charges against witnesses (*see, e.g., United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999)); monetary inducements (*see, e.g., United States v. Mejia*, 82 F. 3d 1032, 1036 (11th Cir. 1996); *United States v. Fenech*, 943 F. Supp. 480, 486-87 (E.D. Pa. 1996)); bias (*see, e.g., United States v. Schledwitz*, 169 F.3d 1003 (6th Cir. 1999)); proffers of witnesses and documents relating to negotiation process with the government (*see, e.g., United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1203 (C.D. Ca. 1999)); and the government's failure to institute civil proceedings against key witnesses (*see, e.g., United States v. Shaffer*, 789 F.2d 682, 690-91 (9th Cir. 1986)).

Despite the fact that *Brady v. Maryland* recognized the prosecutor's duty to disclose evidence favorable to the defense in 1963, the decades since then have seen repeated instances of prosecutors overlooking or ignoring this obligation. *See, e.g., Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001) (granting habeas petition after state failed to produce evidence impeaching the victim's identification, statements of other eyewitnesses, and reports regarding other possible suspects); *United States v. Perdomo*, 929 F.2d 967 (3d Cir. 1991) (overturning appellant's cocaine possession conviction because prior criminal record of prosecution witness was not turned over to the defense); *United States v. Pelullo*, 105 F.3d 117 (3d Cir. 1997) (reversing denial of collateral relief from wire fraud and RICO convictions upon showing that the government had withheld evidence of prior inconsistent statements by a key witness, there were changes to FBI incident reports, and contradictions existed regarding the appellant's attendance at a

particular meeting); *Spicer v. Roxbury*, 194 F.3d 547 (4th Cir. 1999) (upholding petition for writ of habeas corpus because state failed to turn over evidence of conflicting statements by main prosecution witness); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealment of coerced testimony of key witness); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (granting petition for writ of habeas corpus when petitioner showed that the prosecution failed to turn over a report indicating that a key witness could not positively identify the petitioner as the shooter in a murder case); *Carriger v. Stewart*, 132 F.3d 463, 479-482 (9th Cir. 1997) (reversing conviction where prosecution failed to disclose witness's prior criminal history); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (overturning drug trafficking convictions for government's *Brady* violation in not turning over a law enforcement official's report that raised serious doubts regarding the truthfulness of the prosecution's key witness); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (prosecution's failure to disclose immunity to key witness); and *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999) (overturning conviction for misuse of banking funds because of the failure to disclose prosecutorial intimidation of witnesses).

The proposed Rule 16(f) requires the prosecutor to turn over all information favorable to the defendant within 14 days of the date the defendant requests it. Timely disclosure of favorable information to the defense is essential to meaningful compliance with *Brady*. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (1984). It is anticipated that, like many other discovery deadlines, this one can be extended by agreement of the parties, and if necessary, the government may apply to the court for a protective order, under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time. The proposed rule requires a request from the defense in order to trigger the 14-day time frame, but the rule is not intended to obviate the prosecution's obligation to provide information favorable to the defense even in the absence of a defense request, *United States v. Agurs, supra*.

The drafters anticipate that before or at the time of guilty pleas, government attorneys will furnish to the defense favorable information that mitigates the offense or punishment. As a result of the promulgation of the United States Sentencing Guidelines and the increased importance of even minor facts that can affect punishment by diminishing the degree of a defendant's culpability or Offense Level, the drafters believe that timely production of *Brady* information in the sentencing context is far more significant and critical today than ever before.

Proposed Rule 16(f) requires government attorney(s) to turn over "all information, in any form, whether or not admissible . . ." The rule thus contemplates disclosure of not only written documents but also of tape recordings, computer data, electronic communications, and oral information acquired through interviews or any other means. The proposed rule does not burden the government with the responsibility of assessing whether information is likely admissible.

The proposed Rule 16(f) contains no requirement that the information be "material" to the defense. The drafters believe that the Rule's definition of "Information favorable to the defendant" is sufficiently clear to guide the government attorneys at the pre-trial stage. A materiality standard is only appropriate in the context of an appellate review since determinations of materiality are best made in light of all the evidence addressed at trial. A materiality analysis cannot realistically be applied by a trial court facing a pre-trial discovery request. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Sudikoff*, 39 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999). In cases where a failure to disclose favorable information is uncovered after the trial or sentencing, of course, the reviewing court will presumably employ concepts of materiality in determining the degree of prejudice, if any, suffered by the defense as a result of the government's failure.

Proposed Rule 16(f)'s requirement of a written disclosure and certification by the government attorney is, the drafters believe, critical to its operation. It is anticipated that government attorneys will describe the disclosures being made in sufficient detail to permit the defense to investigate the information. Likewise, the government's certification should specifically confirm that the attorney signing it has exercised due diligence in locating and attempting to locate all information favorable to the defendant within the files or knowledge of the government. There is due diligence precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant; Rule 16(a)(1)(B), Defendant's Prior Record, and Rule 16(a)(1)(D), Reports of Examinations and Tests.

It may be prudent for the government to maintain a record of the manner in which this due diligence inquiry was conducted so as to facilitate its response in any post-trial proceedings, but the Rule does not require this nor does it require the government to turn any such record over to the defense at the time of the certification. The drafters anticipate that in the event any government agency refuses to respond to a request from the prosecutor for information favorable to the defendant, the prosecutor's certification will identify the refusing agency and official so as to permit the defense to investigate and, if necessary, seek redress from the court.

The proposed rule contains no separate provision for sanctions for intentional violations or inadvertent noncompliance. The drafters anticipate that the full range of remedial and punitive sanctions, ranging from a trial or sentencing continuance to dismissal of the indictment, is already available to the court under Rule 16(d)(2) as is the Court's general supervisory power to craft a remedy or punishment appropriate to the circumstances. Few courts have dismissed criminal charges as a result of *Brady* violations. *See, e.g., United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). The drafters believe that the far more common remedy of a new trial for *Brady* violations has in many instances proven impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government of a retrial is under most circumstances inconsequential. Second, the remedy of a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.

* * *

1. **Discussion**

a. **Definition of Favorable Evidence**

Proposed Language:

Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate punishment.

Without a clear definition of what constitutes *Brady* material, prosecutors have exercised a hodgepodge of judgments about the nature and extent of favorable information to be disclosed to defendants.¹¹⁴ A clear definition of favorable information will help eliminate disparate interpretations of the *Brady* obligation by both prosecutors and defense counsel and give prosecutors clear guidance, thereby promoting equal treatment of similarly situated defendants under the law.

The definition clarifies the nature and scope of favorable information by providing that favorable information includes evidence or information, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate the punishment. The first category addresses classic *Brady* or exculpatory evidence. The second category makes clear that *Giglio* or impeachment material must also be produced. Categories three and four are intended to cover the disclosure of evidence favorable to punishment or sentencing. This definition makes clear that the admissibility and nature or form of the information, i.e., written, oral or electronic, is irrelevant in the determination of both its exculpatory nature and disclosability.

There may be instances where fairness requires that the defense make specific *Brady* requests for information from the government. Such requests must be sufficiently clear and directed to give reasonable notice about what is sought and why the information may be material to the case.¹¹⁵ Absent specific defense requests the government may, notwithstanding the proposed definition, be able to fully respond to *Brady* requests and provide responsive material.

¹¹⁴ Section II.A., *infra*.

¹¹⁵ *United States v McVeigh*, 954 F. Supp. 1441, 1451 (D. Colo. 1997).

b. Timing of Disclosure

Proposed Language:

Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing and provide all information favorable to the defendant.

Absent local rules with a *Brady* disclosure timetable, there is no uniformity as to when federal defendants receive exculpatory information as to guilty or punishment. The Judicial Members of the District of Massachusetts Committee that recommended the local criminal rule changes observed that "cases too often go to trial without legally required discovery having been provided."¹¹⁶ Almost invariably *Brady* material is disclosed well after the explicit Rule 16 obligations have been satisfied by the government. A major criticism of the current federal discovery practice is that prosecutors too often disclose favorable information at a stage well after it can benefit the defense. Unfortunately, the case law has left the prosecution and defense with little precise timing guidance.

In *United States v. Copp*,¹¹⁷ the Second Circuit recently addressed whether as a general rule due process of law requires that the government, disclose all exculpatory and impeachment material immediately upon demand by a defendant. In reversing a district judge's order to immediately supply this material to the defendants, the Second Circuit noted that as long as a defendant possesses *Brady* evidence in time for its effective use at trial or at a plea proceeding, the government has not deprived the defendant of due process of law.¹¹⁸ *Copp* granted the government's mandamus petition and remanded the cause to "afford the District Court an opportunity to determine what disclosure order, if any, it deems appropriate as a matter of case management."¹¹⁹

Because disclosure of favorable information affects a defendant's plea decisions, trial strategy, and sentencing, it is critical to the fair administration of justice that this discovery take place as early as practicable in the criminal process. There is no discernible benefit to fair-minded prosecutors in delaying the disclosure of constitutionally-mandated favorable information. To the extent the government has favorable evidence and is required to timely disclose it, the disclosure may affect the government's charging decision and properly lessen its sentencing position. This in turn may cause the defendant and counsel to compromise, to plead and to receive the benefit of acceptance of responsibility under the Guidelines.¹²⁰ Thus, prompt disclosure may well foster an earlier exchange of favorable information and guilty plea decisions. Furthermore, a criminal justice system with a *Brady* definition, a due diligence

¹¹⁶ *Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the U.S. District Court in the District of Massachusetts Concerning Criminal Cases*, at 8 (October 28, 1998).

