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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

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

Date: **May 19, 2007**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 16-17, 2007 in Brooklyn, N.Y. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items:

(1) approval of published Rules 1, 12.1, 17, 18, 32, 41(b)(5), 60, and 61 for transmission to the Judicial Conference;

(2) approval for publication and comment of a proposed amendment to time computation Rule 45(a) and related amendments to Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases; and

(3) approval for publication and comment of proposed amendments to Rules 7, 16, 32.2, 41, and Rule 11 of the Rules Governing §§ 2254 and 2255 Cases.

In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, most notably the Committee's recommendation that published Rule 29 not be transmitted to the Judicial Conference.

II. Action Items–Recommendations to Forward Amendments to the Judicial Conference

The first seven amendments discussed below implement the Crime Victims' Rights Act (CVRA), codified as 18 U.S.C. § 3771. As explained when these rules were proposed for publication, they reflect two basic decisions. The first decision concerns the scope of the proposals.

The CVRA reflects a careful Congressional balance between the constitutional rights of defendants, the discretion afforded the prosecution, and the new rights afforded to victims. Given that careful balance, the Committee generally sought to implement, but not go beyond, the rights created by the statute. For the same reason, the Committee adopted the statutory language whenever possible. The second decision concerns the structure of the proposed amendments. The Committee believed it would be easier for victims and their advocates (as well as judges, prosecutors and defense counsel) to identify the new provisions regarding victims if they were placed in a single rule. Therefore where possible the Committee placed many of the new provisions in a single rule (new Rule 60) rather than scattering them throughout the rules.

The proposed amendments generated a large number of written comments (as well as testimony at the public hearing) including both criticism that the proposed rules went too far, tipping the adversarial balance and depriving the defense of critical rights, and criticism that the proposed rules did not go far enough to implement the specific provisions of the CVRA and the fundamental policies that it reflects. Of particular note were letters from Senator Kyl, one of the sponsors of the CVRA, and Representatives Poe and Costa, co-chairs of the Congressional Victims' Rights Caucus. In addition to concerns focusing on specific amendments, some comments urged that the Committee begin the drafting process anew, rather than moving forward with the proposed amendments.

The Committee devoted a great deal of time, attention, and thought to the public comments, hearing testimony, and the important issues raised therein. After the public comment period closed, a subcommittee met several times by teleconference and exchanged many preliminary memoranda and e-mails. Its work was incorporated into a detailed report to the full Advisory Committee, which then discussed the CVRA rules for more than five hours at its April meeting.

After careful consideration, the Advisory Committee recommends that the full slate of proposed rules, as modified in response to the public comments, be approved and forwarded to the Judicial Conference. These proposals implement core requirements of the CVRA. The Committee favors proceeding on a step-by-step basis, beginning generally with amendments that implement the clear requirements imposed by the statute, leaving many other issues that are less clear for additional development by judicial decisions that will provide concrete examples of the factual situations in which the issues arise and give us the benefit of thoughtful treatment by the judges who confront these issues.

The Committee recognized that further amendments may also be desirable, but concluded that need not and should not delay the adoption of the proposed amendments. The Committee will treat the question of victim rights as a continuing agenda item, allowing for consideration of amendments to other rules (or revisions, as needed in light of experience, to the rules that would be amended by our proposal). Several additional amendments have been suggested by Senator Kyl, Representatives Poe and Costa, Judge Paul Cassell, and the Federal Public and Community

Defenders, among others. Additional proposals may come to the Committee's attention as a result of developments in judicial decisions.

It is important to note that proceeding in this fashion will expedite the implementation of core requirements of the CVRA, and will not prevent the immediate implementation of any other provisions of the Act. The courts are already bound to follow the statute. But where the statute's dictates are not clear, or its directives may be accommodated in more than one way, the Committee felt it best to allow some judicial development of the issues which will guide the rulemaking process. (The same course of action is being followed, for example, with the forfeiture rules that will be discussed later in this report.)

1. ACTION ITEM–Rule 1. Scope; Definitions; Proposed Amendment Defining "Victim"

This amendment incorporates by reference the definition of the term "crime victim" found in the Crime Victims' Rights Act (CVRA), codified as 18 U.S.C. § 3771(e). The statutory definition provides that a victim is "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia." The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the court has the power to decide any dispute as to who is a victim. The Committee concluded that it was not necessary at this point to create detailed procedures for this determination, though something of this nature could be added in the future if experience indicates it would be desirable.

The Committee considered but did not adopt two other suggested changes. Although some comments suggested that the definition should be expressly limited to the specific rules adopted to implement the CVRA, these concerns seemed misplaced. The definitions in Rule 1 are applicable only to the Criminal Rules themselves[1]; they do not govern, for example, rights to obtain restitution, to bring civil actions, and so forth. Accordingly, the Committee declined to add a listing of the rules to which the definition would be applicable. The Committee also declined to add additional

---

[1]In addition to the proposed rules, the new definition would apply to current Rules 12.4 and 38, which use the term "victim" or "victims." The adoption of the general definition does not appear to pose a problem for the interpretation or application of either provision. Rule 12.4(a)(2) requires the government to file a statement identifying an organizational victim. Rule 38(e) authorizes a court to stay a sentence providing for notice to victims under 18 U.S.C. § 3555. Section 3555 gives the court discretion to require that the defendant give victims notice and an explanation of his conviction of fraud or other intentionally deceptive practices.

language limiting the definition to a person injured by a crime that is the subject of a pending prosecution. The only instances in which the present and proposed Criminal Rules provide rights to victims--Rules 12.1, 12.4, 17, 18, 32, 38, and 60--are those in which a prosecution is pending. Moreover, proposed Rule 60(b)(4) requires the rights provided therein to be asserted in the district in which the defendant is being prosecuted.

With the modifications noted above, the Committee voted 10 to 1 in favor of recommending approval of the amendment to Rule 1.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 1 be approved as amended and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 12.1. Notice of Alibi Defense; Proposed Amendment Regarding Victim's Address and Telephone Number.

This amendment implements the victim's right 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 amended 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 either to order its disclosure to the defense 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.

At the suggestion of the Standing Committee, we requested public comment on the question whether the rule should assume that a defendant must demonstrate need to get the name and contact information for a victim who will testify to rebut his alibi defense, or should instead require a case-by-case showing of the need to withhold this information. Several comments urged that the published rule struck the wrong balance, and that the proposed amendment to Rule 12.1 tips the adversarial balance too far as a policy or constitutional matter by requiring a showing of need. Critics argue that this violates the fundamental requirement that discovery be reciprocal, which is a condition of requiring the defendant to produce information about his defense in advance of trial; the defendant must provide the names and contact information for his alibi witnesses, but he may be denied the same information about victims who will be called as alibi witnesses. Many other comments argued that the proposed rule does not go far enough. These comments argued the amendment gives too little weight to victim interests in providing--upon a showing of need–for either disclosure of the name and contact information to the defense or providing some other reasonable procedure to allow the preparation of the defense as well as the protection of the victim's interests.

The Committee considered these concerns at length before approving the rule by a 9 to 2 vote. It concluded that the rule, as published, strikes an appropriate balance and does not violate the requirement that discovery be reciprocal. The rule triggers a judicial determination in any case where the defendant meets the low threshold standard of showing a "need" for the name and contact information of a victim who will testify to rebut his alibi. Generally the defense will be able to meet this standard, though there will be occasional cases in which the defense is already aware of the name and contact information of a victim who will be called to rebut his alibi. Once there has been a showing of "need," the rule requires the court either to provide this information to the defense or to fashion some other reasonable procedure that allows the preparation of the defense while protecting the victim's interest. The rule fairly puts the burden, in the first instance, on the defendant to bring the issue before the court. In a normal case, the victim is not likely to be in a position to raise a timely objection or establish a basis for non- disclosure, and the government may not be privy to all of the relevant facts. If the defendant establishes a need for this information, the amendment gives the government or the victim time to weigh in before disclosure can occur. The "need" threshold is an appropriate basis to trigger the court's consideration of all aspects of the need and risk analysis. Finally, the proposed amendment does provide ample authority to protect the victim. In the exceptional case in which the authority to fashion an alternative to disclosure is not sufficient for this purpose, the court has the authority under Rule 12.1(d) for good cause to grant relief from any of the requirements in the Rule 12.1.

The Committee voted 9 to 2 to forward proposed Rule 12.1 to the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 12.1 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 17. Subpoena; Proposed Amendment Regarding Personal or Confidential Information About Victim.

This amendment implements the provision in the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the existence of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The amendment also provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive. Following publication the text was also modified to make it clear that a victim could also object by other means, such as a letter to the court.

The amendment seeks to protect the privacy and dignity interests of victims without unfair prejudice to the defense. During the comment period it drew criticism from both advocates of victims, who argued that it did not go far enough, and persons concerned that it unduly restricted defense access to critical information during preparation for trial. More general concerns were also expressed about ex parte judicial action.

At present, all subpoenas are issued by the court in blank at the request of a party under Rule 17(c), and served without notice to opposing counsel. As published, the amendment authorized the court to approve the issuance of the subpoenas ex parte, and made notice to the victim discretionary. This portion of the amendment was revised to omit the reference authorizing ex parte action, and to provide that the court must, absent exceptional circumstances, give notice to the victim prior to approving such a subpoena. The Committee approved this language after an extended discussion that included consideration of substituting the "good cause shown" standard (which was rejected by a vote of 8 to 4). The Committee also added language to the note leaving to the judgement of the district court the determination whether to permit the matter to be decided ex parte without notice to anyone in a particular case. This clarifies the point that in exceptional cases the subpoena can be served without notice to either the government or the victim. The note references as examples of such exceptional circumstances situations where evidence might be lost or destroyed without immediate action, or where providing notice would unfairly prejudice the defense by premature disclosure of sensitive defense strategy.

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

After extended discussion the Committee voted 9 to 3 in favor of recommending the approval of the proposed amendment to Rule 17.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 17 be approved as amended and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 18. Place of Trial Within District; Proposed Amendment Requiring Court to Consider Convenience of Victims.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the defendant and witnesses – in setting the place for trial within the district. It is intended to implement the victim's "right to be treated with fairness" under the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(8). Because the interests of victims who will testify are

already considered when setting the place for trial within a district, the amendment's focus is on victims who will not testify. In response to public comments, the Committee revised the note to delete some language that might be misconstrued and to state that the court has substantial discretion to balance any competing interests.

The Committee voted 9 to 2 in favor of recommending approval of the proposed rule.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 18 be approved as amended and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 32. Sentencing and Judgment; Proposed Amendment Deleting Definition of Victim, Amending Scope of Presentence Investigation and Report, and Providing for Victim's Opportunity to Be Heard at Sentencing.

Several amendments to Rule 32 are proposed to implement various aspects of the Crime Victims' Rights Act.

First, Rule 32(a) is amended by deleting the definitions of "victim" and "[c]rime of violence or sexual abuse." These provisions have been superseded by the CVRA. As noted above, a companion amendment to Rule 1 incorporates the CVRA's broader definition of victim. The amendment would delete all of the text in Rule 32(a). The Committee proposes reserving Rule 32(a), rather than renumbering all of the subdivisions of this complex rule.

Second, the Committee proposes amending Rule 32(c)(1) to make it clear that the presentence investigation should include information pertinent to restitution whenever the law permits the court to order restitution, not merely when it requires restitution. This amendment implements the victim's statutory right under the Crime Victims' Rights Act to "full and timely restitution as provided by law." *See* 18 U.S.C. § 3771(a)(6).

Third, Rule 32(d)(2)(B) is amended to make it clear that victim impact information should be treated in the same way as other information contained in the presentence report. The amendment deletes language requiring victim impact information to be "verified" and "stated in a nonargumentative style" because that language does not appear in the other subdivisions of Rule 32(d)(2).

Fourth, amended Rule 32(i)(4)(B) deletes language which refers only to victims of crimes of violence or sexual abuse. As noted above, these provisions have been superseded by the CVRA.

Fifth, subdivision (i)(4)(B) has been amended to incorporate the statutory language of the CVRA, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). This proposed change prompted the greatest number of public comments. One concern that was expressed repeatedly was that the statutory language might be interpreted to cut back on the victim's right to be heard at sentencing because the statutory phrase replaced language giving victims of crimes of violence or sexual offenses the right "to speak." The Committee added language to the note stating that absent unusual circumstances any victim who is in the courtroom should be allowed a reasonable opportunity to speak directly to the judge. Other comments requested changes falling outside the bounds of the published amendments, such as adding a requirement that victims be given the right to disclosure to all or part of the presentence report. A change of this nature would require publication for notice and comment, and thus could not be considered as part of this amendment.

After extended discussion and votes on preliminary matters, the Committee voted 10 to 2 to forward the proposed Rule 32 amendments to the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rule 32 be approved as amended and forwarded to the Judicial Conference.

6. ACTION ITEM–Rule 60. Victim's Rights. Proposed New Rule Providing for Notice to Victims, Attendance at Proceedings, the Victim's Right to Be Heard; Enforcement of Victim's Rights; and Limitations on Relief.

This rule implements several provisions of the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771, in judicial proceedings in the federal courts. It contains provisions regarding the notice to victims regarding judicial proceedings, the victim's attendance at these proceedings, and the victim's right to be heard, as well as provisions governing the enforcement of victims' rights, including who may assert these rights and where they may be asserted. The Rule also incorporates the statutory provisions limiting relief. Following publication, the Rule was amended throughout to use consistent language to describe its application to the rights of victims "described in these rules." That change responds to concerns that the Rule might be thought to apply to other contexts where victim interests are considered, where there are distinct bodies of statutory or decisional law.

Rule 60, like other CVRA amendments, was criticized both for going too far and not going far enough. A number of commentators proposed additions which were not considered on the merits because they would require publication for comment. These include the following: (1) a provision governing the time when victim rights must be raised, (2) a provision requiring victims to assert their rights under the same procedural rules applicable to the parties, (3) a provision applying waiver to

victim rights not asserted in a timely manner, (4) a provision requiring victims to be notified of their rights at proceedings, and (5) a provision giving the victims the right to be heard at any proceeding affecting their rights, not just at bail, plea, and sentencing hearings. Other comments suggested that some or all of the provisions in Rule 60 were unnecessary because they were already provided for by statute, or were beyond the scope of the Enabling Act. Finally, there was support for adding a provision that would indicate that the victim's rights under the Criminal Rules do not override the constitutional rights of the defendant or third parties, and do not override statutory rights in the absence of a showing of compelling need. These proposals, and others, can be considered by the Committee in the future. Finally, support was also expressed for unpacking Rule 60 and distributing its changes throughout the rules. As noted above, the Advisory Committee has reaffirmed its view that it is desirable to group these key provisions in a single rule.

Subdivision (a)(1) implements 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceedings. . . ." The proposed amendment requires "the government" to use its best efforts to notify victims of public court proceedings.

Subdivision (a)(2) implements 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding. It closely tracks the statutory language.

Subdivision (a)(3) implements 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing...." It tracks the statutory language.

Subdivision (b) implements the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). It provides that the victim and the attorney for the government may assert the rights provided for under the Crime Victims' Rights Act, and that those rights are to be asserted in the district where the defendant is being prosecuted. Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

In response to public comments, proposed Rule 60 was amended to state that the "victim's legal representative" may raise the victim's rights, as specified by the CVRA. The note has been revised to state the Committee's understanding that counsel may present the views of the victim or the victim's lawful representative. The rule was also revised to state that a victim's rights can be raised by "any other person as authorized by 18 U.S.C. § 3771(d) and (e)." This incorporates the statutory provisions regarding victims who are minors and other victims who are incompetent,

incapacitated or deceased, and it also recognizes the statutory limitations on a defendant's assertion of rights as a victim, which are found in 18 U.S.C. § 3771(d)(1) and (e).

Finally, the statute and the implementing rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged. (The term "highest offense charged" was drawn from the CVRA, 18 U.S.C. § 3771 (d)(5)(C).)

The Committee voted 10 to 2 in favor of recommending the proposed Rule 60 be approved.

Recommendation–The Advisory Committee recommends that proposed Rule 60 be approved as amended and forwarded to the Judicial Conference.

7. ACTION ITEM–Rule 61. Title. Proposed New Rule.

This amendment renumbers current Rule 60 as Rule 61 to accommodate the new victims' rights rule. The Committee approved the amendment without objection.

Recommendation–The Advisory Committee recommends that the proposal to renumber Rule 60 as Rule 61 be approved and forwarded to the Judicial Conference.

8. ACTION ITEM–Rule 41, Search and Seizure; Proposed Amendment Authorizing Magistrate Judge to Issue Warrants for Property Outside of the United States.

This amendment responds to a problem that affects the investigation of cases involving corruption in United States embassies and consulates around the world. Often the most important evidence is located in the offices or residences associated with the consulate or embassy. Problems of this nature have arisen in cases involving embassies and consulates in many countries, and similar difficulties have arisen in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are all within U.S. control, they are not in any State or U.S. judicial district. As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. (Although the USA PATRIOT Act amended Rule 41(b)(3) to provide magistrate judges with the authority to issue

warrants outside the magistrate's district, this authority is applicable only in cases involving certain terrorism offenses.)

The language of the proposed amendment was based upon Rule 41(b)(3), added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes U.S. consulates and embassies. The proposed amendment provides for jurisdiction in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." The current proposal, in contrast, is limited to property within any of the following: (1) a territory, possession, or commonwealth of the United States; (2) the premises of a United States diplomatic or consular mission in a foreign state, and related buildings and land; and (3) the residences and related property owned or leased by the United States and used by United States personnel assigned to United States diplomatic or consular missions in foreign states. These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. The amendment was intentionally drafted narrowly to avoid any thorny international issues. It addresses only search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

The published draft incorporated the language of 18 U.S.C. § 7(9), the statutory provision granting jurisdiction over crimes committed in diplomatic and consular missions, as well as the residences and related property owned or leased by the United States for United States personnel assigned to diplomatic or consular missions. At the urging of the Committee's Style Consultant, the statutory language was simplified. The committee note was also amended to include a statement that the Rule is intended to authorize a magistrate judge to issue a warrant in all locations where the statute provides for jurisdiction, and that the differences in language reflect only differing style conventions.

At the request of the Standing Committee a reference to American Samoa was added to the rule and placed in brackets, and public comment was sought on whether American Samoa presented a special case. The Pacific Islands Committee of the Judicial Council of the Ninth Circuit opposed the application of the rule to American Samoa, suggesting that the matter requires further study, and that a different amendment that would treat the High Court of Samoa as the equivalent of a state court would be preferable to the current proposal.

The Advisory Committee concluded that the rule should apply to American Samoa. A gap in the Government's ability to enforce the law is plainly present in American Samoa, and that gap should be remedied. The Department is presently conducting investigations involving possible federal criminal activity in American Samoa, and the Federal Bureau of Investigation has established a Resident Agency there to address criminal activity. Because American Samoa is not located within any federal judicial district, violations of Title 18 that occur in American Samoa must be prosecuted in districts outside of American Samoa, consistent with the venue provisions of 18 U.S.C. § 3238. The proposed amendment of Rule 41(b) would simply provide United States magistrate judges located in those other federal districts with the authority to issue search warrants to gather evidence that pertains to those federal criminal violations. The suggestion of the Pacific Islands Committee for a different amendment to Rule 41 addresses distinct issues of comity that are beyond the focus of the current proposal; this suggestion should not delay the implementation of the current proposal.

The Committee unanimously approved the proposed amendment for transmittal to the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41(b) be approved as amended and forwarded to the Judicial Conference.

III. Action Items–Recommendations to Publish Amendments to the Rules

A. Time Computation Rules

1. ACTION ITEM-Rule 45(a)

The Advisory Committee recommends that Rule 45(a) be amended to track the time computation template developed by Judge Kravitz's committee. Only minor changes (such as the substitution of references to criminal rather than civil rules in the committee note) were needed to adapt the template to the Criminal Rules.

Only one aspect of the proposed rule deserves special mention. Following the template, proposed Rule 45(a) applies to statutory time periods as well as to periods stated in the rules, with the exception of statutes that provide for a different time counting rule (such as "business days" or "excluding Saturdays, Sundays, and holidays"). At present it is not clear that Rule 45(a) has any application to statutory time periods. Unlike the comparable provisions in the other rules (such as Civil Rule 6(a)), Rule 45(a) currently contains no reference to statutory time periods, nor did it retain the general language "any time period" used prior to restyling. Accordingly, the proposed committee note recognizes that the new language may broaden the applicability of Rule 45. It states that the

general time computations do not apply to Rule 46(h), because that rule is based upon a statute that provides for a different time-counting method.

The Committee discussed the need for legislative action in tandem with the rulemaking process, and noted that the need for legislative action is particularly acute in several instances where statutory time periods underlie the time periods specified in the Criminal Rules. For example, the time specified in Rule 5.1(c) for preliminary hearings is based upon the requirements of 18 U.S.C. § 3060(b). If the "new days are days" time computation rule is not applicable to statutory periods, it would leave open the argument that actions that would be timely under particular rules would not meet statutory requirements like those in § 3060(b). The Committee is working to develop a list of statutory provisions where legislative action is most needed.

The Committee also discussed the need to develop a process for revising local rules to accommodate the new time counting rules, and urged Judge Kravitz and his committee to make this part of the implementation process.

The Committee voted unanimously to forward the Rule 45(a) amendment to the Standing Committee for publication. After the meeting changes were circulated and approved by e-mail to bring Rule 45(a) and the committee note into conformity with the most recent draft of the time computation template and accompanying rule, so that all of the rules would be as consistent as possible.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 45(a) be published for public comment.

The Committee was also unanimous in recommending the following amendments to time periods that are intended to compensate for the change to a "days are days" method of counting time. Rules Committee–to accompany these amendments. The Committee approved the addition of these Subsequent to the meeting, committee notes were drafted–paralleling those adopted by the Civil notes by e-mail.

2. ACTION ITEM-Rule 5.1

Rule 5.1 requires a preliminary hearing to be held within 10 days after a defendant's initial appearance if the defendant is in custody or 20 days if the defendant is not in custody. The Committee recommends extending these periods to 14 and 21 days if proposed Rule 45(a) is adopted, but notes that these periods are based upon 18 U.S.C. § 3060(b). Because of the statutory basis of the time periods in the current rule, this proposal is contingent upon the adoption of a

statutory amendment. If the statute can be amended, conversion to 14 and 21 days would be the rough equivalent of the times under the current rule.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 5.1 be published for public comment.

3. ACTION ITEM-Rule 7

The Committee unanimously concluded that the time for motions for a bill of particulars should be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 7 be published for public comment.

4. ACTION ITEM-Rule 12.1

Rule 12.1 (alibi defense) establishes time periods for responses and disclosure. The Committee concluded that if proposed Rule 45(a) is adopted the 10 day periods for the defendant's response and the government's disclosure under Rule 12.1(a)(2) and (b)(2) should be increased from 10 to 14 days.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 12.1 be published for public comment.

5. ACTION ITEM-Rule 12.3

Rule 12.3 (public authority defense) establishes time periods for responses, requests, and replies. The Committee concluded that if proposed Rule 45(a) is adopted the 10 days periods in Rule 12.3 should be increased to 14 days, and the 20 day period be increased to 21 days.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 12.3 be published for public comment.

6. ACTION ITEM-Rule 29

Rule 29(c)(1) requires motions for post-verdict acquittal to be filed within 7 days after a verdict or the discharge of the jury. The Committee recommends increasing the time to 14 days if proposed Rule 45(a) is adopted. At present, excluding weekends and holidays from the 7 day period means that the defense has at least 9 days for such motions. Requests for continuances are frequent, and often the motions are filed in a bare bones fashion requiring later supplementation. Rather than increasing the need for continuances, it would be preferable to set the general time at 14 days (a multiple of 7).

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 29 be published for public comment.

7. ACTION ITEM-Rule 33

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for a new trial under Rule 33(b)(2).

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 33 be published for public comment.

8. ACTION ITEM-Rule 34

The Committee concluded that the considerations that support extending Rule 29(c)(1)'s 7 day period to 14 days apply equally to motions for arrest of judgment under Rule 34.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 34 be published for public comment.

9. ACTION ITEM-Rule 35

Rule 35(a) currently allows the court to correct a sentence for arithmetic, technical, or other clear error within 7 days after sentencing (which is, in practical terms, approximately 9 days under the current counting rules). The Committee concluded that this period should be increased to 14 days if proposed Rule 45(a) is adopted. Sentencing is now so complex that minor technical errors are not uncommon. Extension of the period to 14 days will not cause any jurisdictional problems if an appeal has been filed because FRAP 4(b)(5) expressly provides that the filing of a notice of

appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a). There was some sentiment on the committee for a rule that would allow the court to correct such errors at any time, but the Committee did not pursue this line of thought because it falls beyond the scope of the current computation project.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 35 be published for public comment.

10. ACTION ITEM-Rule 41

Rule 41(e)(2)(A)(i) now states that a warrant must command that it be executed within a specified time no longer than 10 days (which can be up to 14 days under the current time computation rules). The Committee recommends that the period be increased to 14 days, although it noted that the considerations here are significantly different than those pertinent to many of the other rules. First, warrants can and often are executed on nights and weekends. Second, there is a real concern that warrants not be executed on the basis of stale evidence. For that reason, the courts often set a time for execution that is shorter than 10 days. On the other hand, there are situations in which more time may be needed for the proper execution of a highly complex warrant. After weighing these various considerations, the Committee concluded that designating a 14 day period was appropriate because it was the rough equivalent of the present period, followed the multiples of 7 rule of thumb, and still left the court with discretion to set a shorter time period in individual cases, as is frequently done at present.

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

11. ACTION ITEM-Rule 47

The Committee recommends that the current requirement under Rule 47(c) that motions be served 5 days before the hearing date be increased to 7 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 47 be published for public comment.

12. ACTION ITEM-Rule 58

Rule 58(g) governs appeals from a magistrate judge's order or judgment in cases involving petty offenses and misdemeanors. The Committee recommends that the time under Rule 58(g)(2) for interlocutory appeals and appeals from a sentence or conviction of a misdemeanor be increased from 10 to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 45(a) be published for public comment.

13. ACTION ITEM-Rule 59

The Committee concluded that the 10 day period for objections to nondispositive determinations, findings, and recommendations by a magistrate judge under Rule 59(a) and dispositive matters under 59(b) should be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 59 be published for public comment.

14. ACTION ITEM-Rule 8 of the Rules Governing § 2254 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2254 Proceedings be published for public comment.

15. ACTION ITEM-Rule 8 of the Rules Governing § 2255 Proceedings

The Committee recommends that the 10 day period for filing objections under Rule 8(b) be increased to 14 days if proposed Rule 45(a) is adopted.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 8 of the Rules Governing § 2255 Proceedings be published for public comment.

B. Rule 16

ACTION ITEM–Rule 16 Discovery and Inspection; Proposed Amendment Exculpatory and Impeachment Information

The proposed amendment to Rule 16 is the result of four years of discussion and consideration by the full Advisory Committee and by two subcommittees. This portion of my report provides a summary of the justifications for and issues raised by the proposed amendment.

I have provided the following related materials as attachments: (1) an American College of Trial Lawyers 2003 position paper; (2) the Federal Judicial Center's 2004 Report on the Treatment of *Brady v. Maryland* Material and supplemental 2005 data; (3) a letter from the Federal and Community Defenders; (4) excerpts from the American Bar Association's Model Rules of Professional Conduct and Criminal Justice Standards; (5) the Department of Justice's new *Brady* policy; (6) two lists of *Brady* cases, one covering the period through July 2001, and the other listing more recent cases; and (7) excerpts from an ALR annotation discussing other cases. In addition, the Federal Judicial Center is completing a new research report that should be available in time for inclusion in the materials distributed to the Standing Committee, and I understand that the Department of Justice expects to submit additional materials.

The proposed amendment reflects the Advisory Committee's conclusions that (1) there is a strong case for codifying the prosecution's duty to disclose exculpatory and impeachment evidence in the Federal Rules, and (2) the disclosure under the rules should be broader in scope than the constitutional obligation imposed by *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny. The proposed amendment makes the prosecution's disclosure to the defense of exculpatory and impeachment material a standard part of pretrial discovery in federal prosecutions.