¹¹⁷ 267 F.3d 132 (2d Cir. 2001).

¹¹⁸ *Id.* at 144.

¹¹⁹ *Id.* at 146.

¹²⁰ U.S.S.G. § 3E1.1 (acceptance of responsibility).

requirement, a disclosure timetable and clear sanctions may promote a system that parties have confidence in both the rule's compliance and effective sanctions. Under that system defendants and counsel, who timely have received the required disclosure or have been assured in writing that the United States possesses no exculpatory information, are more likely to reach plea decisions earlier and lessen the congestion of the trial dockets.

While timely disclosure of favorable information is mandated and essential to the defense in all cases, it is of particular importance in complex federal prosecutions where defendants and their counsel can be forced to trial with comparatively inadequate time to prepare. Federal authorities often investigate complex cases for years. The Speedy Trial Act of 1974¹²¹ requires that a trial must begin within seventy days of an indictment or initial appearance. While defense requests for continuances are frequently granted to meet "the ends of justice,"¹²² pre-trial defense preparation time is often limited. The United States will in most cases still have had at least twice as long a time to prepare for trial as the defendant. The government usually also has far more investigative resources. Fourteen days following a defense request is not an unreasonable period of time for the government to disclose in writing favorable evidence as to guilt or punishment. By the time of indictment, the government has concluded most of its investigation and is in a position to disclose any information known to be exculpatory or mitigating for the defendant. It will be thereafter under a continuing obligation to disclose additional evidence or material subject to discovery under the rule.¹²³

c. **Due Diligence**

Proposed Language:

The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

This due diligence requirement ensures that government attorneys will fully consult with law enforcement agents by the time of indictment about potential favorable information and that the former will address not only federal agents, but law enforcement officers or joint federal-state local investigators about the nature and scope of the information required to be turned over. Several decisions have upheld the duty of the prosecution to consult

¹²¹ 18 U.S.C. §§ 3151-3174 (2000).

¹²² *Id.* § 3151(h)(8)(A).

¹²³ Fed. R. Crim. P. 16(c)

with the appropriate law enforcement personnel or agency¹²⁴ as simply determined that the prosecution includes law enforcement officers¹²⁵

The due diligence language requires that government attorneys exercise due diligence in locating all favorable information. The language is intended to avoid *Kyles*-type situations where favorable evidence is known to law enforcement officers, but not to the prosecutor. The due diligence language finds precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant; Rule 16(a)(1)(B), Defendant's Prior Record; and Rule 16(a)(1)(D), Reports of Examinations and Tests.

The certification requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post-sentencing litigation about what may have been orally communicated. As important, this requirement conveys to the government attorney the importance of accuracy, consultation and prompt disclosure. This requirement too has precedent in Rule 16(e) Expert Witnesses which requires both parties to provide a written summary of testimony they intend to use.

Finally, the due diligence provision does not mandate an "open file" by the government, as favored by some commentators.¹²⁶ Open file cases do not cure *Brady-Giglio* problems,¹²⁷ and in particular, do not compel prosecutors to consult with law enforcement agents about the nature or existence of information favorable to the accused¹²⁸ or to disclose in writing favorable evidence that has not been memorialized. The provision does not impose upon the court the burden of reviewing government files for favorable information, as recommended by other legal commentators.¹²⁹ While such a review might be ideal, courts have neither the time nor the resources for such reviews, and they cannot be expected at the pre-trial stage to be familiar enough with the case or likely trial issues to appreciate which information is favorable.¹³⁰

d. Sanctions

In addressing failures to comply with discovery requests, Fed. R. Crim. P. 16 (d)(2) provides that the court may order a party to permit the discovery or inspection, grant a

¹²⁴ See, e.g., *Kyles*, 527 U.S. at 266; *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995).

¹²⁵ *United States v. Boyd*, 833 F. Supp. 1277, 1357 (N.D. Ill. 1993), *aff'd* 55 F.3d 239 (7th Cir. 1995); see also *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

¹²⁶ See Bass, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 113 (1972).

¹²⁷ See, e.g., *United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.C. Cir. 1998) (stating that "open file discovery does not relieve the government of its *Brady* obligations by claiming [the defendant] had access to 600,000 documents and should have been able to find the exculpatory information in the haystack").

¹²⁸ See *Strickler*, 527 U.S. 263.

¹²⁹ See, e.g., Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391 (Dec. 1984).

¹³⁰ *McVeigh*, 954 F. Supp at 1451.

continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. Few courts have dismissed indictments as a remedy for the government's failure to disclose exculpatory information.¹³¹ At present prosecutorial misconduct must not only be flagrant, but must prejudice the defendant such that he does not receive a fair trial, or be intended to abort the trial to result in a dismissal.¹³² Some circuits do not even permit dismissal of an indictment for a *Brady* violation.¹³³ The less drastic and far more common remedy for a *Brady* violation is the granting of a new trial.¹³⁴ This remedy has been impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government is under most circumstances inconsequential. Second, a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.¹³⁵ For these reasons, the Official Commentary to Rule 16(f) urges courts to consider dismissal of an indictment for failure to comply with Rule 16 upon a showing of substantial prejudice to the defendant or intentional misconduct by the government.

e. **Regulation of Discovery.**

Rule 16(d) will continue to provide that a party may under a sufficient showing demonstrate that particular discovery or inspection should be denied, restricted or deferred. The government may still seek a protective or modifying order if it can establish that disclosure of exculpatory information within the time contemplated by the amendment will create an unacceptable risk of facilitating obstruction of justice or of discouraging the testimony of witnesses.

¹³¹ *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). See generally, *United States v. Carter*, 1 Fed. Appx. 716, 2001 WL 32068 (9th Cir. Jan. 12, 2001) (unpublished); *United States v. Manthei*, 979 F.2d 124, 126-27 (8th Cir. 1992); *United States v. Osorio*, 929 F.2d 753, 763 (1st Cir. 1991); *United States v. Campagnuolo*, 592 F.2d 852, 865 (5th Cir. 1979), discussing the requirements for a defendant to obtain a dismissal of the indictment for a *Brady* violation. Cf. *Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (vacating a denaturalization and extradition order because the government failed to disclose *Brady* information).

¹³² *United States v. Vozzella*, 124 F.3d 389 (2d Cir. 1997); *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993); *United States v. McLaughlin*, 89 F. Supp. 2d 617 (E.D. Pa. 2000) (failure to disclose witness' exculpatory grand jury testimony necessitated new trial); *United States v. Patrick*, 985 F. Supp. 543 (E.D. Pa. 1997).

¹³³ See, e.g., *United States v. Davis*, 578 F.2d 277, 279-80 (10th Cir. 1978) ("[A] violation of due process under *Brady*, does not entitle a defendant to an acquittal, but only to a new trial in which the convicted defendant has access to the wrongfully withheld evidence.").

¹³⁴ See *United States v. Blueford*, No. 00-10210, 2002 WL 193023 (9th Cir. Feb. 8, 2002); *United States v. Service Deli, Inc.*, 151 F.3d 938 (9th Cir. 1998); *United States v. Arnold*, 117 F. 3d 1308 (11th Cir. 1997); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995); *United States v. Peterson*, 116 F. Supp. 2d 366 (N.D.N.Y. 2000); *United States v. McLaughlin*, 89 F. Supp. 2d (E.D. Pa. 2000).

¹³⁵ *United States v. Pevelo*, 881 F.2d 844 (10th Cir. 1989) (pattern of United States attorneys not providing exculpatory evidence until very late only warranted two week continuance).

B. Proposed Amendment to Rule 11

Fed. R. Crim. P. 11(e)(7)

(7) Disclosure of Favorable Evidence

The attorney for the government shall disclose in writing to the defendant all exculpatory and mitigating information as provided in Rule 16(f) fourteen days before the defendant enters a plea of guilty or nolo contendere to a charged offense.

Official Commentary

This amendment is intended to ensure that a party intent on pleading guilty timely receives favorable information. The emphasis on *Brady* material by the government is too often focused on the guilt aspect rather than the sentencing impact of mitigating evidence. Since over ninety percent of all federal criminal cases are resolved by plea dispositions, it is essential that prosecutors not only provide information that can significantly affect punishment but also that they do so in time to make the information meaningful at sentencing. Belated disclosure or inadvertent nondisclosure of mitigating evidence undermines the fairness essential to the sentencing process. This proposed amendment reduces the likelihood that favorable evidence will not be disclosed or disclosed too late.