The Committee did not come to the decision to recommend this amendment lightly. The Department of Justice has consistently opposed the idea of amending Rule 16 to encompass exculpatory and impeachment material. The Committee has considered the Department's concerns, and it revised the draft amendment, narrowing it substantially in several respects, in an effort to be responsive to these concerns. During the time the amendment was under consideration, as discussed below, the Department also adopted an internal policy intended to address many of the concerns that prompted the consideration of an amendment. The Advisory Committee welcomed the new policy, but ultimately concluded that it did not take the place of a judicially enforceable amendment to the Federal Rules. The proposed rule and the Department's policy are not in conflict. Rather, they would complement one another and focus appropriate attention on the importance of providing exculpatory and impeachment evidence and information to the defense in a timely fashion.

After the Department's presentation of its new internal policy, the Committee voted 8 to 4 to forward the proposed amendment to the Standing Committee for publication.

The need to address the issue in Rule 16

The failure of the Federal Rules of Criminal Procedure to provide a duty to disclose exculpatory evidence is an anomaly that should be remedied. Although the Federal Rules contain very detailed provisions requiring pretrial disclosure of a wide variety of material and information, there is a gap within the rules. They contain no requirement that the government disclose evidence that would tend to establish the defendant's innocence or tend to cast doubt on key elements of the government's case. In contrast, virtually all states define the prosecutor's obligation to disclosure evidence favorable to the defendant by court rule or statute,[2] and approximately one third of federal districts have local rules that codify the obligation, define what constitutes *Brady* material, and/or set requirements for timing and conditions of disclosure.[3]

There is strong support for amending Rule 16 to include a requirement that the government disclose exculpatory evidence. The Advisory Committee's consideration of this issue was prompted by its receipt of a lengthy 2003 position paper from the American College of Trial Lawyers that advocated an amendment to Rule 16 (as well as a companion amendment to Rule 11). The position paper--which was adopted by the College's Board of Regents--reported the experience of the members of the College's Federal Criminal Procedure Committee. In essence, the College concluded that defense efforts to obtain *Brady* material are often unsuccessful because neither the scope of the obligation nor the timing requirements are clear. In the absence of a clear definition, federal prosecutors have adopted various interpretations of their obligations under *Brady* that improperly restrict disclosure, and disclosure has often been delayed or even denied. The practitioners on the Advisory Committee reported that similar experiences are common. A letter from the Federal and Community Defenders that is included as an attachment and additional communications from individual Federal Defenders also support this view.

---

[2]The state rules are described in 2004 report of the Federal Judicial Center, which is included as an attachment. Because it is not critical to know the precise count of states that have each variation of the rules in question, the Federal Judicial Center has not been asked to update that portion of its report. This could, of course, be done during the comment period if it were deemed helpful.

[3]In its 2004 report the Federal Judicial Center found (p. 4) that 30 of the 94 districts had a relevant local rule, order, or procedure governing disclosure of *Brady* material. As noted above, the FJC is presently updating this report to provide a completely current count, and its new report will be included in the agenda materials.

The Committee is also aware of a significant number of cases in which the courts have found *Brady* violations, as well as many more cases in which the courts have found that exculpatory material was not disclosed–or was not disclosed in a timely fashion–but nevertheless found no constitutional violation because the failure to provide the evidence did not deprive the defendant of due process. In many cases, the court found that the undisclosed evidence was favorable to the defendant–and material in the sense that term is generally used under Rule 16–but not material in a narrower constitutional sense. In order to meet this elevated constitutional standard of materiality, the defense must establish a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667 (1985), or that the trial did not result in a verdict worthy of confidence, *Kyles v. Whitley*, 514 U.S. 419 (1995). The attached materials include brief descriptions of cases considering *Brady* issues,[4] as well as an annotation collecting cases.[5]

The reported cases are not, however, a true measure of the scope of the problem, which it is impossible to measure precisely. The defense is, by definition, unaware of exculpatory information that has not been provided by the government. Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light. There is, however, no way to determine how frequently this occurs. For that reason, the Advisory Committee places substantial weight on the experience of highly respected practitioners, such as the members of the American College of Trial Lawyers and the practitioner members of the Advisory Committee, who strongly support the need for an amendment to Rule 16. Similarly, the Federal and Community Defenders believe that a rule is needed. One of the values of publishing the proposed rule, of course, would be to gain further information on this point.

It is also important to note that in a large number of districts the local rules or standing orders require disclosure of some or all of the information that would be addressed by the proposed amendment. The local rules, it should be noted, vary widely regarding both the scope of the material to be disclosed, as well as the timing. These variations will be described in the forthcoming Federal Judicial Center report, which will be distributed with the agenda materials. For present purposes, it is sufficient to note two points. First, the development of numerous local rules supports

---

[4]Cases prior to July 2001 are summarized in an excerpt from the Habeas Assistance and Training Project. Later cases were summarized by Professor Beale.

[5]This annotation is of interest because it contains not only cases in which the court found that exculpatory or impeachment information was "material" in the sense that term is used in *Brady*, but also a large number of cases in which the court found that exculpatory material was not provided, but that the error was not of constitutional dimensions because the defendant was unable to show a reasonable probability that the result of the trial would have been different if the evidence has been disclosed.

the Advisory Committee's view that exculpatory and impeachment evidence and information can and should be addressed by rulemaking. Second, the variety of these rules suggests that it may be time to replace the patchwork of varying local rules with a single uniform rule.

One new factor emerged during the course of the Committee's consideration of this issue: the Department of Justice, under the leadership of Assistant Attorney General Alice Fisher, adopted a new policy in the United States Attorneys Manual (USAM) requiring disclosure. This is the first time that the Department's written policies have mandated disclosure of exculpatory and impeachment evidence and information, and the Committee was extremely supportive of the Department's action. Moreover, the Department took the unusual step of providing Committee members with drafts of the policy and seeking their comments. The Committee applauded the Department's action, and specifically its broad statement of the duty of disclosure. In the end, however, the Advisory Committee concluded that the new policy, though a major step forward, did not obviate the need for the proposed rule, which differs from the USAM policy in two key respects. First, the USAM policy retains a subjective limitation on the duty to disclose information that is exculpatory or impeaching, but which the prosecutor concludes is "not significantly probative of the issues before the court." USAM § 9-5.001(E)(C). Second, the new policy, like the remainder of the USAM, is not judicially enforceable; it "does not create a general right of discovery," "[n]or does it provide defendants with any additional rights and remedies." USAM § 9-5.001(E). *See also* USAM § 9-5.100 (Preface) ("GIGLIO POLICY") (same). The Committee considered deferring consideration of the amendment to give the new policy time to take effect, but felt that it would not be feasible to monitor compliance. As noted above, the defense is generally unaware when the prosecution fails to provide exculpatory or impeachment information. Accordingly, although it welcomed the Department's recognition of the prosecution's constitutional and professional obligations in the United States Attorneys Manual, the Committee concluded that the new policy did not eliminate the need for a rule making disclosure a part of pretrial discovery.

The rationale for the scope of the proposed Amendment

The proposed amendment is not intended simply to codify the prosecution's constitutional duty under *Brady*. Under *Brady* and the cases that followed it, due process is denied and reversal of a conviction required only if the defense establishes a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667, 682 (1985), or that the trial did not result in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419 (1995). Although the Supreme Court refers to this as a "materiality" requirement, it is not the same standard of materiality used in Rule 16, which requires disclosure of documents, objects, reports and examinations that are "material to preparing the defense." *See* Rule 16(a)(1)(E)(I) & (F)(iii). Under *Brady*, materiality is a requirement that the defense show prejudice.

The proposed rule requires disclosure of "all ... exculpatory or impeaching information" that is known to the attorney for the government or law enforcement agents who are involved in the investigation of the case. The committee note defines information as exculpatory "if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information." The note also states what is implicit in the text of the rule: there is no additional requirement of materiality as that term is used in cases such as *Kyles v. Whitley*. As a policy matter, this is desirable for several reasons. First, the materiality standard in *Brady* and its progeny was developed for the purpose of appellate review and collateral attack, and it focuses on the impact of undisclosed evidence in light of the record as presented at trial. This standard is obviously ill suited to application prior to trial, particularly in light of the fact that full discovery is not available to either the prosecution or the defense. It is nearly impossible to assess before trial the likelihood that particular information would change the outcome of trial. Second, the materiality standard in the *Brady* line of cases is a constitutional minimum, imposed in state as well as federal cases, not a rule of best practice. Showing a "true" *Brady* violation is an extremely difficult burden for the defense to bear, because it encompasses only a narrow range of information. *Cf. Strickler v. Green*, 527 U.S. 263, 281-82 (1999) (recognizing the distinction between "so-called *Brady* violations" – violations of a "broad obligation to disclose 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).

Codifying a requirement that the prosecution disclose all evidence that casts doubt on the defendant's guilt as to any essential element of the case as well as information that impeaches the government's case would bring the Federal Rules in line with current statements of the prosecution's ethical responsibilities and professional statements of good practice, which go substantially beyond the constitutional requirements under *Brady*. The American Bar Associations's Model Rules of Professional Conduct and the ABA Criminal Justice Standards both articulate a broad standard for pretrial discovery. The Model Rules state that the prosecutor 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....*" AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8(d) (2002) (emphasis added).[6] Similarly, the ABA Standards for Criminal

---

[6]The American Bar Association's Criminal Justice Standards for Discovery states the same obligation. It 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)

Justice: Prosecution and Defense Function provide that broad disclosure is required at the earliest possible time "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, Standard 3-3.11 (3 ed. 1993) (emphasis added).

Codifying a general discovery obligation that goes beyond the constitutional minimum would also bring the Federal Rules in line with state procedural rules. A 2004 study by the Federal Judicial Center (included as an attachment) 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.

Specific aspects of the proposed rule

There are two critical features of the proposed rule: the scope of required disclosure, and the timing of the disclosure.

Scope of required disclosure. As noted above, the proposed rule is stated without any separate "materiality" requirement, though evidence is certainly material in the general sense used in Rule 16--"material to preparing the defense"--if it "is ... either exculpatory or impeaching." The proposed rule further defines exculpatory in the committee note as information "that tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment." This is similar to the ABA Standards noted above and many state statutes and court rules based upon them, all of which refer to evidence or information that tends to negate the guilt of the accused. The committee note does not define the term impeachment.

(3rd Ed. 1996).

The rule refers to "information." This word was chosen, instead of evidence, to make it clear that the discovery obligation was not limited to admissible evidence. The Advisory Committee discussed whether to use the phrase "evidence and information," which is used in many of the state provisions as well as the ABA Standards and Model Rules. The Committee felt that the term information was broad enough to encompass both, but can rephrase the amendment following notice and comment if there is any confusion on this point.

The rule refers to information "known to" the prosecution team, without limiting it to information that is within the prosecution's "possession, custody, and control," as is the case with several other parts of Rule 16. *See, e.g.*, Rule 16(a)(1)(E). Since the rule is phrased in terms of "information," rather than evidence or material, it is fair to ask the government to provide exculpatory information even if it does not have custody of any specific piece of evidence (because, for example, it is in the custody and control of state officials). Providing the defense with the information that such exculpatory evidence exists would permit the defendant to subpoena the evidence from a third party or to investigate in an effort to find admissible evidence.

Timing. The Committee considered at length the issue of the timing of disclosure, which is a critical issue for both prosecution and defense. From the defense perspective, the earliest possible disclosure is desirable, and one of the key objections from both the American College of Trial Lawyers and other practitioners is that if disclosure is made, it often occurs on the eve of, or even during trial. As a result, it is difficult for the defense to make use of the information without a continuance, if one can be obtained. The defense seeks exculpatory and impeachment information as part of routine pretrial disclosure, and that is, in fact, how it is treated in many jurisdictions (including a number of federal districts). The Department of Justice, however, expressed grave concern that disclosure significantly in advance of trial could have adverse consequences. The most pressing concern, from the Department's perspective, is the need to protect witnesses from intimidation and even physical harm. Accordingly, the Department placed a high priority on deferring the disclosure of any information that would identify witnesses, directly or indirectly, in order to limit the time during which any prospective witness is subject to coercion or threats. Moreover, deferring disclosures about witnesses until the eve of trial means that the identity of many prospective witnesses will never be disclosed, since most cases do not go to trial.

The rule proposed by the Committee reflects a compromise on timing. It distinguishes between the timing for exculpatory information and information that merely goes to impeachment. It is impeachment information, by definition, which raises most of the concerns about revealing the identity of prospective government witnesses. The rule defers the duty to provide impeachment information, providing that "[t]he court may not order disclosure of impeachment information earlier than 14 days before trial." In the case of exculpatory information, in contrast, the rule states that prosecution must make this information available "[u]pon a defendant's request," without setting a particular time. This follows the pattern of other pretrial discovery obligations under Rule 16.

Thus the rule would permit the district courts to include such disclosure within the other timing requirements applicable to pretrial discovery. In contrast, the American College of Trial Lawyers proposed a requirement that disclosure be provided within 14 days after the defendant's request. The College noted (p. 23) that early discovery is especially important in the federal system, where the Speedy Trial Act requires cases to be brought to trial quickly, and the time for pretrial preparation is limited, even in complex cases which may have been under investigation for years.

Other features not included. The American College of Trial Lawyers also proposed (pp. 23-24) a due diligence certification, which would require the government attorney to certify in writing that he or she has exercised due diligence in locating all information favorable to the defendant, provided all such information to the defendant, and acknowledged the continuing obligation to disclose such evidence until final judgment has been entered. This certification requirement was intended to avoid a situation where evidence known to investigators was never known to the prosecutor or disclosed to the defense, and to highlight the critical importance placed upon compliance with this requirement. The Committee's proposal does not include a certification requirement.

The Committee also discussed, but did not include in this proposal, a requirement to provide information that would be relevant to sentencing. The Committee has received proposals for disclosure requirements related to sentencing, but did not make that part of this proposal.

Effect on appellate review and collateral attack

One issue that concerned members of the Advisory Committee was the effect that the amendment would have on cases on direct appeals and collateral attack. The short answer is that (1) defendants who could establish a violation of Rule 16 would likely find it somewhat easier to obtain a new trial on direct appeal than if they had to prove a constitutional violation, but (2) it is doubtful that there would be any difference on collateral attack.

Direct appeals. The adoption of the proposed rule would have two effects in cases on direct appeal. First, because the rule would define the duty to provide exculpatory and impeachment material more clearly and more broadly, it should simplify the court's task in determining whether a violation occurred. The rule would also change the standard of review, though there is sufficient variation in law at the circuit level that the picture is not entirely clear. A showing of prejudice is a necessary element of a constitutional violation under *Brady* and the cases that follow it. To establish a constitutional violation the defendant must demonstrate a reasonable probability that had disclosure been made the result would have been different, *United States v. Bagley*, 473 U.S. 667 (1985), or that the trial did not result in a verdict worthy of confidence, *Kyles v. Whitley*, 514 U.S. 419 (1995). In contrast, once a defendant has established that a violation of the Rules of Criminal Procedure, the burden in on the government to demonstrate that any error raised in a timely fashion

was harmless. *See United States v. Vonn*, 535 U.S. 55, 62 (2002). In *Vonn* and *United States v. Olano*, 507 F.3d 725, 733 (1993), the Supreme Court stated that the government has the burden of persuasion on the prejudice issue under Rule 52(a), but a defendant who did not raise the issue in a timely fashion bears the burden of persuasion on prejudice under the plain error provision of Rule 52(b). Although both *Vonn* and *Olano* were plain error cases, and the discussion of Rule 52(a) was technically dicta, the Court was clear on the point that in contrast to Rule 52(b) the government has the burden of showing harmlessness under Rule 52(a).

Many circuit decisions, however, still cite older precedents and hold that the defendant seeking relief on appeal from a discovery violation must always show prejudice. *See, e.g., United States v. Rosario-Peralta*, 199 F.3d 552 (1st Cir. 1999), and *United States v. Figure on-Lopez*, 125 F.3d 1241 (9th Cir. 1997). It is doubtful whether these cases can be squared with the Supreme Court's decisions in *Vonn* and *Olano*.

Collateral attacks. In § 2255 proceedings a defendant must establish "a violation of the Constitution or laws of the United States." Nonconstitutional claims can be raised, however, only if the error is "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). Since *Hill* involved a violation of the Federal Rules of Criminal Procedure, the same standard should be applicable to a violation of Rule 16. It seems likely that the "complete miscarriage of justice" and "rudimentary demands of fair procedure" standards would be similar the principles the Court has articulated in the *Brady* line of cases. If so, then the adoption of the amendment would have no effect in collateral proceedings.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 16 be published for public comment.

C. Forfeiture Rules

Working through a subcommittee, and with the substantial assistance of forfeiture specialists in the Department of Justice and Mr. David Smith (an authority on forfeiture who presented the views of the National Association of Criminal Defense Lawyers), the Committee developed and approved a package of amendments intended to incorporate current practice as it has developed since the revision of the forfeiture rules in 2000. Although the Committee heard proposals for more fundamental changes, in general it chose not to break new ground, and adopted what are largely consensus proposals. All members of the Committee concurred in recommending that the proposed amendments be forwarded to the Standing Committee for publication. Three rules are affected: Rule 7 (indictment and information), Rule 32 (sentencing), and Rule 32.2 (forfeiture).

1. ACTION ITEM-Rule 7

The proposal to amend Rule 7 removes a provision that duplicates the same language in Rule 32.2, which was intended to consolidate the forfeiture related provisions.

Recommendation--The Advisory Committee recommends that the proposed amendment to Rule 7 be published for public comment.

2. ACTION ITEM-Rule 32

The proposed amendment provides that the presentence report should state whether the government is seeking forfeiture. This is intended to promote timely consideration of issues concerning forfeiture as part of the sentencing process.

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

3. ACTION ITEM-Rule 32.2

Several changes to Rule 32.2 are proposed. In subdivision (a) the Committee proposes new language to respond to uncertainty regarding the form of the required notice that the government is seeking forfeiture. The amendment states that the notice should not be designated as a count in an indictment or information, and that it need not identify the specific property or money judgement that is sought. Where additional detail is needed, it is generally provided in a bill of particulars. After extensive consideration in the subcommittee of language that would provide more detail about the use of bills of particulars, the Committee determined that the better course at this point is to leave the matter to further judicial development guided by general comments in the committee note.

In subdivision (b)(1) the Committee proposes to add language clarifying the point that the court's forfeiture determination may be based on additional evidence or information accepted by the court in the forfeiture phase of the trial. The amendment also states that the court must conduct a hearing when requested to do so by either party, and notes that in some instances live testimony will be needed. The Committee noted that the present rule, which refers to "evidence or information," does not limit the court to considering evidence that would be admissible under the Rules of Evidence (which themselves provide that they are not applicable to sentencing). Whether this is a good policy can be debated, but it reflects a decision made in 2000 and the Committee did not seek to reopen the matter.

Proposed subdivision (b)(2) requires that the court enter a preliminary order of forfeiture sufficiently in advance of sentencing to permit the parties to suggest modifications before the order becomes final as to the defendant, and also expressly authorizes the court to enter a forfeiture order that is general in nature in cases where it is not possible to identify all of the property subject to forfeiture at the time of sentencing. Recognizing the authority to issue a general reconciles the requirement that the court make the forfeiture order part of the sentence with Rule 32.2(e), which allows the court on motion of the government to amend the forfeiture order to include property "located and identified" after the forfeiture order was entered. The committee note cautions that the authority to enter a general order should be used only in unusual circumstances, and not as a matter of course.

The proposed amendments to subdivisions (b)(3) and (4) clarify when the forfeiture order becomes final as to the defendant (as opposed to third parties whose interests may be affected), what the district court is required to do at sentencing, and how to deal with clerical errors.

Proposed subdivision (b)(5) clarifies the procedure for requesting a jury determination of forfeiture, and requires the government to submit a special verdict form.

Proposed subdivisions (b)(6) and (7) govern technical issues of notice, publication, and interlocutory sale. They are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure.

Recommendation--The Advisory Committee recommends that the proposed amendments to Rule 32.2 be published for public comment.

D. Electronically Seized Evidence

ACTION ITEM-Rule 41

After study by a subcommittee and a tutorial on the technology for storing and recovering electronic information, the Advisory Committee approved two changes in Rule 41.

The first change acknowledges that the very large volume of information that can be stored on computers and other electronic storage media generally requires a two-step process in which the government first seizes the storage medium and then reviews it to determine what information within it falls within the scope of the warrant. In light of the enormous quantities of information that are often involved, as well as the difficulties often encountered involving encryption and booby traps, the Committee concluded that it would be impractical to set a definite time period during which the

offsite review must be completed. The committee note emphasizes, however, that the court may impose a deadline for the return of the medium or access to the electronically stored information.

The second proposed change provides that in a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information the inventory may be limited to a description of the physical storage media seized or copied. Similarly, when business papers or other documents are seized, the inventory will often refer to a file cabinet or file drawer, rather than seeking to list each document.

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

E. Motions For Reconsideration and Certificates of Appealability in Actions Under §§ 2254 and 2255

ACTION ITEM-Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings

The amendments to Rule 11 of the Rules governing 2254 proceedings, and to Rule 11 of the Rules Governing 2255 proceedings are intended to provide, for the first time, a well-defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under those rules. The efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Civil Procedure 60(b) – have generated a good deal of confusion.

The amendments to Rule 11 seek to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a §§ 2254 or 2255 order is the procedure provided by Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amendments provide disappointed litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 545 U.S. 524, 532 & n.5, but within an appropriate and definite time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 532 & nn.4-5, 538 (emphasis by Court). Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2254 and 2255 as well as the finality of criminal judgments.

The proposed amendment also makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 and § 2255 Proceedings in the District Courts. Rule 11(a) also requires the

district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Committee voted unanimously to forward the proposed amendments to Rule 11 to the Standing Committee. After a lengthy discussion of a related proposal to amend Rule 37 to regularize coram nobis relief and to provide that other ancient writs may not be used to seek relief from a criminal judgment, the Committee voted 7 to 4 not to forward the proposed rule to the Standing Committee.

Recommendation--The Advisory Committee recommends that the proposed amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings be published for public comment.

IV. Information Items

A. Rule 29

At present, Rule 29 permits the court to grant a preverdict acquittal that is insulated from appellate review because of the Double Jeopardy Clause. The subject of amending Rule 29 has been under active consideration for more than four years, leading to the current amendment that was published for comment in August of 2006. After extensive discussion of the public comments and the difficult issues raised by the proposed amendment, the Rules Committee voted 9 to 3 to recommend that the Standing Committee not forward the proposed amendment to Rule 29 to the Judicial Conference. After further discussion of other possible changes that might be responsive to the concerns that prompted the amendment, the Committee voted 7 to 5 to table other amendments to Rule 29 indefinitely, *sine die*.

This report will first review the background and then describe the Committee's recommendation and its reasoning.

Background. For several years the Department of Justice has pressed for an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns 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 was intended to show the frequency of preverdict acquittals, and selected case studies were presented to show the impact erroneous and unreviewable preverdict acquittals have had on the administration of justice. The Department presented the new information at the January 2005 meeting of the Standing Committee and strongly urged the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. The Department indicated that it 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.

Following 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 whether the Advisory Committee recommended such an amendment.

In response to the Standing Committee's request, the Advisory Committee developed and refined a draft amendment at a series of meetings in 2005 and 2006. The Committee considered but ultimately rejected the option of prohibiting all preverdict acquittals, because they serve a number of important functions. They provide the trial court with a valuable case-management tool, especially in complex cases involving a large number of defendants and/or counts. In complex cases it is very helpful to be able to simplify the case by eliminating some defendant(s) or count(s) from the jury's consideration if there is no evidence that could support a conviction. Retaining the option of preverdict acquittals is also highly desirable from the defense perspective, since there are obvious costs to continued participation in the latter stages of what may be a lengthy and costly trial.

The published amendment addressed the problem by retaining the option of preverdict acquittals, but allowing them only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. The amended rule sought to protect both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous preverdict judgments of acquittal. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and/or multiple defendants, the amendment permitted any defendant to move for a judgment of acquittal on any count (or counts).

The Advisory Committee was closely divided on the question whether to recommend publication of the amendment, and approved doing so by a vote of 6-5. This vote reflected serious reservations regarding the merits of the proposed amendment, rather than concerns about the language or form of the amendment. The discussion at the Committee focused on the policy issues. Members of the Committee who opposed the amendment saw it as inconsistent with the public policy underlying the Double Jeopardy Clause and as unduly restricting the trial court's authority. They were not persuaded that erroneous preverdict acquittals have been a sufficient problem to warrant such a restriction of constitutional rights and judicial authority. Additionally, since the rule contemplates a government appeal from a preverdict acquittal, they expressed concern that government appeals could create new problems, complicating the continuation of the trial of related counts or defendants, or possibly denying the district courts of jurisdiction to continue such trials.

Action Following Publication and Comment. After publication of the amendment in August 2006 many written comments were received, and several speakers at the public hearing addressed the proposed amendment at length. The amendment generated very substantial opposition from both the bench and the bar (though there were some positive comments). The main themes in the statements opposing the amendment were the following:

- The amendment subverts the defendant's immediate interest in finality, which is protected by both Due Process and the Double Jeopardy clause.

- The amendment intrudes upon judicial independence and unduly restricts the historic powers of the trial court to protect the interests of individual defendants and to manage its docket.

- The amendment exceeds the authority granted by the Rules Enabling Act.

- The amendment's waiver provision imposes an unconstitutional condition.

- The data provided by the government do not show the need for an amendment, because the statistical information failed to isolate pre-trial acquittals, which are quite rare.

- A close examination of the records in the selected case studies upon which the Department of Justice relied to show the impact of erroneous acquitials demonstrates that the court in each case acted properly.

The public comments and hearing testimony were considered by both a subcommittee, which discussed them in two teleconferences, and by the full Committee.

There was a substantial agreement within both the subcommittee and the full Committee that the current proposal should not be adopted. After discussion, the Advisory Committee voted 9 to 3 not to recommend the published Rule 29 amendment to the Standing Committee.

The more difficult question was whether to continue the effort to find an alternative means of providing appellate review for some or all of the cases of greatest concern to the Department of Justice and members of the Committee. The Committee voted 7 to 5 to table the proposal to amend Rule 29 indefinitely, *sine die*. Because of the interest expressed by the Standing Committee and the high priority the Department of Justice has placed on this issue, each member of the Committee was asked to state briefly the reasons for his or her vote. Those voting to table cited two main reasons. First, they felt that there had not been a showing of a sufficient need for the amendment. The record developed during the public comment period and at the hearing shed new light on both the sample cases cited by the Department and the statistical information it provided. Moreover, the judges and practitioners on the Committee (and those who testified) concurred in the view, expressed in the public comment and hearings, that midtrial acquittals are extraordinarily rare. The district courts use this power very sparingly, granting midtrial acquittals only in what they identify as the clearest cases. Second, those voting against the amendment cited concerns that it might exceed the powers granted by the Rules Enabling Act, affecting substantive rather than procedural matters. Moreover, it was noted that the Committee had attempted for more than four years to craft the best mechanism to provide appellate review, and many of the suggestions now being put forth had been rejected in the past as inferior to the published proposal. Those voting against tabling expressed the view that even if the number of midtrial acquittals is small, some are so problematic that they warrant a remedy. Also there are one or more alternatives that could be explored. The Department of Justice, which has consistently advocated the need for an amendment, expressed its strong continuing support for some mechanism providing appellate review. Assistant Attorney General Alice Fisher expressed great disappointment that neither a prohibition on midtrial acquittals nor the current waiver amendment was being recommended to the Standing Committee.