1. Discussion

a. Purpose and Cross Reference

This amendment is designed to ensure that favorable information is made known to the defendant during the plea negotiation process and to the court in the sentencing process. Rather than restate the five-part definition of favorable information, the due diligence obligation and the available sanctions, Rule 11(e)(7) cross references Fed. R. Crim. P. 16(f). The Rule 11(e)(7) amendment is also designed to avoid plea agreements where the United States requires a defendant to waive his right to exculpatory information without knowing what that information is.

b. Timing of Disclosure

Fourteen days is a reasonable period for the government to disclose in writing information favorable to the defendant on either guilt or punishment. As a practical matter, the majority of criminal cases have been investigated by the time of indictment. To the extent that investigation is ongoing, the government is required to only disclose favorable information to the defendant then known through the exercise of due diligence. Any subsequent discovery of additional favorable evidence or material can be later disclosed to the defendant.

Furthermore, to the extent some districts have in place "fast track" programs,¹³⁶ there is nothing in Rule 11(e)(7)'s language that prevents the government from providing favorable information to the defendant before an indictment. Thus, the government may still comply with this rule and enable the defendant to plead guilty at the initial arraignment and plea and receive credit under a fast track program. As with the companion Fed. R. Crim. P. 16(f) amendment, the writing requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post sentencing litigation about what may have been orally communicated.

c. Sanctions

A guilty plea can be set aside in limited circumstances if a defendant can establish prejudice from prosecutorial misconduct.¹³⁷ Normally, the withheld information must be material to the prosecution of the defendant.¹³⁸ The proposed Rule 11(e)(7) is silent with respect to sanctions but does cross reference proposed Rule 16(f) which provides for a variety of sanctions, including dismissal.

In most instances the appropriate remedy for non-disclosure of information that reduces punishment will be resentencing. While the Guidelines have a basic objective of enhancing the ability of the criminal justice system to combat crime through an effective, fair sentencing system,¹³⁹ they do not at present directly provide a remedy to a defendant who has not been provided mitigating evidence under *Brady v. Maryland*. The only remedy available to federal prisoners who have been deprived of *Brady* evidence favorable to sentencing is a motion under 28 U.S.C. §2255 alleging an error that involves "a fundamental defect which results in a complete miscarriage of justice."¹⁴⁰

CONCLUSION

The American College of Trial Lawyers respectfully recommends that the Judicial Conference of the United States Committee on Rules of Practice and Procedure amend Federal Rules of Criminal Procedure 11 and 16 to codify *Brady* and its progeny. The proposed amendments will ensure the timely, fair and consistent application of *Brady v. Maryland* and will aid Federal Courts in the sound administration of justice.

¹³⁶ See *Ruiz*, 241 F.2d at 1160-61 ("fast track" programs are designed to minimize the expenditure of government resources and expedite the processing of more routine cases).

¹³⁷ See, e.g., *Banks v. United States*, 920 F. Supp. 688 (E.D. Va. 1996)

¹³⁸ *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *United States v. Kates*, 174 F.3d 580, 583 (5th Cir. 1999).

¹³⁹ U.S.S.G. Ch. 1, Part A - Introduction at 2.

¹⁴⁰ *Davis v. United States*, 417 U.S. 333, 346 (1974).

APPENDICES

A. Federal Rule of Criminal Procedures 16

Rule 16. Discovery and Inspection

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) The Defendant's Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which

the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

B. Federal Rule of Criminal Procedure 11(e)

(e) Plea Agreement Procedure.

(1) **In General.** The attorney for the government and the attorney for the defendant - or the defendant when acting pro se -- may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussion, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

C. District of Massachusetts Local Rules 116.02 and 1.3

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) **Definition.** Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;

(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;

(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its, case-in-chief; or

(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) **Timing of Disclosure by the Government.** Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

(1) *Within the time period designated in L.R. 116.1(C)(1):*

(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. 5 3731.

(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

(2) *Not later than twenty-one (21) days before the trial date established by the judge who will preside:*

(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its 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.

RULE 1.3 SANCTIONS

Failure to comply with any of the directions or obligations set forth herein or obligations set forth herein, or authorized by, these Local Rules may result in dismissal, default or the imposition of other sanctions as deemed appropriate by the judicial officer.

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TREATMENT OF *BRADY* v. *MARYLAND* MATERIAL

FEDERAL JUDICIAL CENTER REPORT
OCTOBER 2004

Treatment of *Brady v. Maryland* Material
in United States District and State Courts'
Rules, Orders, and Policies

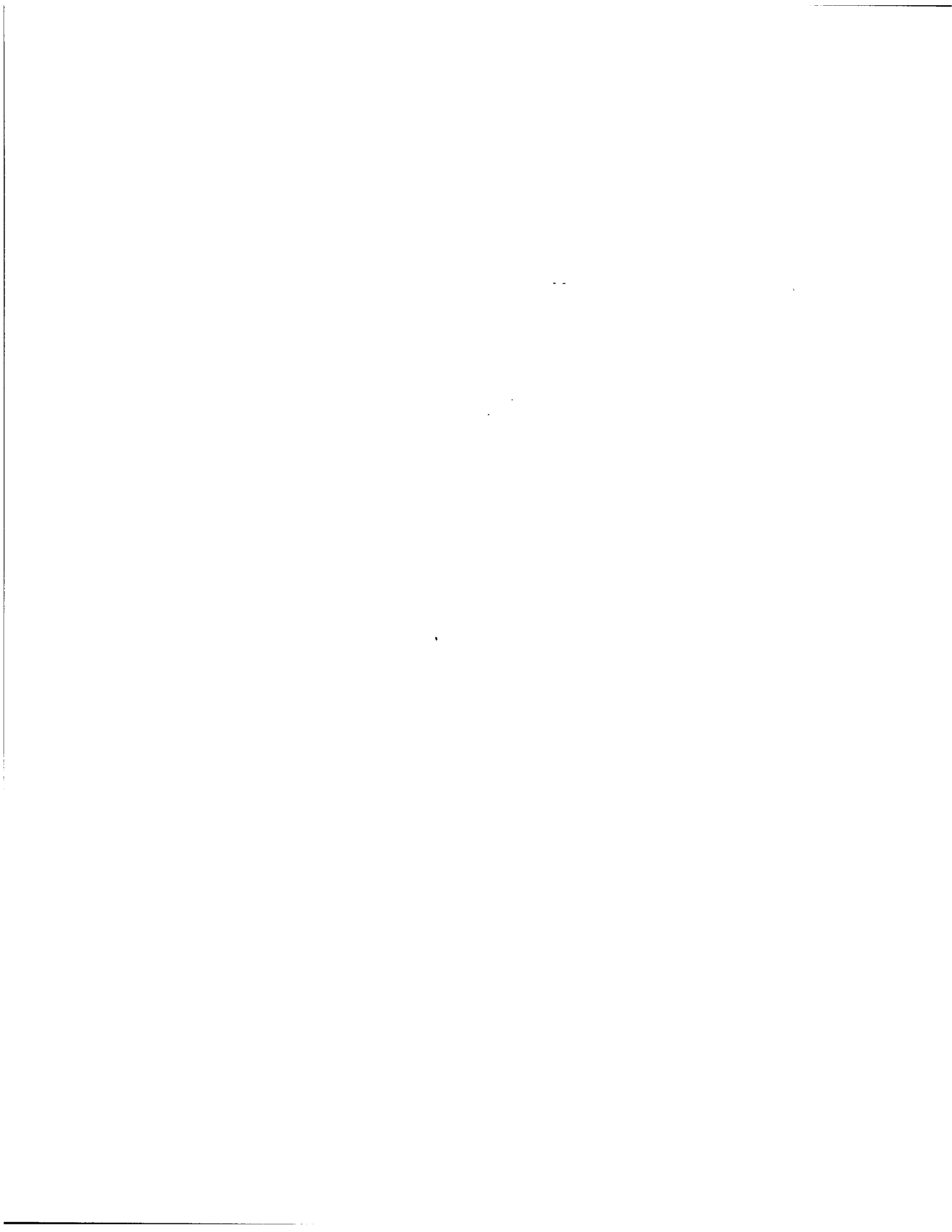
Report to the Advisory Committee on
Criminal Rules of the Judicial Conference
of the United States

Laural L. Hooper, Jennifer E. Marsh, and Brian Yeh
Federal Judicial Center
October 2004

This report was undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

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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;

6. See *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.”).

7. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

8. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

9. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

10. *Bagley*, 473 U.S. at 682.

11. *Kyles*, 514 U.S. at 434.

12. *Strickler*, 527 U.S. at 281–82.