B. Rule 49.1; Redaction of Arrest and Search Warrants

When it approved Rule 49.1 (which will become effective December 1, 2007) the Standing Committee asked the Rules Committee to revisit the rule's treatment of arrest and search warrants. Rule 49.1 provides for the redaction of certain personal and sensitive information that would

otherwise become generally available over the Internet when documents are filed with the district court. Rule 49.1(b)(8) exempts from the general redaction requirements "an arrest or search warrant." In addition, arrest and search warrants may also be exempted under Rule 49.1(b)(7)'s exemption of "a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case." The question is whether arrest and search warrants should remain exempt from the redaction requirements, with the result that the personal information in such warrants will be available absent a protective order in a particular case.

Despite the general policy, reflected in Rule 49.1(a), of protecting certain categories of personal information by requiring redaction, the Committee concluded that exempting this information from redaction is warranted. Since search and arrest warrants may pose different issues, the Committee analyzed them separately.

(1) Search Warrants. A search warrant must identify the person or property to be searched, and in some circumstances this requires the inclusion of information that would ordinarily be redacted, particularly a financial-account number or an individual's home address. Redacting this information would require a major change in current procedures. In many districts, search warrants are executed and then returned without any involvement of the U.S. Attorney's Office. There is thus no prosecutorial screening of these documents before filing, and it would be burdensome to require such screening in order to redact the documents. In addition, there was support on the Advisory Committee for the view that the public has an interest in some of this information, such as the locations that were searched.

(2) Arrest Warrants. In addition to the practical difficulty of requiring the redaction of arrest warrants (which, like search warrants, may be returned without the involvement of the U.S. Attorney's Office), there are several additional reasons not to require redaction of arrest warrants. Personal information in arrest warrants, much like the account information in forfeiture proceedings documents, is generally included for the purpose of identifying the individual to be arrested. In some cases, the Social Security Number will be the critical information to determine whether the person arrested is the same person named in the warrant. With tens of thousands of federal arrests annually, a significant number of cases will involve defendants with common names. In such cases, the defendant's name, city and state of residence, and even date of birth may simply not provide sufficient information to conclusively identify the defendant. In these cases, the full Social Security Number may be necessary to ensure proper identification. To the extent that including Social Security Numbers or other confidential identifying information in arrest warrants raises concerns in a specific case, a court is explicitly authorized to issue a protective order to limit the distribution of the arrest warrant (for example, ordering that warrant not be accessible over the Internet).

The identifying information contained in the body of the warrant may also play an important role in several later stages in the criminal process, and it would interfere with those later stages to redact the information in question. For example, if a defendant is arrested in a judicial district other than where the crime occurred, he or she will be removed to the charging district pursuant to the provisions of Rule 40. As part of that procedure, the defendant is entitled to a removal hearing at which identity is a key issue, and such hearings can take place well after arrest and long after the original issuance of an arrest warrant. Redaction of the identifying information would be disruptive to that process, as well as to the overall interest in ensuring that the right person is arrested. Similarly, arrest warrants can play a vital role in identifying defendants who have jumped bail or fled after arrest; in many cases, agents, deputy marshals or police officers in other jurisdictions obtain copies of the warrants directly from the courthouse. Unlike arrest warrants, bench warrants issued by the Court are often deficient in identifying information.

Finally, there is a strong societal interest in learning the identity of those charged and arrested with criminal activity, and such information is routinely published in newspapers or through the media. Once again, there is a need to make sure that the identifying information is as accurate as possible so that the correct people are reported as being arrested. Finally, the identifying information on arrest warrants is less sensitive than that in other court documents because it pertains solely to the defendant who has been charged, and does not include any innocent third party information.

C. Rule 32(h)

An amendment to Rule 32(h) was proposed as part of the Booker package of amendments. Following the public comment period the Criminal Rules Committee revised the language of the amendment and recommended that it be approved. The Standing Committee, however, raised concerns and asked the Rules Committee to study the matter further. After discussion, the Rules Committee voted 7 to 4 at its October 2006 meeting to reexamine the proposed amendment. That reexamination was intended to take account of a number of issues, including the relationship between the Guidelines and other sentencing factors. After the meeting, the Supreme Court granted review in two cases that may resolve some of the issues, Rita v. United States, No. 06-5754, and Claiborne v. United States, No. 06-5618. For that reason, the Committee deferred further consideration of Rule 32(h) pending the Supreme Court's decision in these cases. Rita and Claiborne have been argued, and decisions are expected before the end of the term. We anticipate returning to this issue at the Rules Committee's October meeting.

D. Indicative Rulings

The Committee deferred consideration of the indicative rulings project, being led by the Civil Rules Committee and coordinated with the Appellate Rules Committee, until the Rules Committee's October meeting.

Attachments:

Appendix A. Rules 1, 12.1, 17, 18, 32, 60, 61
Appendix B. Rule 41(b)(5)
Appendix C. Rules 45(a), 5.1, 7(f), 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases
Appendix D. Rule 16
Appendix E. Rules 7(c), 32, 32.2
Appendix F. Rule 41(e)(2)
Appendix G. Rule 11 of the Rules Governing §§ 2254 and 2255 Cases

APPENDIX A

Rules 1, 12.1, 17, 18, 32, 60, 61.

- **Copy of Rules**
- **Committee Notes**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope; Definitions

(b) **Definitions.** The following definitions apply to these rules:

* * * * *

(11) "Victim" means a "crime victim" as defined in 18 U.S.C. § 3771(e).

* * * * *

Committee Note

Subdivision (b)(11). This amendment incorporates the definition of the term "crime victim" found in the Crime Victims' Rights Act, codified as 18 U.S.C. § 3771(e). It provides that ". . . the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."

Upon occasion, disputes may arise over the question whether a particular person is a victim. Although the rule makes no special provision for such cases, the courts have the authority to do any necessary fact finding and make any necessary legal rulings.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of Rule 1(b)(11) in response to public comments by transferring portions of the subdivision relating to who may assert the rights of a victim to Rule 60(b)(2). The Committee Note was revised to reflect that change and to indicate that the Court has the power to decide any dispute as to who is a victim.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) expressed concern that the definition of victim did not also refer to the victim's representative.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) expressed several concerns: (1) the definition should apply only to listed rules to avoid unintended consequences, including the possibility that persons who claim to be victims of crimes not yet charged could assert rights under the rules, (2) the rule provides no procedure for determining whether an individual claiming to be a victim is entitled to assert the victim's rights, and (3) the language deeming the accused not to be a victim is not an appropriate way to implement the statutory directive that a person accused of a crime cannot obtain any relief under the Crime Victims' Rights Act.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) suggests that the reference to representatives for minors, deceased, and incapacitated victims should be moved to Rule 60, where it could be added to the provisions regarding "who may assert" the rights of victims. He

opposes the second sentence of the rule, since an accused may in some circumstances be a victim, and he suggests that addition of language stating that a government agency may not be a victim for this purpose. He also supports the Federal Defenders' proposal for new procedures determining how and by whom victims' rights may be asserted.

The **Federal Magistrate Judges Association (06-CR-015)** supports the proposed amendment, noting that incorporating the statutory definition by reference means that any statutory changes will become effective immediately without the necessity of amending the rule.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) opposes the amendment because it "would equate 'crime victim' under the CVRA with 'victim' under the Rules, present and future, independent of the CVRA." She fears that this would affect rights and privileges under other statutes, such as the Victim and Witness Protection Act and the Victim's Restitution Act. In her view, this rule exceeds the authority conferred by the Rules Enabling Act. She also objects to the proposed language stating that the defendant was not a victim of the crime, noting that co-defendants may each claim to be the other's victim. She urges that a procedure is necessary to determine who is a victim for this purpose.

The State Bar of California Committee on Federal Courts [hereinafter State Bar of California] (06-CR-023) opposes the second sentence of the draft rule, which provides that a accused of an offense is not a victim, since in cases such as alien smuggling a person who has some degree of culpability may also be a victim, and the usual labeling of defendant and victim may not be applicable.

Rule 12.1. Notice of an Alibi Defense.

* * * * *

(b) Disclosing Government Witnesses.

(1) ***Disclosure.***

(A) *In general.* If the defendant serves a Rule 12.1(a)(2) notice, an attorney for the government must disclose in writing to the defendant or the defendant's attorney:

(i) ~~(A)~~ the name~~, address, and telephone number~~ of each witness --and the address and telephone number of each witness other than a victim--that the government intends to rely on to establish that the defendant was present at the scene of the alleged offense, and

(ii) ~~(B)~~ each government rebuttal witness to the defendant's alibi defense.

(B) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests.

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within 10 days after the defendant serves notice of an intended

alibi defense under Rule 12.1(a)(2), but no later than 10 days before trial.

(c) Continuing Duty to Disclose.

(1) ***In General.*** Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of each additional witness-- and the address; and telephone number of each additional witness other than a victim – if:

(A) ~~(1)~~ the disclosing party learns of the witness before or during trial; and

(B) ~~(2)~~ the witness should have been disclosed under Rule 12.1(a) or (b) if the disclosing party had known of the witness earlier.

(2) ***Address and Telephone Number of an Additional Victim Witness.*** The address and telephone

number of an additional victim witness must not be disclosed except as provided in (b)(1)(B).

* * * * *

Committee Note

Subdivisions (b) and (c). The amendment implements the Crime Victims' Rights Act, which states that victims have the right 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.

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).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee made very minor changes in the text at the suggestion of the Style Consultant. The Committee revised the Note in response to public comments, omitting the suggestion that the court might upon occasion have the defendant and victim meet.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) opposes the amendment as drafted, arguing that the rule should be revised to eliminate any requirement that the government provide the defense with the name and contact information for a victim whom it expects to call to rebut an alibi defense. The proposed rule is inadequate, in his view, on several grounds: (1) it requires only a showing of "need" to overcome the blanket protection for this information, (2) if a showing of need is made, the rule does not adequately protect victims because it does not clearly require the court to give priority to the victim's safety concerns, and it does not expressly provide that the court may decline to turn over this information if necessary to protect the victim, and (3) it does not provide that the victim has a right to be heard on the question whether this information will be provided to the defense. Although the language "the court may" gives the court discretion, it is troublesome that the rule authorizes disclosure to the defendant as well as defense counsel. Moreover, it is inappropriate to suggest in the notes that the court could order a face to face meeting rather than providing the defense with the victim-witness's name and contact information.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) opposes the amendment on the ground that it upsets the constitutional balance between prosecution. The present rule properly presumes that the defendant who presents an alibi defense needs to locate, interview, and investigate a witness who will place him at the scene of an crime, and requires disclosure of those witnesses' names and contact information to facilitate that process. The Supreme Court has recognized the witnesses may be asked their names and addresses, because they are necessary in order to open various avenues of cross examination as well as out of court

investigation. Yet the proposed amendment would force the defendant to provide the names and contact information for his alibi witnesses, on pain of having them excluded at trial, though he would not be given the name and contact information for a victim whose testimony would place him at the scene of the crime unless he could make a showing of his need for the information. This violates due process, which prohibits notice of alibi rules that are not reciprocal. It also rule sets a dangerous precedent by giving an interpretation to the statutory rights under the CVRA that abridges defendants' constitutional rights. There is no need for such a procedure, since the victim's right to be reasonably protected from the accused and to be treated with fairness and dignity can be accommodated adequately under current Rule 12(d), which provides for exceptions from disclosure for good cause. If necessary, Rule 12(d) could be amended to provide expressly for situations when disclosure of this information would violate the victim's right to be reasonably protected from the accused.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) opposes the amendment on the grounds that it is not reasonable to restrict the opportunity of all defendants to investigate and prepare their cases on the assumption that all victims needs this protection, rather than requiring a showing of a special need for secrecy. The proposed rule goes too far in creating a burdensome procedure for victims that is not available even for confidential informants or cooperating co-defendants. It is unhelpful to suggest that the court might authorize the defendant and his counsel to meet with the victim rather than providing the victim's contact information. The fact that a witness is also a victim does not, by itself, justify protecting that person from being approached, in a lawful manner, for purposes of pretrial investigation and preparation.

The Federal Magistrate Judges Association (06-CR-015) supports the amendment.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) opposes the amendment because (1) it is not required by the CVRA, (2) it will operate unfairly, denying defendants necessary information, and (3) it is not reciprocal. Nondisclosure should be the exception, not the rule, and must be justified on a case-by-case basis by clear and convincing evidence.

The State Bar of California (06-CR-023) indicates that its membership was divided on the wisdom of this amendment. Some felt that requiring the defendant to show need to get this information was not necessitated by the CVRA, would impose undue burdens on the courts, and would improperly accelerate the required disclosure of defense strategies. Thus the rule should continue to assume defendants need this information, and provide that it should be limited only when there is a showing of a special need to do so. Others, however, support the amendment, noting that defendants may be able to make the required showing of need ex parte. They also suggested that some prosecutors have already adopted similar practices.

Monika Johnson Hostler on behalf of the National Alliance to End Sexual Violence (06-CR-021) opposes the amendment on the ground that it provides only a "negligible" standard for releasing the name and contact information of a victim who would be called to rebut the defendant's alibi defense. Moreover, it does not provide for the victim to be heard on the question whether this information should be released.

Mary Lou Leary on behalf of the National Center for Victims of Crime (06-CR-024) emphasizes the seriousness of the problem of intimidation, and supports the proposal's requirement that a defendant show a need for the name and contact information of a victim who will be called to rebut an alibi defense.

Rule 17. Subpoena

* * * * *

(c) Producing Documents and Objects

* * * * *

(3) ***Subpoena for Personal or Confidential Information About a Victim.*** After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require that notice be given to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

* * * * *

Committee Note

Subdivision (c)(3). This amendment implements the Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(a)(8), which states that victims have a right to respect for their "dignity and privacy." The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim's interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase "personal or confidential information," which may include such things as medical or school records, is left to case development. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the matter to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2) on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed, or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no

application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim's privacy and dignity interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The proposed amendment omits the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. The last sentence of the amendment was revised to provide that unless there are exceptional circumstances the court must give the victim notice before a subpoena seeking the victim's personal or confidential information can be served upon a third party. It was also revised to add the language "or otherwise object" to make it clear that the victim's objection might be lodged by means other than a motion, such as a letter to the court.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) opposes the amendment as drafted, on the ground that it gives too much discretion to the trial court, and he objects to allowing the court to grant a motion permitting such a subpoena ex parte. A victim whose personal or confidential information is being sought should be given notice and be heard in every case before the court permits the subpoena to be served. The published rule does not, in his view, reliably protect defense strategy, and alternative approaches would treat both prosecution and defense interests equitably. Judge Cassell also favors more detailed language that would clarify the standards as well as the

procedures for authorizing the service of subpoenas for private or confidential information about the victim. In his view, the amendment could be read to expand the scope of a defendant's power to subpoena information about a victim.

Thomas Hillier, for the Federal Public and Community Defenders (06-CR-003) states that no amendment is needed, and that the published amendment will result in wasteful litigation, and undermine effective cross examination at trial, prematurely disclose defense strategy to the government, and give the government (whose grand jury subpoenas are not subject to this rule) an unfair advantage.

Russell Butler, on behalf of the Maryland Crime Victims' Resource Center, Inc. (06-CR-006) states that the proposed amendment does not adequately protect the victim's rights to privacy and fairness. Victims are entitled to notice of such subpoenas.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) opposes the amendment on the grounds that is unnecessary, and that it trenches on the defendant's Sixth Amendment rights to confront and cross examine witnesses, to have compulsory process, and to have the effective assistance of counsel in preparing and presenting a defense. The information sought in subpoenas of this nature is used to impeach credibility, and privacy is not a legitimate basis to restrict cross examination or impeachment of character. Such cross examination requires an element of surprise which would be defeated by notice and judicial prescreening.

Professor Wendy J. Murphy (06-CR-011) advocates preventing pre-trial discovery of privileged third party information.

The Federal Magistrate Judges Association (06-CR-015) supports the amendment but urges that the terms "personal" and "confidential" be defined.

Barbara Adkins, on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) concurs with the Federal Public and Community Defenders that the amendment is unnecessary and unwise.

The State Bar of California (06-CR-023) indicates that its membership was divided on this amendment. Some opposed it because it adds one more onerous burden, impinging on the ability of the defense to challenge the veracity of victim-witnesses, particularly in the absence of a definition of the broad terms personal and confidential. Others believe "the benefit of avoiding unjustified harassment of victims outweighs the burden on the court and the defendant."

Monika Johnson Hostler on behalf of the National Alliance to End Sexual Violence (06-CR-021) opposes the provision allowing ex parte approval of subpoenas because "victims should be informed and have the opportunity to oppose such intrusions into their confidentiality."

Mothers Against Drunk Driving (06-CR-022) support notification of victims when their private records are subpoenaed.

Mary Lou Leary on behalf of the National Center for Victims of Crime (06-CR-024) opposes "permitting the defense to obtain personal information about the victim in an ex parte manner." The rule should require that the victim be notified and have the right to be heard in every case when the subpoena is requested.

Robert Johnson on behalf of the American Bar Association (06-CR-028) expresses concern that the rule, as published, violates several ABA Standards by permitting attorneys to obtain evidence by means that violate the rights of third parties, by not allowing the victim or the victim's attorney to be heard, and by permitting ex parte contact with the court.

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

Committee Note

The rule requires the court to consider the convenience of victims – as well as the defendant and witnesses – in setting the place for trial within the district. The Committee recognizes that the court has substantial discretion to balance any competing interests.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

There were no changes in the text of the rule. The Committee note was amended delete a statutory reference that commentators found misleading, and to draw attention to the court's discretion to balance the competing interests, which may be more important as the court must consider a new set of interests.

SUMMARY OF PUBLIC COMMENTS

Comments Supporting the Amendment

The Federal Magistrate Judges Association (06-CR-016) (p.4) supports the amendment "because it implements the victim's right to attend proceedings under the CVRA."

Judge Cassell (06-CR-002) (p. 59) supports the amendment, which was, as he notes, based upon his original submission to the Committee. He notes that the Committee Note grounds the amendment on the right to be treated with fairness under the CVRA and questions why the same analysis was not adopted in the case of other amendments he proposed.

Amy Sousa for the National Organization for Victim Assistance (06-CR-025) generally supports Judge Cassell's comments.

Comments Opposing the Amendment

Peter Goldberger for the NACDL (06-CR-010) (p. 9) argues that the amendment does not, as stated in the Committee Note,

implement the victim's right to attend proceedings under 18 U.S.C. § 3771(b). In calling upon courts to make every effort to permit the fullest attendance of victims, he argues, subsection (b) merely implements18 U.S.C. § 3771(a), which he describes as a right not to be excluded, rather than a right to attend judicial proceedings. Thus the proposed amendment actually creates a new substantive right, which exceeds the scope of the authority granted by the Rules Enabling Act. Moreover, the provision is unwise because it allows a non-testifying victim "to press, under threat of a mandamus action, for a place of trial that may be hundreds of miles from the courthouse that is convenient to the judge, testifying witnesses and the defendant."

Thomas Hillier of the Federal Public and Community Defenders (06-CR-003)(p. 23) agrees with NACDL that 18 U.S.C. § 3771 precludes exclusion but does not create a right to attend judicial proceedings and thus does not provide a basis for the amendment, which would create a new substantive right to decide where the trial is to be held–enforceable by mandamus–that may cause hardship and expense for the defendant, witnesses, court, and prosecution.

Barbara Adkins and Mark Jordan of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019)(p. 4-5) concur with the comments of the Federal Public and Community Defenders; the proposed amendment could cause "judicial inefficiency and potential chaos in cases involving numerous self-proclaimed victims advocating different venues." The qualified right of victims to attend proceedings does not require the courts to "bring such proceedings to their living rooms."

The **State Bar of California (06-CR-023)** (p.5) argues that the amendment is an "overbroad reaction" to 18 U.S.C. § 3771(b).

It would be difficult to implement in complex cases and cases in involving many non-testifying victims, such as those involving Ponzi schemes. The amendment might lead to burdensome and unnecessary litigation.

Rule 32. Sentencing and Judgment

(a) **[Reserved.]** ~~**Definitions.** The following definitions apply under this rule:~~

~~(1) "Crime of violence or sexual abuse" means:~~

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

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

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

* * * * *

(c) **Presentence Investigation.**

(1) ***Required Investigation.***

* * * * *

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

* * * * *

(d) Presentence Report.

* * * * *

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

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

(i) any prior criminal record;

(ii) the defendant's financial condition; and

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

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

* * * * *

(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 heard ~~speak or submit any information about the sentence. Whether or not the victim is present, a victim's right to~~

~~address the court may be exercised by the following persons if present:~~

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

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

* * * * *

Committee Note

Subdivision (a). The Crime Victims' Rights Act, codified at 18 U.S.C. § 3771(e), adopted a new definition of the term "crime victim." The new statutory definition has been incorporated in an amendment to Rule 1, which supersedes the provisions that have been deleted here.

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

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

Subdivision (i)(4). The deleted language, referring only to victims of crimes of violence or sexual abuse, has been superseded by the Crime Victims' Rights Act, 18 U.S.C. § 3771(e). The act defines the term "crime victim" without limiting it to certain crimes, and provides that crime victims, so defined, have a right to be reasonably heard at all public court proceedings regarding sentencing. A companion amendment to Rule 1(b) adopts the statutory definition as the definition of the term "victim" for purposes of the Federal Rules of Criminal Procedure, and explains who may raise the rights of a victim, so the language in this subdivision is no longer needed.

Subdivision (i)(4) has also been amended to incorporate the statutory language of the Crime Victims' Rights Act, which provides that victims have the right "to be reasonably heard" in judicial proceedings regarding sentencing. *See* 18 U.S.C. § 3771(a)(4). The amended rule provides that the judge must speak to any victim present in the courtroom at sentencing. Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the text of the rule. In response to public comments, the Committee Note was amended to make it clear that absent unusual circumstances any victim who is in the courtroom should have a reasonable opportunity to speak directly to the judge.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) (pp. 66-78) opposes the amendment because the government should be required to disclose "relevant" portions of the presentence report (PSR) to victims, and victims should be able to object on disputed issues therein. This argument proceeds in several steps. First, the right to be "reasonably heard" encompass not only the right to provide information regarding the impact of the crime upon the victim, but also the right to make sentencing recommendations. Second, since the guideline calculation will likely be a significant factor in the ultimate sentence, the right to make sentencing recommendations should be interpreted to include the right to be heard on relevant guideline issues. This, in turn, requires access to relevant portions of the report. Judge Cassell bases these arguments on Senator Kyl's statement in the legislative history describing the right to be reasonably heard on the sentence as including the right to make sentencing recommendations, as well as the victim's statutory right to be treated with fairness. He distinguishes *In re Kenna*, 453 F.3d 1136 (9th Cir. 2006), which affirmed the district court's refusal to provide a victim with the PSR, on the ground that it involved a request for the whole report, not merely the relevant portions. He rejects as inadequate the notion that the prosecutor should have discretion to determine what information from the PSR should be provided to the victim, on the ground that the

CVRA gives the victim an independent statutory right to the information in question.

Judge Cassell also takes issue with the Committee's position that courts should gradually define the contours of the right to be reasonably heard, reasoning that Congress intended a paradigmatic shift expanding and defining victim rights, including the right to dispute sentencing issues.

Judge Cassell couples these objections with suggestions that would increase procedural protections for defendants. For instance, he suggests requiring notice be given to the defendant when an upward departure might rest on information provided by the victim, an issue upon which there is currently a split in the circuits.

Finally, Judge Cassell opposes section (i)(4) for changing the victim's right to "speak or submit any information" to the right to be "reasonably heard" at sentencing. He argues that this section should directly state that victims have the right to speak at sentencing, as suggested by the legislative history and "as the only courts to have reached the issue have held."

Thomas W. Hillier, II (06-CR-003) (pp. 24-26) opposes the revision of (c)(1)(B) for requiring the Probation Officer to conduct an investigation and submit a report on restitution merely if the law "permits restitution," as opposed to if the law "requires restitution."

He opposes the revision of (d)(2)(B) for deleting the requirement that information regarding the impact on the victim to be "verified" and "stated in a nonargumentative style." Indeed, he argues these requirements should apply to all information in the presentence report, which should be added as (d)(4).

He opposes the revision of (i)(4)(B) for requiring the court to address any victim at sentencing, and for implying (with the word "address") that the victim has the right to "speak" at sentencing. He believes the rule should specifically reference Rule 60(a)(3). He also suggests that the title of (i)(4) should be changed from "Opportunity to Speak" to "Opportunity to be Heard" to avoid confusion.

Russell P. Butler on behalf of Maryland Crime Victims' Resource Center (06-CR-006) (pp. 4-8) opposes the amendment because victims should have the right to speak, rather than to be "reasonably heard," regarding sentencing. He believes that the court should have an affirmative obligation to ask the victim if he wishes to speak at sentencing and, where the victim is absent, to ask the government if the victim has been notified. Also, he believes that the presentence report should be required to identify victims, the victim's representative should be able to assert the victim's rights, and the victim's standing should be incorporated under sections (f)-(i).

Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) (pp. 11-14) opposes section (c)(1)(B) for making a presentence report mandatory, even when the interests of justice dictate otherwise. He believes restitution should not be addressed at all in the rule, and should be left to the distinct statutory scheme. He also opposes (d)(2)(B) for eliminating the requirement that victim impact information be verified and stated in a nonargumentative style. He also argues that section (i)(4)(B) should make clear that the trial judge has broad discretion and that the section should note that the right to be "heard" does not grant the right to "speak."

Federal Magistrate Judges Association (06-CR-015) (p.3) broadly supports the amendment.

Barbara Adkins on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) (p. 6) opposes the deletion of the requirements that information in the presentence report be verified and stated in a nonargumentative style (otherwise, she suggests eliminating reliance on presentence reports altogether). She also objects to section (i)(4)(B) for failing to require that notice of a victim's evidence be given to the defendant. She believes that courts should not be required to address victims (as some may prefer not to be addressed), and should retain broad discretion over courtroom decorum and protocol. She notes that these changes would be more appropriately incorporated into a new Rule 60.

The State Bar of California Committee on Federal Courts (06-CR-023) (pp. 5-6) opposes the amendment for deleting the requirements that presentence report information be verified and stated in a nonargumentative style. It also opposes the (i)(4)(B) changes, preferring that victim statements be submitted as part of the written presentence report.

Senator Jon Kyl (06-CR-026) protests that the revisions do not go far enough to advance the purposes of the CVRA and poses this question: "Does Rule 32 treat victims fairly in failing to guarantee victims a chance to review the presentence report and the Sentencing Guidelines calculation that will control the sentence and provide an opportunity to speak directly to the judge, rights criminal defendants already enjoy? He suggests that the answer is "no."

Rule 60. Victim's Rights

1 **(a) In General.**

(1) ***Notice of a Proceeding.*** The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) ***Attending the Proceeding.*** The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) ***Right to Be Heard.*** The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.

(b) Enforcement and Limitations.

(1) ***Time for Deciding a Motion.*** The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) ***Who May Assert the Rights.*** A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e).

(3) ***Multiple Victims.*** If the court finds that the number of victims makes it impracticable to accord all of them their rights described in

these rules, the court must fashion a reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) ***Where Rights May Be Asserted.*** A victim's rights described in these rules must be asserted in the district in which a defendant is being prosecuted for the crime.

(5) ***Limitations on relief.*** A victim may move to reopen a plea or sentence only if:

(A) the victim has asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days after the denial, and the writ is granted; and

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

(6) ***No New Trial.*** A failure to afford a victim any right described in these rules is not grounds for a new trial.

Committee Note

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

Subdivision (a)(1). This subdivision incorporates 18 U.S.C. § 3771(a)(2), which provides that a victim has a "right to reasonable, accurate, and timely notice of any public court proceedings. . . ." The enactment of 18 U.S.C. § 3771(a)(2) supplemented an existing statutory requirement that all federal departments and agencies engaged in the detection, investigation, and prosecution of crime identify victims at the earliest possible time and inform those victims of various rights, including the right to notice of the status of the investigation, the arrest of a suspect, the filing of charges against a suspect, and the scheduling of judicial proceedings. *See* 42 U.S.C. § 10607(b) & (c)(3)(A)-(D).