13. Fed. R. Crim. P. 16 advisory committee’s note (italics added).

14. *Id.*

- documents and tangible objects within the government’s possession that “are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant”;
- reports of examinations and tests that are material to the preparation of the defense; and
- written summaries of expert testimony that the government intends to use during its case in chief at trial.¹⁵

Rule 16 also imposes on the government a continuing duty to disclose additional evidence or material subject to discovery under the rule, if the government discovers such information prior to or during the trial.¹⁶ Finally, Rule 16 grants the court discretion to issue sanctions or other orders “as are just” in the event the government fails to comply with a discovery request made under the rule.¹⁷

3. *Federal Rule of Criminal Procedure 11*

Federal Rule of Criminal Procedure 11 governs prosecutor and defendant practices during plea negotiations. The Supreme Court has not said whether disclosure of exculpatory evidence is required in the context of plea negotiations; however, in *United States v. Ruiz*, the Court held that the government is not constitutionally required to disclose *impeachment* evidence to a defendant prior to entering a plea agreement.¹⁸ The Court noted that “impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* (‘knowing,’ ‘intelligent,’ and ‘sufficiently aware’).”¹⁹ The Court stated that “[t]he degree of help that impeachment information can provide will depend upon the defendant’s own independent knowledge of the prosecution’s potential case—a matter that the Constitution does not require prosecutors to disclose.”²⁰ Finally, the Court stated that “a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.”²¹

4. *American College of Trial Lawyers’ proposal*

In October 2003, the American College of Trial Lawyers (ACTL) proposed amending Federal Rules of Criminal Procedure 11 and 16 in order to “codify the rule of law first propounded in *Brady v. Maryland*, clarify both the nature and

15. Fed. R. Crim. P. 16(a)(1)(A)–(E).

16. Fed. R. Crim. P. 16(c).

17. Fed. R. Crim. P. 16(d)(2).

18. 536 U.S. 622, 633 (2002).

19. *Id.* at 629 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

20. *Id.* at 630.

21. *Id.* at 631.

scope of favorable information, require the attorney for the government to exercise due diligence in locating information and establish deadlines by which the United States must disclose favorable information.”²²

5. Department of Justice’s response to the ACTL’s proposal

The Department of Justice (DOJ) opposes the ACTL’s proposal to amend Federal Rules of Criminal Procedure 11 and 16. DOJ contends that the government’s *Brady* obligations are “clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule,” and therefore no codification of the *Brady* rule is warranted.²³

B. Summary of Findings

1. Relevant authorities identified in the U.S. district courts

- Thirty of the ninety-four districts reported having a relevant local rule, order, or procedure governing disclosure of *Brady* material. References to *Brady* material are usually in the courts’ local rules but are sometimes in standard or standing orders and joint discovery statements.
- Eighteen of the thirty districts that explicitly reference *Brady* material use the term “favorable to the defendant” in describing evidence subject to the disclosure obligation. Nine other districts refer to *Brady* material as evidence that is exculpatory in nature. One additional district uses neither term, and two other additional districts use both terms in defining *Brady* material.
- Twenty-one of the thirty districts mandate automatic disclosure; five dictate that the government provide such material only upon request of the defendant. One district requires parties to address *Brady* material in a pretrial conference statement, and three are silent on disclosure.
- The thirty districts that reference *Brady* material vary significantly in their timetables for disclosure of the material. The most common time frame is “within 14 days of the arraignment,” followed by “within five days of the arraignment.” Some districts have no specified time requirements for disclosure, using terms such as “as soon as reasonably possible” or “before the trial.”
- In twenty-two of the thirty districts with *Brady*-related provisions, the disclosure obligation is a continuing one, such that if additional evidence is discovered during the trial or after initial disclosure, the defendant must be notified and provided with the new evidence.

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

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 Georgia²⁹ and Northern District of New York³⁰) 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.

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 districts⁴³ 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.

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 disclosure⁴⁵

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-

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 districts⁵⁷ plus one additional district⁵⁸ 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:

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.

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 states⁷⁴ 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 states⁷⁶ 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

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 states⁸⁵ 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;

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

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 states¹⁰⁴ 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

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 Maryland¹¹⁰ and Washington.¹¹¹

3. Disclosure upon request of defendant

Thirty-eight states¹¹² require a defendant to request favorable information, sometimes in writing, before the prosecution's obligation to disclose is triggered.

Ten states¹¹³ 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

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 states¹¹⁶ 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 states¹¹⁹ 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 states¹²⁰ 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

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 states¹³² 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 states¹³⁶ indicate that willful violations of a criminal discovery rule or court order requiring disclosure may subject the prosecution to other sanctions as the court deems appropriate. These sanctions "may include, but

131. Del. Super. Ct. R. 16(c).

132. Colo., Fla., Idaho, Mass., N.M.

133. Fla. R. Crim. P. 3.220(n)(3). *See also* Idaho Crim. R. 16(e) (Certificate of Service).

134. Mass. Crim. P. R. 14(a)(1)(E)(3) (as amended, effective Sept. 7, 2004).

135. Fed. R. Crim. P. 16(d)(2).

136. Ala., Ark., Fla., Haw., Ill., La., Minn., Mo., N.M., Vt., Wash.

are not limited to, contempt proceedings against the attorney . . . as well as the assessment of costs incurred by the opposing party, when appropriate.”¹³⁷

At least one state, Idaho, expressly states that failure to comply with the time prescribed for disclosure “shall be grounds for the imposition of sanctions by the court.”¹³⁸ Other states probably also permit their courts to impose sanctions for failure to meet time requirements, as their rules provide remedies for failure to comply with *any* discovery rules, which can and often do include a time-limits provision.

At least three states¹³⁹ 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 states¹⁴¹ regard dismissal to be too severe a sanction for non-disclosure. 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

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.”).

SUPPLEMENTAL DATA TO
FEDERAL JUDICIAL CENTER REPORT
MARCH 2005



LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JOHN K. RABIEJ
Chief

CLARENCE A. LEE, JR.
Associate Director

WASHINGTON, D.C. 20544

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.

Memorandum to Brady Subcommittee
March 2, 2005
Page Two

- 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.

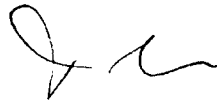
- Table 2. Districts with Time Requirements for Prosecutorial Disclosure of *Brady* Material (Page 12)

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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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*.

A handwritten signature in black ink, appearing to be "JR", written in a cursive style.

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 Georgia²⁹ and Northern District of New York³⁰) 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

charles

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/US
COURTS

08/30/2004 10:40
AM

Lance
Wilson/NVD/09/USCOURTS@USCOURTS

To

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/USC
OURTS

08/30/2004 09:18
AM

Lawrence
Leavitt/NVD/09/USCOURTS@USCOURTS

To

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
vs.) FOR THE PROGRESSION
) 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.;

atomate

*Moving
to
Judge*

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;

*of
plea
in
5 min.*

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, ¶ 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. Agurs*, 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/F
 JC@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*)".

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

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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	Refuse to	Not	Comm
ents		Disclose Upon Receipt	Disclose	Applicable	
	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.

PAUL PETTIGREW
a/k/a PAUL PETTIGREE
a/k/a "BOGRIP",

Defendant(s):

NO.3:04-CR-20(CAR)

Violation(s): Drug Related

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 prosecution 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.

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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*.

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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 contemporaneously 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.



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,

v.

Defendant.

CRIMINAL FILE NO.

1:04-CR-

Magistrate Judge

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.

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]

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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~~
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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 ~~1162~~
MA R USDCT LR ~~1162~~
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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
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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**
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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~~

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Crim. L.R. ~~16-1~~

WEST'S CALIFORNIA LOCAL COURT RULES PAMPHLETS AND WEST'S CALIFORNIA RULES
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CRIMINAL LOCAL RULES

IV. PREPARATION FOR DISPOSITION BY TRIAL OR SETTLEMENT

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(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~~
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Crim. L.R. 17.1-1

WEST'S CALIFORNIA LOCAL COURT RULES PAMPHLETS AND WEST'S CALIFORNIA RULES
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CRIMINAL LOCAL RULES

IV. PREPARATION FOR DISPOSITION BY TRIAL OR SETTLEMENT

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(a) **Time for Pretrial conferences.** 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

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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.

WEST'S ALABAMA RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF
ALABAMA
III. PLEADINGS AND MOTIONS
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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., **ER** 16.13
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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. ~~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

WEST'S VERMONT RULES OF COURT
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT LOCAL RULES OF
PROCEDURE

XII. CRIMINAL RULES

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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.

UNITED STATES DISTRICT COURT

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. 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;

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 404(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 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.
- 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
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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

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Current with amendments received through January 1, 2004

CR 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 in 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 on 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
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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.

Current with Amendments received through February 15, 2004

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WV R USDCTND LR Cr P 16.05

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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 Roviario 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); Roviario 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
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January 1, 2003>

LIBRARY REFERENCES

Criminal Law ↔627.8(2).

Westlaw Key Number Search: 110k627.8(2).

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U.S. Dist. Ct. Rules N.D.W.Va., **LR Cr.P. 16.1**

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.)

RIGHT OF 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. 16.1** 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.