Subdivision (a)(2). This subdivision incorporates 18 U.S.C. § 3771(a)(3), which provides that the victim shall not be excluded from public court proceedings unless the court finds by clear and convincing evidence that the victim's testimony would be materially altered by attending and hearing other testimony at the proceeding,

and 18 U.S.C. § 3771(b), which provides that the court shall make every effort to permit the fullest possible attendance by the victim.

Rule 615 of the Federal Rule of Evidence address the sequestration of witnesses. Although Rule 615 requires the court upon the request of a party to order the witnesses to be excluded so they cannot hear the testimony of other witnesses, it contains an exception for "a person authorized by statute to be present." Accordingly, there is no conflict between Rule 615 and this rule, which implements the provisions of the Crime Victims' Rights Act.

Subdivision (a)(3). This subdivision incorporates 18 U.S.C. § 3771(a)(4), which provides that a victim has the "right to be reasonably heard at any public proceeding in the district court involving release, plea, [or] sentencing...."

Subdivision (b). This subdivision incorporates the provisions of 18 U.S.C. § 3771(d)(1), (2), (3), and (5). The statute provides that the victim, the victim's lawful representative, and the attorney for the government, and any other person as authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights. In referring to the victim and the victim's lawful representative, the committee intends to include counsel. 18 U.S.C. § 3771(e) makes provision for the rights of and victims who are incompetent, incapacitated, or deceased, and it also provides that "[a] person accused of a crime may not obtain any form of relief under the Crime Victims' Rights Act." Similarly, 18 U.S.C. § 3771(d)(1) provides that "[a] person accused of a crime may not obtain any form of relief under this chapter."

The statute provides that those rights are to be asserted in the district court where the defendant is being prosecuted (or if no prosecution is underway, in the district where the crime occurred).

Where there are too many victims to accord each the rights provided by the statute, the district court is given the authority to fashion a reasonable procedure to give effect to the rights without unduly complicating or prolonging the proceedings.

Finally, the statute and the rule make it clear that failure to provide relief under the rule never provides a basis for a new trial. Failure to afford the rights provided by the statute and implementing rules may provide a basis for re-opening a plea or a sentence, but only if the victim can establish all of the following: the victim asserted the right before or during the proceeding, the right was denied, the victim petitioned for mandamus within 10 days as provided by 18 U.S.C. § 3771 (d)(3), and – in the case of a plea – the defendant did not plead guilty to the highest offense charged.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Subsection (a)(2) was revised to make it clear that the duty to permit fullest attendance arises in the context of the victim's possible exclusion.

Subsection (b)(2) was revised to respond to concerns that the amendments did not clearly state that the victim's lawful representative could assert the victim's rights. The Committee Note makes it clear that a victim or the lawful representative of a victim may generally participate through counsel, and provides that any other person authorized by 18 U.S.C. § 3771(d) and (e) may assert the victim's rights, such as persons authorized to raise the rights of victims who are minors or are incompetent.

References throughout subsection (b) were revised to indicate that they were applicable to victim's rights described in the Federal Rules of Criminal Procedure, not merely subsection (a) of Rule 60.

Other minor changes were made at the suggestion of the Style Consultant to improve clarity.

SUMMARY OF PUBLIC COMMENTS

Judge Paul Cassell (06-CR-002) (pp. 86-99) recommends that some of the issues dealt with in Rule 60 would be better treated in other sections. He also specifically opposes the following subsections:

> (a)(1) because the rule should also require that victims be notified of their rights at proceedings, specifically the right to make a statement, rather than being notified merely of the existence of proceedings. Additionally, he states that the rule should include a section detailing how courts should proceed when victims lack notice of a hearing.
>
> (a)(3) because victims should have the right to heard at any proceeding affecting their rights, not just at bail, plea, and sentencing hearings (as the amendment suggests).
>
> (b)(1) because the proposed rule uses the term "promptly" rather than the statutory term "forthwith."
>
> (b)(2) because the proposed rule does not state that the victim's lawful representative can assert the victim's rights.

(b)(4) (where rights may be asserted) because it omits key language from 18 U.S.C. § 3771(d)(3) providing venue, if no prosecution is underway, in the district in which the crime occurred.

(b)(5)(a-c) because these provisions should be qualified, following the CVRA, to note that they do not affect a victim's right to restitution.

Judge Cassell supports subsection (a)(2). He opposes the NACDL's proposal for a full evidentiary hearing to determine victim status, which is not in the published rule.

Thomas W. Hillier, II (06-CR-003) (pp. 26-41) opposes restating the statutory right to not be excluded in the rules, arguing that the proper role of the rules is to provide a procedure for implementing that right, and to clarify which "determination described in subsection (a)(3)" is being referenced. He also argues that the court should be required to state its rationale for denials of exclusion.

Hillier criticizes (a)(3) because it should do more than merely restate the victim's statutory right to be "reasonably heard," and should, instead, clarify the breadth of the district court's discretion to restrict victim input. The rule should also afford the defendant adequate notice of a victim's statement and sufficient opportunity to respond.

Hillier also opposes subdivision (b) because it should require victims to assert rights by motions and should specify where, when, and by whom rights may be asserted – including a procedure for determining victim status. He argues that a court should be required to state, on the record, the reasons for any CVRA decision, not just

those denying relief. The rule should direct readers to the applicable Federal Rules of Appellate Procedure, should properly implement the "motion to re-open a plea or sentence" rule, and should make clear that relief afforded a victim under the statute should not violate others' constitutional rights.

Hillier supports (a)(1).

Russell P. Butler on behalf of Maryland Crime Victims' Resource Center (06-CR-006) (pp. 12-15) opposes the proposed rule on the grounds that it does not safeguard, with sufficient clarity, the court's obligations to victims. For example, he asserts that courts should inquire about the presence of and notice given to victims at every proceeding, and should inform victims of their rights whenever those rights are implicated. Also, he argues that the rules should provide for appointment of counsel for victims in appropriate circumstances. Additionally, he proposes that the right to be reasonably heard should apply in any proceeding and that the victim's attorney should be able to assert the victim's rights.

Professor Douglas E. Beloof, of Lewis & Clark Law School (06-CR-009) (pp. 1-3) generally supports Judge Cassell's rule proposals and argues that the CVRA should be integrated into the rules more thoroughly.

Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers (06-CR-010) (pp. 4-9) opposes the amendment because a fact-finding determination of victim status would be the only way to safeguard the defendant's due process rights. He argues that such a finding would have to involve a determination that (1) a federal crime had occurred and (2) that the crime directly and proximately harmed the putative victim. He also

proposes changing the amendment to refer to the "rights under § 3771(a)" and not the "rights under these rules."

Goldberger agrees that it should be the government's responsibility to notify victims under (a)(1).

He opposes (a)(2), arguing that it largely restates substantive rights that do not belong in the Rules of Procedure, except for a requirement that the court articulate its reasons for deciding a motion. He agrees with the Federal Public and Community Defenders that this section should include a procedural framework for how to exclude a victim from the proceedings.

He similarly opposes much of (a)(3) as improperly restating substantive law. He argues that this subsection should clarify and expand the district court's discretion to manage its caseload, permitting it to hear the victim only in writing, to hear the victim before public proceedings, and to control the victim's oral statement within reason (including discretion to allow the defendant's counsel to question the victim).

He opposes section (b) because it does not currently specify that the victim's rights must be asserted by motion, as if the victim were a party, allowing the defendant to participate.

Federal Magistrate Judges Association (06-CR-015) (p.3) supports the proposed amendment.

Barbara Adkins on behalf of the Jordan Center for Criminal Justice and Penal Reform (06-CR-019) (pp. 4, 6-8) generally concurs with the analyses of the Federal Public and Community Defenders and the NACDL, though not necessarily with their recommended alternatives. She states that Rule 60 should be re-

titled "Rights of Crime Victims" or "Rights of Victims and Crime Victims" to distinguish the CVRA's use of the word "victim" from other uses in the United States Code and Federal Rules. She also argues that the breadth of the victim's right to attend proceedings under (a)(2) is unconstitutional, violating the separation of powers and due process.

She opposes (b)(2) for permitting the government to assert the victim's rights because the government often has conflicting interests. She also opposes the reopening of pleas or sentences, especially when the defendant lacks the right to thereafter withdraw the plea. Finally, she argues for the addition of a provision stating that no assertion of rights by a victim may prejudice the rights of the accused or be contrary to the interests of justice.

Mothers Against Drunk Driving (MADD) (06-CR-022) (p.1) broadly supports Judge Cassell's rule proposals.

The State Bar of California Committee on Federal Courts (06-CR-023) (pp. 7-8) generally opposes this proposed rule as a restatement of the CVRA that both expands and limits the provisions of § 3771. However, the Committee believes that alterations to certain sections can remedy the problem by bringing the Rule into accord with the precise statutory language.

The Committee believes that (b)(1) should clarify the time limits placed on motion rulings and stays of proceeding, that (b)(2) should allow the victim's lawful representative to assert the victim's rights, that (b)(4) should include statutory language on where the victim's rights may be asserted, and that (b)(5)(B) should not include the language "of the denial and the writ is granted."

The Committee notes that sections (a)(2), (a)(3), (b)(3), and (b)(6) are generally consistent with the statute, but that they "seem[] redundant."

Amy C. Sousa on behalf of the National Organization for Victim Assistance (06-CR-025) (p. 1) advocates for the wholesale adoption of the CVRA according to Judge Cassell's rule proposals.

Senator Jon Kyl (06-CR-026) (pp. 2-3) concludes that many of the amendments are inconsistent with the CVRA. He criticizes (b)(2) for preventing the victim's representative from asserting the victim's rights. He opposes (a)(3) for confining the matters on which victims may be heard to release, plea, and sentencing proceedings, as opposed to all matters relevant to crime victims. This seems to provide no mechanism for a victim to raise other rights under the CVRA, such as the right to proceedings free from unreasonable delay. The Senator stressed that the CVRA enjoyed bipartisan support and that legislative intent, as present in the Congressional Record, demands full implementation of the "sweeping" changes of the CVRA. He also endorses Judge Cassell's approach.

Representatives Poe and Costa, co-chairs of the Congressional Victim's Rights Caucus (06-CR-027) (p. 1) endorse a "meaningful incorporation of the CVRA rights into the federal rules."

Rule 61~~60~~. Title

These rules may be known and cited as the Federal Rules of Criminal Procedure.

FEDERAL RULES OF CRIMINAL PROCEDURE

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made.

SUMMARY OF PUBLIC COMMENTS

No comments were received.

APPENDIX B

Rule 41(b)(5).

- **Copy of Rule**
- **Committee Note**
- **Summary of Written Public Comments**
- **Changes Made After Publication and Comment**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 41. Search and Seizure

* * * * *

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth[,except American Samoa];

(B) the premises—no matter who owns them—of a United States diplomatic or consular

mission in a foreign state, including any appurtenant buildings, parts of buildings, and land used for the mission's purposes; or

(C) residences and any appurtenant land owned or leased by the United States and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

* * * * *

Committee Note

Subdivision (b)(5). Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. The rule is intended to authorize a magistrate to issue a search warrant in any of the locations for which 18 U.S.C. § 7(9) provides jurisdiction. The difference between the language in this rule and the statute reflect the style conventions used in these rules, rather than

any intention to alter the scope of the legal authority conferred. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

With the assistance of the Style Consultant the Committee revised (b)(5)(B) and (C) for greater clarity and compliance with the style conventions governing these rules. Because the language no longer tracks precisely the statute, the Committee Note was revised to state that the proposed rule is intended to have the same scope as the jurisdictional provision upon which it was based, 18 U.S.C. § 7(9).

SUMMARY OF PUBLIC COMMENTS

The **Pacific Islands Committee of the Judicial Council of the Ninth Circuit (06-CR-001)** opposes the application of the rule to American Samoa. If an amendment permitting a federal magistrate

judge to issue a warrant in American Samoa is to be adopted, the proposal should be reviewed first by the judiciary of American Samoa and have the support of the Chief Justice of the High Court of American Samoa. Additionally, because American Samoa's representative to Congress has requested that the GAO conduct a study of the judiciary system in American Samoa, the committee suggests that the Advisory Committee should await such a report before taking a position on the proposed amendment. Instead of authorizing a federal magistrate to issue warrants, the committee states that Rule 41(b)(1) should be amended to allow issuance by a High Court Justice in American Samoa, which would put that court on the same footing as state courts in the United States.

Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (06-CR-101) opposes proposed subsection 41(b)(5)(A) as unnecessary, on the ground that there has been no showing of a gap that needs filling, and no need to grant the authority to issue warrants to a magistrate far from the scene of the proposed search.

The **Federal Magistrate Judges Association (06-CR-015)** supports the amendment and states that it is aware of no reason why it should not apply in American Samoa.

The **California State Bar Association (06-CR-023)** has no objection to the proposed amendment.

APPENDIX C

Rules 45(a), 5.1, 7(f), 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59, and Rule 8 of the Rules Governing §§ 2254 and 2255 Cases.

- **Copy of Rules**
- **Committee Notes**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

~~Rule 45. Computing and Extending Time~~

~~**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:~~

~~**(1) *Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.~~

~~**(2) *Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.~~

~~**(3) *Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is~~

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

~~not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~

~~(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:~~

~~(A) the day set aside by statute for observing:~~

~~(i) New Year's Day;~~

~~(ii) Martin Luther King, Jr.'s Birthday;~~

~~(iii) Washington's Birthday;~~

~~(iv) Memorial Day;~~

~~(v) Independence Day;~~

~~(vi) Labor Day;~~

~~(vii) Columbus Day;~~

~~(viii) Veterans' Day;~~

~~(ix) Thanksgiving Day;~~

~~(x) Christmas Day; and~~

~~(B) any other day declared a holiday by the President, the Congress, or the state where the district court is held.~~

~~**(b) Extending Time.**~~

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

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

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

~~**(2)** ***Exception.*** The court may not extend the time to take any action under Rule 35, except as stated in that rule.~~

~~**(c) Additional Time After Service.** When these rules permit or require a party to act within a specified period~~

~~after a notice or a paper has been served on that party, 3 days are added to the period if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), (C), or (D).~~

* * * * *

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Criminal Procedure, a statute, a local rule, or a court order. In accordance with Rule 57(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). In making these time computation rules applicable to statutory time periods, subdivision (a) is consistent with Civil Rule 6(a). It is also consistent with the language of Rule 45 prior to restyling, when the rule applied to "computing any period of time." Although the restyled Rule 45(a) referred only to time periods "specified in these rules, any local rule, or any court order," some courts nonetheless applied the restyled Rule 45(a) when computing various statutory periods.