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WV R USDCTND **LR Cr.P. 16.1**

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WEST'S TENNESSEE **RULES** OF COURT
LOCAL **RULES** OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
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LOCAL **RULES** OF COURT

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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**.

(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

10(a)(2)(h)

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
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WEST'S TENNESSEE RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
TENNESSEE

LOCAL RULES OF COURT

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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

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

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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

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
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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 filing 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 to 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

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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
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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
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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

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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) ~~Initial 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 ~~pre-trial 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 ~~pre-trial 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

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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
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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

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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

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WEST'S NEW HAMPSHIRE RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW
HAMPSHIRE
XII. CRIMINAL RULES

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~~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

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~~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~~
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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
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CRIMINAL 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 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 R.R. 16.1(b), discovery must proceed pursuant to Fed.R.Crim.P. 16 and Criminal R.R. 12.1(c).

[Effective January 31, 2001.]

U. S. Dist. Ct. Rules E.D.Wis., Crim CR 16.1
WI R USDCTED Crim CR 16.1
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Terry
Deppner/WVSD/04/USCOUR
TS@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@wvsc.uscourts.gov" <Terry_Deppner@wvsc.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@wvsc.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 assumptions:

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 obligations. 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@wvsc.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 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.

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

ENTERED

NOV 21 2003

TERESA L. DEPPNER, CLERK
U.S. District & Bankruptcy Courts
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, 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

WEST'S RHODE ISLAND **RULES** OF COURT
LOCAL **RULES** OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE
ISLAND

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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 or 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

Arlen Coyle/MSND/05/USCOURTS@USCOURTS, Betty
cc 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
Whitner/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

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
V.S.
ERIC COMPTON

PLAINTIFF
CRIMINAL ACTION NUMBER: 3:04CR-75-H
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, buildings, 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 known, or by the exercise of due diligence may become known, 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 be 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\ KATHERYN D. NIEMANN
DEPUTY CLERK**

Copies: U.S. Attorney
Counsel for Defendant
U.S. Probation
U.S. Marshal

030



MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Rule 29

DATE: September 23, 2005

This amendment responds to the Department of Justice's longstanding concern that erroneous preverdict acquittals should not be immune from appellate review. The issue has a long history that is reviewed here briefly as a preface to consideration of the proposed amendment.

As amended in 1994, Rule 29(b), addresses the concern for unreviewable judgments of acquittal by providing a procedure for the court to reserve its ruling on a motion for judgment of acquittal, submit the case to the jury, and rule on the motion after verdict if the defendant is convicted. A ruling at this point is appealable because the jury's verdict can be reinstated.

In 2003 the Department of Justice asked the Rules Committee to return to this issue because some courts were not reserving judgment, and there was no mechanism for review of erroneous preverdict acquittals. The Department initially proposed an amendment that would require the court to defer its ruling in all cases until after the jury returned a verdict. Subsequent discussion included the option of allowing preverdict rulings if the defendant waived his Double Jeopardy rights. After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule unchanged. The Committee was concerned that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information demonstrated the frequency of preverdict acquittals, and selected case studies showed the serious impact that erroneous and unreviewable preverdict acquittals have had on the administration of justice. Deputy Attorney General Christopher Wray presented the new information at the January 2005 meeting of the Standing Committee and strongly advocated the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. He stated that

the Department would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

On the basis of this presentation, the Standing Committee asked the Advisory Committee to draft an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that it would be necessary to substantially redraft several provisions, and expressed concern that there was little time before the Standing Committee meeting to perfect the language. There was a consensus that if a final version of the proposed rule was not yet available, a draft rule would be presented to the Standing Committee at its June 2005 meeting for informational purposes. A draft rule was presented at the June meeting as an information item.

Judge Bucklew appointed a subcommittee to develop a draft rule and advisory committee note for presentation at the October meeting. The members of the subcommittee are Judge Bucklew, Lucien Campbell, Judge David Trager, Professor Nancy King, and Deborah Rhodes. Professor David Schlueter and I also participated. The subcommittee conferred on several occasions by conference call, and developed the draft amendment and advisory committee note that are attached. Because the changes to subdivisions (a) to (c) were so extensive, I did not show the changes as using underlining and strike outs. Instead, I have provided a clean text of the proposed amendment and rule, followed by a side by side comparison of the proposed amendment and the current rule.

The draft rule requires the court to defer its ruling on a motion for acquittal until the jury returns a verdict unless the defendant waives his Double Jeopardy rights. The amendment makes it clear that the waiver may be made by a single defendant in a multi-defendant case, and that it may concern some or all of the counts against any particular defendant.

This item is on the agenda for the October meeting in Santa Rosa.

1 **Rule 29. Motion for a Judgment of Acquittal**

2
3 **(a) Time for a Motion.**

4
5 **(1) Before Submission to the Jury.** After the government closes its evidence or after
6 the close of all the evidence, a defendant may move for a judgment on acquittal on any
7 offense. The court may invite the motion.
8

9 **(2) After a Guilty Verdict or a Jury's Discharge.** A defendant may move for a
10 judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the
11 court discharges the jury,¹ whichever is later. A defendant may make the motion even without
12 having made it before the court submitted the case to the jury.
13

14 **(b) Reserving Decision; Waiver.**

15
16 **(1) In general.** Except as provided in Rule 29(b)(2),² if a defendant moves for a
17 judgment of acquittal before the jury reaches a verdict (or after the court discharges the jury
18 before a verdict), the court must proceed with the trial (or any retrial in the case of discharge),
19 submit the case to the jury, and reserve its decision until after a verdict. The court must decide
20 the motion on the basis of the evidence up to the time the decision was reserved. The court
21 must set aside a guilty verdict and enter a judgment of acquittal on any offense for which the
22 evidence is insufficient to sustain a conviction.
23

24 **(2) Exception for a Waiver.** Upon the defendant's request, the court may rule on the
25 motion with regard to any offense before the jury returns a verdict (or before any retrial in the
26 case of discharge), but only after:
27

28 **(A)** the court addresses the defendant personally in open court, [and informs the
29 defendant of,]³ and determines that the defendant understands, the following:
30

31 **(i)** that under the Double Jeopardy Clause the defendant has the right to

¹Joe Kimball proposed adding the phrase "for not reaching a verdict" here and in section (b)(1), but that would be a substantive change. The Subcommittee felt that the rule should apply if the jury were discharged for reasons other than failure to reach a verdict.

²Joe Kimball added a marginal query asking whether this cross reference is necessary.

³Joe Kimball proposed deleting the bracketed language, which is already present in Rule 11, is intended to make it clear that the court itself must appraise the defendant of his rights, and must do so in open court on the record. Merely requiring the court to determine that the defendant understands his rights does not offer the same degree of assurance as a judicial colloquy on the record.

32 prevent the government from appealing a judgment of acquittal (and retrying the
33 defendant on the offense) if the motion is granted before the jury returns a verdict; and
34

35 (ii) that the court can decide the motion before the verdict only if the defendant
36 waives that right; and
37

38 (B) the defendant in open court personally waives the right [described in Rule
39 29(b)(2)(A)(I)]⁴ for any offense for which the court grants a judgment of acquittal before the
40 verdict.
41

42 (c) **Ruling on a Motion Made After a Jury Verdict.** If the defendant moves for a
43 judgment of acquittal after the jury has returned a guilty verdict, the court must set aside the
44 verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient
45 to sustain a conviction.
46

47 Committee Note

48
49 Subdivisions (a), (b), and (c) The purpose of the amendment is to allow the
50 government to seek appellate review of any judgment of acquittal. At present, the rule permits
51 the court to grant acquittals under circumstances where Double Jeopardy will preclude
52 appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict,
53 appellate review is not permitted because Double Jeopardy would prohibit a retrial. If,
54 however, the court defers its ruling until the jury has reached a verdict, and then grants a
55 motion for judgment of acquittal, appellate review is available, because the jury's verdict can
56 be reinstated if the acquittal is reversed on appeal.
57

58 The amendment permits preverdict acquittals, but only when accompanied by a waiver
59 by the defendant that permits the government to appeal and – if the appeal is successful – on
60 remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise
61 in cases involving multiple counts and or multiple defendants, the amendment permits any
62 defendant to move for a judgment of acquittal on any count (or counts). Following the usage
63 in other rules, the amendment uses the terms “offense” and “offenses,” rather than count or
64 counts.
65

66 The amended rule protects both a defendant's interest in holding the government to its
67 burden of proof and the government's interest in appealing erroneous judgments of acquittal,
68 while ensuring that the court will only have to consider the motion once. Although the change
69 has required some reorganization of the subdivisions, no substantive change is intended other
70 than the limitation on preverdict rulings and the new waiver provision.

⁴Joe Kimball suggested deleting this cross reference is necessary, but I believe the change would be substantive. The cross reference makes clear the limited nature of the Double Jeopardy waiver.

71 **Subdivision (a).** Amended Rule 29(a), which states the times at which a motion for
72 judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and
73 (c)(1). No change is intended except that no ruling is permitted before submission without a
74 waiver by the defendant.
75

76 The amended rule omits the statement in Rule 29(a) that “If the defendant moves for
77 judgment of acquittal at the close of the government's evidence, the defendant may offer
78 evidence without having reserved the right to do so.” The Committee concluded that this
79 language was no longer necessary. It referred to a practice in some courts, no longer followed,
80 of requiring a defendant to “reserve” the right to present a defense when making a Rule 29
81 motion. There is no reason to require such a reservation under the amended rule. When the
82 defense moves for a judgement of acquittal at the close of the government's case, the court
83 will ordinarily reserve its ruling, the trial will continue, and the defense may present its case.
84

85 **Subdivision (b).** Amended Rule 29(b)(1) sets forth the general rule that the court must
86 reserve decision on a motion for a judgment of acquittal on a count until after a guilty verdict
87 has been reached on that count, or the court has discharged the jury before reaching a verdict.
88 (There is, of course, no need to rule if a not guilty verdict is returned.) The court may neither
89 grant nor deny the motion prior to verdict. *See Carlisle v. United States*, 517 U.S. 416, 420-33
90 (1996) (holding that trial court did not have authority to grant an untimely motion for
91 judgment of acquittal under Rule 29).
92

93 Accordingly, if the defendant moves for a judgment of acquittal at the close of the
94 government's evidence or the close of all the evidence, Rule 29(b)(1) requires that the court
95 proceed with trial, submit the case to the jury, and reserve its decision until after a guilty
96 verdict is returned. As under the prior Rule, if the defendant made the motion at the close of
97 the government's evidence, the court must grant the motion if the evidence presented in the
98 government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if
99 evidence in the whole trial is sufficient. If the government successfully appeals, the guilty
100 verdict can be reinstated. This general rule requiring the court to defer its ruling applies
101 equally to motions for judgments of acquittal made in bench trials. *Cf. United States v.*
102 *Morrison*, 429 U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from
103 judgment of acquittal entered after guilty verdict in bench trial, because verdict can be
104 reinstated upon remand).
105

106 Similarly, if the defendant moves for a judgment of acquittal after the jury is
107 discharged and the government wishes to retry the case, Rule 29(b)(1) states that the court
108 must proceed with the retrial, submit the case to that jury, and reserve its decision until after
109 a guilty verdict is received in the retrial. *See Richardson v. United States*, 468 U.S. 317, 324
110 (1984) (“a retrial following a 'hung jury' does not violate the Double Jeopardy Clause”). After
111 the second trial, the court must grant the motion if the evidence presented at the first trial was
112 insufficient when the motion was made, even if the evidence in the retrial was sufficient. This
113 procedure permits the government to appeal, because the verdict at the second trial can be

114 reinstated if the appellate court rules that the judgment of acquittal was erroneous.
115

116 The only exception to the rule requiring the reservation of preverdict rulings on
117 motions under Rule 29 is that provided in subdivision (b)(2), the waiver provision. Under
118 amended Rule 29(b)(2), if requested by any defendant, the court may rule on the motion for
119 judgment of acquittal before the verdict with regard to some or all of the counts, after advising
120 the defendant in open court of the requirement of the Rule and the protections of the Double
121 Jeopardy Clause, and after the defendant waives those protections on the record. The waiver
122 process is triggered only upon request of a defendant, because of the importance under the
123 Double Jeopardy Clause of the defendant's decision to terminate the trial before a verdict.
124

125 As with any constitutional right, the waiver of Double Jeopardy rights must be
126 knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst*, 304 U.S. 458, 464
127 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must
128 be shown to have been done with awareness of its consequences."). Although there are cases
129 holding that a defendant's action or inaction can waive Double Jeopardy, the Committee
130 believed that it was appropriate for the Rule to require waiver both under the rule and
131 explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994)
132 (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred);
133 *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy
134 defense when settlement agreement was not explicit, even if individual was aware of ongoing
135 criminal investigation). For a case holding that a defendant may waive his Double Jeopardy
136 rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir.
137 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).
138

139 Before the court may accept a waiver, it must address the defendant in open court,
140 conducting the colloquy required by subdivisions (b)(2). A general model for these provisions
141 is Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant
142 is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.
143

144 **Subdivision (c).** The amended subdivision applies to cases in which the court rules
145 on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the
146 amendment. The amended rule clarifies the applicable standard, using the same terminology
147 as subdivision (a)(1). No change is intended.

PROPOSED AMENDMENT

CURRENT RULE

1 **Rule 29. Motion for a Judgment of Acquittal**

Rule 29. Motion for a Judgment of Acquittal

2
3 (a) **Time for a Motion.**

4
5 (1) *Before Submission to the Jury.* After the
6 government closes its evidence or after the close of
7 all the evidence, a defendant may move for a
8 judgment on acquittal on any offense. The court
9 may invite the motion.

10
11 (2) *After a Guilty Verdict or a Jury's*
12 *Discharge.* A defendant may move for a judgment
13 of acquittal, or renew such a motion, within 7 days
14 after a guilty verdict or after the court discharges
15 the jury, whichever is later. A defendant may
16 make the motion even without having made it
17 before the court submitted the case to the jury.

18
19 (b) **Reserving Decision; Waiver.**

20
21 (1) *In general.* Except as provided in Rule
22 29(b)(2), if a defendant moves for a judgment of
23 acquittal before the jury reaches a verdict (or after
24 the court discharges the jury before a verdict), the
25 court must proceed with the trial (or any retrial in
26 the case of discharge), submit the case to the jury,
27 and reserve its decision until after a verdict. The
28 court must decide the motion on the basis of the
29 evidence up to the time the decision was reserved.
30 The court must set aside a guilty verdict and enter
31 a judgment of acquittal on any offense for which
32 the evidence is insufficient to sustain a conviction.

33
34 (2) *Exception for a Waiver.* Upon the
35 defendant's request, the court may rule on the
36 motion with regard to any offense before the jury
37 returns a verdict (or before any retrial in the case of
38 discharge), but only after:

39
40 (A) the court addresses the defendant personally
41 in open court, and informs the defendant of, and

(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.

1 determines that the defendant understands, the
2 following:

3
4 (i) that under the Double Jeopardy Clause
5 the defendant has the right to prevent the
6 government from appealing a judgment of
7 acquittal (and retrying the defendant on the
8 offense) if the motion is granted before the jury
9 returns a verdict; and

10
11 (ii) that the court can decide the motion
12 before the verdict only if the defendant waives
13 that right; and

14
15 (B) the defendant in open court personally
16 waives the right described in Rule 29(b)(2)(A)(I)
17 for any offense for which the court grants a
18 judgment of acquittal before the verdict.

19
20 (c) **Ruling on a Motion Made After a**
21 **Jury Verdict.** If the defendant moves for a
22 judgment of acquittal after the jury has returned a
23 guilty verdict, the court must set aside the verdict
24 and enter a judgment of acquittal on any offense for
25 which the evidence is insufficient to sustain a
26 conviction.

(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.

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

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

DATE: September 19, 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 country 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 proposal was tabled at the Committee's April meeting in Charleston, in view of the fact that the issue of the enforceability of the Vienna Convention was before the Supreme Court in *Medellin v. Dretke*. The Supreme Court subsequently dismissed certiorari as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088 (May 23, 2005).

This item is on the agenda for the October meeting in Santa Rosa.



The College Of
WILLIAM & MARY

RECEIVED
3/3/05

05-CR-A

School of Law
P.O. Box 8795
Williamsburg, VA 23187-8795

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

757 / 221-3844
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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 United 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
Marshall-Wythe Foundation Professor of Law and
Director of the Human Rights and National Security
Law Program

Attachment



The College Of
WILLIAM & MARY

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

757 / 221-3844
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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 compliance⁶ 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.

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

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

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

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

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 regulations³⁶ 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.

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

(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

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, Reporter

RE: Rule 10, Proposal of Judge McClure

DATE: September 19, 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 Snyder Counties. Judge McClure's letter to Judge Bartle is attached.

This issue was tabled at the Committee's April meeting in Charleston. Several committee members noted that during the recent restyling project the Rules Committee considered a similar proposal but rejected it because several rules use arraignment as a triggering event.

A review of the rules indicates that arraignment does operate as a triggering event for Rule 7(f) (bill of particulars), Rule 12(b)(4) & (c) (notice of government intention to use evidence), Rule 21(d) (motion for transfer), and Rule 47(h)(2) (reports on material witnesses).

This item is on the agenda for the October meeting in Santa Rosa.

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.

December 14, 2004

(570) 323-9772

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.

The Honorable Harvey Bartle, III
United States District Judge
December 14, 2004
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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.

The Honorable Harvey Bartle, III
United States District Judge
December 14, 2004
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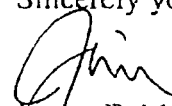
I am aware that the following paragraph appears in the Advisory Committee Notes for the 2002 Amendments to Fed.R.Crim.P. 10:

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

1. 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

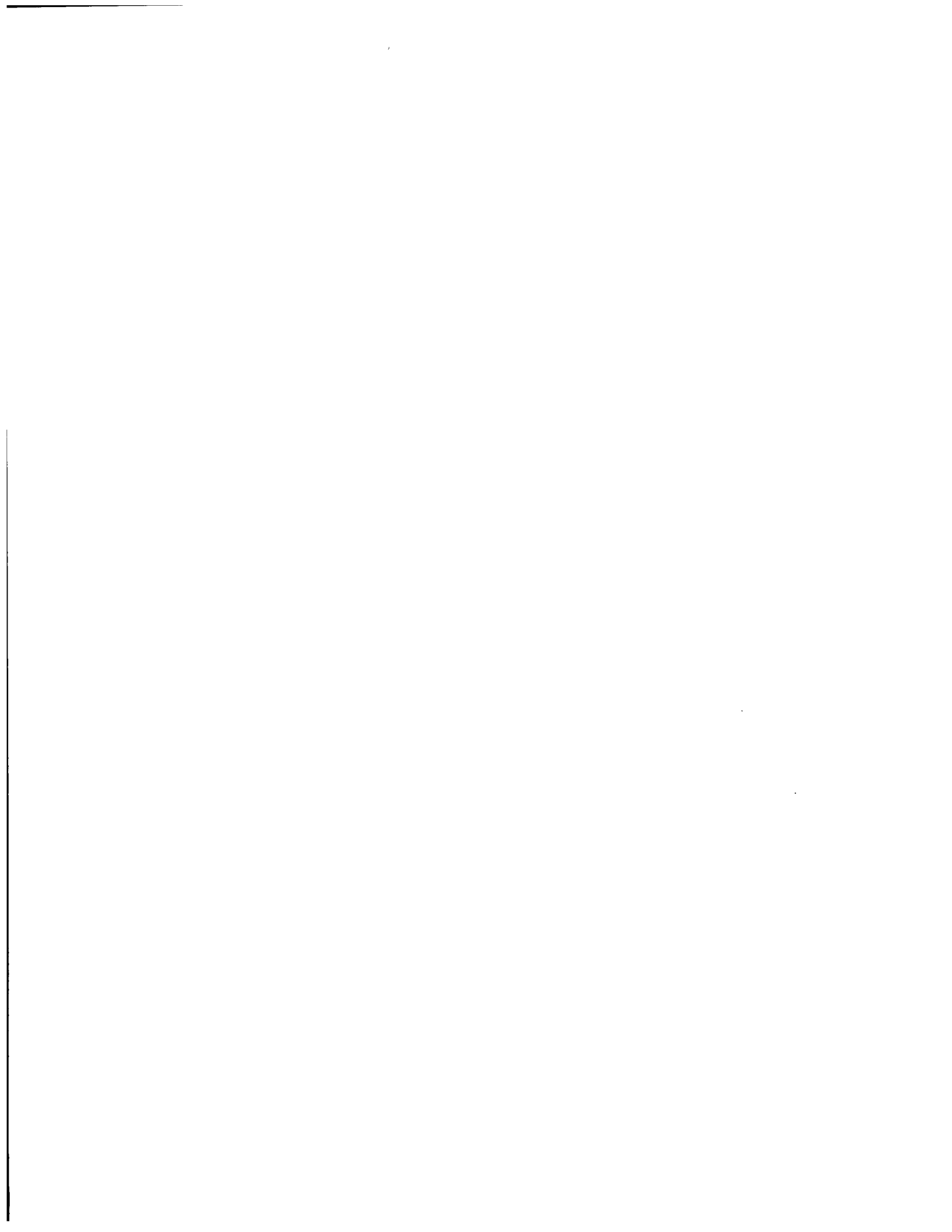
- The waiver of arraignment and entry of a plea of "not guilty" is hereby accepted.
- At the request of the Defendant, a formal arraignment on charges filed by the District Attorney was held this date.
- The guilty plea is accepted.

BY THE COURT

Date

J.

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



MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Time-Computation Project

DATE: September 23, 2005

Judge David Levi has appointed a subcommittee to examine the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. Judge Mark Kravitz is chairing the subcommittee, Prof. Patrick Schiltz is serving as the subcommittee's reporter. The subcommittee's main task is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

The subcommittee's focus is not on deadlines, but rather on rules that direct how deadlines are to be computed. The subcommittee's goal is to develop a time-computation template containing uniform and simplified time-computation rules. It is anticipated that the Civil Rules Advisory Committee will include both a review of the project in general, and some more detailed discussion of certain basic questions. Judge Kravitz's memorandum describing the project and identifying the issues is attached.

This item is on the agenda for the October meeting in Santa Rosa.

MEMORANDUM

DATE: August 11, 2005

TO: Judge David F. Levi
Advisory Committee Chairs
Advisory Committee Reporters

CC: John K. Rabiej

FROM: Judge Mark R. Kravitz

RE: Time-Computation Subcommittee

As you may recall, Judge David Levi has appointed a subcommittee to examine the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. I have been asked to chair the subcommittee, and Prof. Patrick Schiltz has been asked to serve as the subcommittee's reporter. The subcommittee's main task, as I understand it, is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within 8 days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.¹ The subcommittee may act as a "clearinghouse" for information about such changes, and may coordinate the work of the advisory committees, but the subcommittee will not itself address such topics as whether a defendant should have more than 7 days to move for a judgment of acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A) should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the subcommittee.

The ultimate goal of the subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. Attached please find a list of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules, and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,² but no provisions about how to compute those deadlines.) Prof. Schiltz, who put together this list, has also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit the attention of the subcommittee.

I would be grateful if you would review the issues that Prof. Schiltz has identified and let me know whether we have missed any time-computation rules or any topics that might be included in a time-computation template. I would also appreciate it if you would identify any other topics that you think the subcommittee might address, if not in the template, then in some other way. I would appreciate it if you would get back to me by Labor Day.

After hearing from you, I will circulate this list of issues — and any that you add — to the subcommittee. I hope that the subcommittee will be able to meet (either by teleconference in the fall or in conjunction with the January meeting of the Standing Committee) and make tentative decisions about the issues that have been identified. Prof. Schiltz can then draft a template implementing those decisions, and we can circulate that template in time for the spring meetings of the advisory committees.

Thank you for your assistance with this project.

I. SCOPE OF TIME-COMPUTATION RULES

A. Appellate Rule

Rule 26. Computing and Extending Time

- (a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute

B. Bankruptcy Rule

Rule 9006. Time

- (a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute

C. Civil Rule

Rule 6. Time

- (a) **COMPUTATION.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute

D. Criminal Rule

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

E. Comment

Appellate Rule 26(a), Bankruptcy Rule 9006(a), and Civil Rule 6(a) make clear that their time-computation provisions apply to any "applicable statute," as well as to federal rules, local rules, and court orders. For some reason, Criminal Rule 45(a) does not mention "applicable statutes." I do not know why the newly restyled Criminal Rule is inconsistent with the other rules, but the subcommittee may want to address this inconsistency.

II. EXCLUDING DAY OF EVENT

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

C. Civil Rule

Rule 6. Time

(a) **COMPUTATION.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

D. Criminal Rule

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.

E. Comment

Appellate Rule 26(a)(1), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(1) are consistent in substance and, as far as I know, have created no problems for the bench or bar. It appears that only “restyling” to make the language consistent may be needed.

III. 11-DAY RULE: EXCLUDING INTERMEDIATE SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS

A. Appellate Rule

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.

B. Bankruptcy Rule

Rule 9006. Time

(a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

C. Civil Rule

Rule 6. Time

(a) **COMPUTATION.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

D. Criminal Rule

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:

* * * * *

- (2) **Exclusion from Brief Periods.** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

E. Comment

Appellate Rule 26(a)(2), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(2) are consistent in substance, with two exceptions. First, the dividing line under the Bankruptcy Rule is 8 days, whereas the dividing line under the Appellate, Civil, and Criminal Rules is 11 days. Second, the Appellate Rule alone recognizes the concept of “calendar days.” (More about calendar days below.)

The “11-day rule” (which I will call it, for the sake of simplicity) is the most criticized of the time-computation rules. The 11-day rule makes computing deadlines unnecessarily complicated and leads to counterintuitive results — such as parties sometimes having less time to file papers that are due in 14 days than they have to file papers that are due in 10 days.³ The subcommittee should consider eliminating the 11-day rule and providing instead that “days are days” — i.e., that intermediate Saturdays, Sundays, and legal holidays are always counted, no matter how long the deadline. A “days are days” rule would also moot the inconsistency between the 8-day dividing line in the Bankruptcy Rule and the 11-day dividing line in the Appellate, Civil, and Criminal Rules.

IV. CALENDAR DAYS

A. Appellate Rule

As noted above, the Appellate Rules alone recognize the concept of “calendar days.” Appellate Rule 26(a)(2) provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded *unless the deadline is stated in calendar days*. If the deadline is stated in calendar days, then “days are days,” and intermediate Saturdays, Sundays, and legal holidays are counted.

Only one deadline in the Appellate Rules is stated in calendar days: Appellate Rule 41(b) requires that “[t]he court’s mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.”

In addition, Appellate Rule 26(c) — the “3-day rule” (discussed below) — is stated in calendar days: “When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.” (The equivalent provision in the Bankruptcy, Civil, and Criminal Rules is simply stated in “days.”)

Finally, Appellate Rule 25(a)(2)(B)(ii) provides that a brief or appendix is timely filed if, on or before the last day for filing, it is “dispatched to a third-party commercial carrier for delivery to the clerk within 3 calendar days.” And Appellate Rule 25(c)(1)(C) lists as an authorized method of service transmittal “by third-party commercial carrier for delivery within 3 calendar days.”

B. Bankruptcy Rule

The Bankruptcy Rules do not refer to calendar days.

C. Civil Rule

The Civil Rules do not refer to calendar days.

D. Criminal Rule

The Criminal Rules do not refer to calendar days.

E. Comment

The use of calendar days by the Appellate Rules — but not by the Bankruptcy, Civil, or Criminal Rules — is a major inconsistency in the time-computation rules. The inconsistency would not exist but for the 11-day rule. If that rule were eliminated — if “days were days” — then the Appellate Rules would no longer need to use the concept of calendar days, as all days would be counted as calendar days. This is another reason for the subcommittee to consider eliminating the 11-day rule.

V. LAST DAY OF PERIOD ON SATURDAY, SUNDAY, OR LEGAL HOLIDAY

A. Appellate Rule

Rule 26. Computing and Extending Time

- (a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

- (3) Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday

B. Bankruptcy Rule

Rule 9006. Time

- (a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

- (a) **COMPUTATION.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

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:

* * * * *

- (3) **Last Day.** Include the last day of the period unless it is a Saturday, Sunday, [or] legal holiday 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.

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, and, as far as I know, neither the bench nor the bar have had difficulty understanding that when a deadline ends on a Saturday, Sunday, or legal holiday, the deadline is extended to the next day that is not a Saturday, Sunday, or legal holiday. It appears that only “restyling” to make the language consistent may be needed.

VI. LAST DAY OF PERIOD ON DAY CLERK’S OFFICE INACCESSIBLE

A. Appellate Rule

Rule 26. Computing and Extending Time

- (a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

- (3) Include the last day of the period unless . . . if the act to be done is filing a paper in court — [it is] a day on which the weather or other conditions makes the clerk’s office inaccessible.

B. Bankruptcy Rule

Rule 9006. Time

- (a) **Computation.** In computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the clerk’s office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

C. Civil Rule

Rule 6. Time

(a) **COMPUTATION.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute The last day of the period so computed shall be included, unless . . . when the act to be done is the filing of a paper in court, [it is] a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

D. Criminal Rule

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:

* * * * *

(3) **Last Day.** Include the last day of the period unless it is a . . . 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.

E. Comment

Appellate Rule 26(a)(3), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(3) are consistent in substance, except that newly restyled Criminal Rule 45(a)(3) eliminates the "act to be done is filing" qualifier. The reason for this omission is not clear to me, but the subcommittee may wish to address it. The subcommittee may also wish to consider whether the language should be modified to more clearly address the situation in which the clerk's office is physically open, but electronic filing is not possible because of problems with the clerk's computer system. My summer research assistant looked at a sample of local and state rules, but was unable to find any provision directed specifically at electronic accessibility.

VII. DEFINITION OF "LEGAL HOLIDAY"

A. Appellate Rule

Rule 26. Computing and Extending Time

- (a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

- (4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Presidents' Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

B. Bankruptcy Rule

Rule 9006. Time

- (a) **Computation.** . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

C. Civil Rule

Rule 6. Time

- (a) **COMPUTATION.** . . . As used in this rule . . . , "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

D. Criminal Rule

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:

* * * * *

- (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.

E. Comment

Appellate Rule 26(a)(4), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a)(4) are essentially consistent in substance, with the one difference reflecting the fact that most of the circuit courts to which the Appellate Rules apply encompass more than one

state, whereas most of the bankruptcy and district courts to which the Bankruptcy, Civil, and Criminal Rules apply encompass only one state. As far as I know, this provision has not created any difficulties and needs only to be "restyled" to make the language consistent.

VIII. 3-DAY RULE: ADDING 3 DAYS UNLESS PERSONALLY SERVED

A. Appellate Rule

Rule 26. Computing and Extending Time

* * * * *

- (c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

B. Bankruptcy Rule

Rule 9006. Time

* * * * *

- (f) **Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P.** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days shall be added to the prescribed period.

C. Civil Rule

Rule 6. 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. Criminal Rule

Rule 45. Computing and Extending Time

* * * * *

- (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).

E. Comment

Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c) are essentially consistent. The only differences reflect the fact that the service authorized under Appellate Rule 25(c) differs from the service authorized under Civil Rule 5(b) (which is incorporated by reference into the Bankruptcy Rules⁴ and the Criminal Rules⁵). For example, Appellate Rule 25(c)(1)(C) authorizes service by third-party commercial carriers such as Federal Express, while Civil Rule 5(b)(2)(D) authorizes such service only if the party being served has consented.

The subcommittee should consider whether the 3-day rule might be eliminated as part of a general effort to ensure that, to the extent possible, “days are days.” The 3-day rule complicates time computation by forcing parties to figure out whether or not they get 3 extra days. In the past, parties have had particular difficulty grasping the fact that the 3-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order.

The 3-day rule harkens back to the time when almost all service was either in person or by mail. The concern was that a party facing, say, a 10-day deadline to respond to a paper would have 10 real days if the paper was served personally, but only about 7 real days if the paper was served by mail. The 3-day rule was designed to put all served parties in roughly the same position and thus to eliminate strategic behavior by serving parties.

Today, the 3-day rule has been expanded to cover every type of service except personal service, and thus it seems likely that 3 days are being added to the vast majority of service-triggered deadlines. Rather than continue to complicate time computation with the 3-day rule, the subcommittee may want to consider abolishing the rule, leaving the advisory committees free to add 3 days to those service-triggered deadlines that need the extra time.

Abolishing the 3-day rule would simplify time computation. It might, however, introduce the type of strategic behavior that the 3-day rule was designed to curtail. For example, a party might opt for mail rather than electronic or personal service in order to give his or her opponent 2 or 3 fewer days to work on a response. Note, though, that similar incentives exist under the present rule. For example, a party might opt for mail rather than electronic service because, although both gain the benefit of the 3-day rule, mail service is likely to take 2 or 3 days, whereas electronic service is likely to be instantaneous.

IX. OTHER ISSUES

There are several issues that the rules of practice and procedure do not currently address but perhaps should. Those issues include the following:

A. Deadlines stated in hours

Congress is increasingly imposing (or considering imposing) deadlines stated in hours, without giving any instructions about how those deadlines should be computed. For example, the Justice for All Act of 2004 provides that, if a victim of a crime files a mandamus petition complaining that the district court has denied the victim the rights that he or she enjoys under the Act, “[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.” 18 U.S.C. § 3771(d)(3).

Suppose such a petition is filed at 2:00 p.m. on Thursday. By when must the court of appeals “take up and decide” the petition? By 2:00 p.m. Sunday? By 9:01 a.m. Monday? By 2:00 p.m. Monday? By 2:00 p.m. Tuesday? By 5:00 p.m. Tuesday?

The subcommittee may want to recommend new provisions describing how deadlines stated in hours should be computed. This would be a difficult drafting exercise — made more difficult by the fact that, as far as I can tell, no local rules or state rules address the computation of deadlines stated in hours.

B. “Backward-looking” deadlines

The rules are silent about how backward-looking deadlines are computed. For example, Civil Rule 56(c) provides that a summary judgment motion “shall be served at least 10 days before the time fixed for the hearing.” If the 10th day falls on a Saturday, must the motion be served by the previous Friday or by the following Monday? The subcommittee may want to consider proposing template language that would address this issue.

C. Deadlines stated in 7-day increments

Ed Cooper has suggested the possibility that all deadlines could be stated in 7-day increments — i.e., 7 days, 14 days, 21 days, etc. This would eliminate the problem of deadlines ending on a Saturday or Sunday, although it would not eliminate the problem of deadlines ending on legal holidays.

1. *See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

2. *See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

3. If a ten-day period and a fourteen-day period start on the same day, which one ends first? Most sane people would suggest the ten-day period. But, under the Federal Rules of Civil Procedure, time is relative. Fourteen days usually lasts fourteen days. Ten days, however, never lasts just ten days; ten days always lasts at least fourteen days. Eight times per year ten days can last fifteen days. And, once per year, ten days can last sixteen days.

Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

4. *See* FED. R. BANKR. P. 7005.

5. *See* FED. R. CRIM. P. 49(b).