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of a date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 18 U.S.C. § 3142(d) (excluding Saturdays, Sundays, and

holidays from 10 day period). In addition, because the time period in Rule 46(h) is derived from 18 U.S.C. §§ 3142(d) and 3144, the Committee concluded that Rule 45(a) should not be applied to Rule 46(h).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 35(b)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 45(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 45(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: if the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, the new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change the meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 29(c)(1), 33(b)(2), 34, and 35(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Criminal Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on

a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not

attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule CR49.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Criminal Procedure contain both forward-looking

time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (stating that a court may correct an arithmetic or technical error in a sentence "[w]ithin 7 days after sentencing"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 47(c) (stating that a party must serve a written motion "at least 5 days before the hearing date"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Criminal Procedure, including the time-computation provisions of subdivision (a).

Rule 5.1. Preliminary Hearing

* * * * *

(c) Scheduling. The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than ~~10~~ 14 days after the initial appearance if the defendant is in custody and no later than ~~20~~ 21 days if not in custody.

* * * * *

Committee Note

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 7. The Indictment and the Information

* * * * *

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within ~~10~~ 14 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.1. Notice of an Alibi Defense

(a) Government's Request for Notice and Defendant's Response.

* * * * *

(2) ***Defendant's Response.*** Within ~~10~~ 14 days after the request, or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state:

(A) each specific place where the defendant claims to have been at the time of the alleged offense; and

(B) the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

(b) Disclosing Government Witnesses.

* * * * *

(2) ***Time to Disclose.*** Unless the court directs otherwise, an attorney for the government must give its Rule 12.1(b)(1) disclosure within ~~10~~ 14 days after the defendant serves notice of an

intended alibi defense under Rule 12.1(a)(2), but no later than ~~10~~ 14 days before trial.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 12.3. Notice of a Public-Authority Defense

(a) Notice of the Defense and Disclosure of Witnesses.

* * * * *

(3) ***Response to the Notice.*** An attorney for the government must serve a written response on the defendant or the defendant's attorney within ~~10~~ 14 days after receiving the defendant's notice, but no later than ~~20~~ 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(4) ***Disclosing Witnesses.***

(A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than ~~20~~ 21 days before trial.

(B) *Defendant's Response.* Within ~~7~~ 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) *Government's Reply*. Within ~~7~~ 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name, address, and telephone number of each witness the government intends to rely on to oppose the defendant's public-authority defense.

* * * * *

Committee Note

The times set in the former rule at 7, 10, or 20 days have been revised to 14 or 21 days. See the Committee Note to Rule 45(a).

Rule 29. Motion for a Judgment of Acquittal

* * * * *

(c) After Jury Verdict or Discharge.

(1) ***Time for a Motion***. A defendant may move for a judgment of acquittal, or renew such a motion,

within ~~7~~ 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

* * * * *

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 33. New Trial

* * * * *

(b) Time to File.

* * * * *

(2) ***Other Grounds.*** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within ~~7~~ 14 days after the verdict or finding of guilty.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 34. Arresting Judgment

* * * * *

(b) Time to File. The defendant must move to arrest judgment within ~~7~~ 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

Committee Note

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day

period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within ~~7~~ 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

* * * * *

Committee Note

Former Rule 35 permitted the correction of arithmetic, technical, or clear errors within 7 days of sentencing. In light of the increased complexity of the sentencing process, the Committee concluded it would be beneficial to expand this period to 14 days, including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a). Extension of the period will cause no jurisdictional problems if an appeal has been filed, because Federal Rule of Appellate Procedure 4(b)(5) expressly provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under Rule 35(a).

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

(2) ***Contents of the Warrant.***

(A) *Warrant to Search for and Seize a Person or Property.* Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than ~~10~~ 14 days;

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 47. Motions and Supporting Affidavits

* * * * *

(c) **Timing of a Motion.** A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least ~~5~~ 7 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.

* * * * *

Committee Note

The time set in the former rule at 5 days, which excluded intermediate Saturdays, Sundays, and legal holidays, has been expanded to 7 days. See the Committee Note to Rule 45(a).

Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

(g) **Appeal.**

* * * * *

(2) ***From a Magistrate Judge's Order or Judgment.***

(A) *Interlocutory Appeal.* Either party may appeal an order of a magistrate judge to a district

judge within ~~10~~ 14 days of its entry if a district judge's order could similarly be appealed. The party appealing must file a notice with the clerk specifying the order being appealed and must serve a copy on the adverse party.

(B) *Appeal from a Conviction or Sentence.* A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within ~~10~~ 14 days of its entry. To appeal, the defendant must file a notice with the clerk specifying the judgment being appealed and must serve a copy on an attorney for the government.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within ~~10~~ 14 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(b) Dispositive Matters.

* * * * *

(2) Objections to Findings and Recommendations. Within ~~10~~ 14 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

* * * * *

Committee Note

The times set in the former rule at 10 days have been revised to 14 days. See the Committee Note to Rule 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2254 CASES FOR THE UNITED STATES DISTRICT COURTS

* * * * *

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the petition to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 CASES FOR THE UNITED STATES DISTRICT COURTS

* * * * *

Rule 8. Evidentiary Hearing

* * * * *

(b) Reference to a Magistrate Judge. A judge may, under 28 U.S.C. § 636(b), refer the motion to a magistrate judge to conduct hearings and to file proposed findings of fact and recommendations for disposition. When they are filed, the clerk must promptly serve copies of the proposed findings and recommendations on all parties. Within ~~10~~ 14 days after being served, a party may file objections as provided by local court rule. The judge must determine de novo any proposed finding or recommendation to which objection is made. The judge may accept, reject, or modify any proposed finding or recommendation.

* * * * *

Committee Note

The time set in the former rule at 10 days has been revised to 14 days. See the Committee Note to Federal Rules of Criminal Procedure 45(a).

APPENDIX D

Rule 16.

- **Copy of Rule**
- **Committee Note**
- **American College of Trial Lawyers Report - March 2003**
- **Federal Judicial Center Report**
- **May 14, 2007 Letter from Thomas Hillier to Peter McCabe**
- **ABA Model Rules of Professional Conduct (2002)**
- **DOJ Policy**
- **Summaries of Federal Cases Raising Brady Issues After 2001**
- **ALR Annotations**

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

(a) **Government's Disclosure.**

(1) ***Information Subject to Disclosure.***

* * * * *

(H) *Exculpatory or Impeaching Information.* Upon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

* * * * *

Committee Note

Subdivision (a)(1)(H). New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense

also reduces the possibility that innocent persons will be convicted in federal proceedings. *See generally* 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) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

The rule contains no requirement that the information be "material" to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*. It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.

The amendment distinguishes between exculpatory and impeaching information for purposes of the timing of disclosure. Information is exculpatory under the rule if it tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information.

Because the disclosure of the identity of witnesses raises special concerns, and impeachment information may disclose a witness's identity, the rule provides that the court may not order the disclosure of information that is impeaching but not exculpatory earlier than 14 days before trial. The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.

AMERICAN COLLEGE OF TRIAL LAWYERS

PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

March 2003

American College of Trial Lawyers

19900 MacArthur Boulevard, Suite 610
Irvine, California 92612

Telephone (949) 752-1801 | e-mail nationaloffice@actl.com | Fax (949) 752-1674

Office of the President
Warren B. Lightfoot
Lightfoot, Franklin & White, L.L.C.
The Clark Building
400 20th Street North
Birmingham, AL 35203
(205) 581-0711
Fax: (205) 581-0799
E-mail: wlightfoot@lfwlaw.com

October 14, 2003

Honorable Ed E. Carnes
United States Circuit Judge
U. S. Courthouse, Room 408
15 Lee Street
Montgomery, Alabama 36104

Re: Advisory Committee on
Federal Rules of Criminal Procedure

Dear Judge Carnes:

I write to you as Chair of the Advisory Committee and I enclose a copy of the American College's paper regarding disclosure of Brady material. This paper was adopted by the College's Board of Regents this year, and I hope that you can include its recommendations on your Committee's agenda for its spring meeting.

Please let me know if you have any questions regarding the College's position on this important subject.

Best regards,

Warren B. Lightfoot

WBL/ds
Enclosure
cc: Robert B. Fiske, Jr., Esquire
Executive Committee
David J. Beck, Esquire
Mr. Dennis J. Maggi

American College of Trial Lawyers

PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16

Approved by the Board of Regents
March, 2003

American College of Trial Lawyers

The American College of Trial Lawyers, founded in 1950, is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and those whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years' experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases; those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

◆ ◆ ◆

"In this select circle, we find pleasure and charm in the illustrious company of our contemporaries and take the keenest delight in exalting our friendships."

—Hon. Emil Gumpert,
Chancellor-Founder, ACTL

American College of Trial Lawyers
19900 MacArthur Boulevard, Suite 610
Irvine, California 92612
Telephone: (949) 752-1801
Facsimile: (949) 752-1674
E-Mail: nationaloffice@actl.com
Website: www.actl.com

360

American College of Trial Lawyers

CHANCELLOR-FOUNDER

Hon. Emil Gumpert
(1895—1982)

OFFICERS

WARREN B. LIGHTFOOT, *President*
DAVID W. SCOTT, Q.C., *President Elect*
MICHAEL A. COOPER, *Secretary*
JAMES W. MORRIS, III, *Treasurer*
STUART D. SHANOR, *Immediate Past President*

BOARD OF REGENTS

DAVID J. BECK
Houston, Texas

PATRICIA C. BOBB
Chicago, Illinois

ALBERT D. BRAULT
Rockville, Maryland

JOHN L. COOPER
San Francisco, California

MICHAEL A. COOPER
New York, New York

BRIAN P. CROSBY
Buffalo, New York

JOHN J. (JACK) DALTON
Atlanta, Georgia

GREGORY P. JOSEPH
New York, New York

WARREN B. LIGHTFOOT
Birmingham, Alabama

JOAN A. LUKEY
Boston, Massachusetts

JAMES W. MORRIS, III
Richmond, Virginia

EDWARD W. MULLINS, JR.
Columbia, South Carolina

BRIAN B. O'NEILL
Minneapolis, Minnesota

DAVID W. SCOTT, Q.C.
Ottawa, Ontario

STUART D. SHANOR
Roswell, New Mexico

TOM SLUTES
Tucson, Arizona

PAYTON SMITH
Seattle, Washington

MIKEL L. STOUT
Wichita, Kansas

DENNIS R. SUPLEE
Philadelphia, Pennsylvania

SHARON M. WOODS
Detroit, Michigan

American College of Trial Lawyers

PAST PRESIDENTS

1950-51 EMIL GUMPERT*
Los Angeles, California
1951-52 C. RAY ROBINSON*
Merced, California
1952-53 CODY FOWLER*
Tampa, Florida
1953-54 E. D. BRONSON*
San Francisco, California
1954-55 CODY FOWLER*
Tampa, Florida
1955-56 WAYNE E. STICHTER*
Toledo, Ohio
1956-57 JESSE E. NICHOLS*
Oakland, California
1957-58 LEWIS C. RYAN*
Syracuse, New York
1958-59 ALBERT E. JENNER, JR.*
Chicago, Illinois
1959-60 SAMUEL P. SEARS*
Boston, Massachusetts
1960-61 LON HOCKER
Woods Hole, Massachusetts
1961-62 LEON JAWORSKI*
Houston, Texas
1962-63 GRANT B. COOPER*
Los Angeles, California
1963-64 WHITNEY NORTH SEYMOUR*
New York, New York
1964-65 BERNARD G. SEGAL*
Philadelphia, Pennsylvania
1965-66 EDWARD L. WRIGHT*
Little Rock, Arkansas
1966-67 FRANK G. RAICHLE*
Buffalo, New York
1967-68 JOSEPH A. BALL*
Long Beach, California
1968-69 ROBERT W. MESERVE*
Boston, Massachusetts
1969-70 HON. LEWIS F. POWELL, JR.*
Washington, District of Columbia
1970-71 BARNABAS F. SEARS*
Chicago, Illinois
1971-72 HICKS EPTON*
Wewoka, Oklahoma
1972-73 WILLIAM H. MORRISON*
Portland, Oregon
1973-74 ROBERT L. CLARE, JR.*
New York, New York
1974- AUSTIN W. LEWIS*
New Orleans, Louisiana
1975-76 THOMAS E. DEACY, JR.
Kansas City, Missouri
1976-77 SIMON H. RIFKIND*
New York, New York
1977-78 KRAFT W. EIDMAN*
Houston, Texas
1978-79 MARCUS MATTSON*
Los Angeles, California
1979-80 JAMES E. S. BAKER*
Chicago, Illinois
1980-81 JOHN C. ELAM*
Columbus, Ohio
1981-82 ALSTON JENNINGS
Little Rock, Arkansas
1982-83 LEON SILVERMAN
New York, New York
1983-84 GAEL MAHONY
Boston, Massachusetts
1984-85 GENE W. LAFITTE
New Orleans, Louisiana
1985-86 GRIFFIN B. BELL
Atlanta, Georgia
1986-87 R. HARVEY CHAPPELL, JR.
Richmond, Virginia
1987-88 MORRIS HARRELL*
Dallas, Texas
1988-89 PHILIP W. TONE*
Chicago, Illinois
1989-90 RALPH I. LANCASTER, JR.
Portland, Maine
1990-91 CHARLES E. HANGER*
San Francisco, California
1991-92 ROBERT B. FISKE, JR.
New York, New York
1992-93 FULTON HAIGHT*
Santa Monica, California
1993-94 FRANK C. JONES
Atlanta, Georgia
1994-95 LIVELY M. WILSON
Louisville, Kentucky
1995-96 CHARLES B. RENFREW
San Francisco, California
1996-97 ANDREW M. COATS
Oklahoma City, Oklahoma
1997-98 EDWARD BRODSKY*
New York, New York
1998-99 E. OSBORNE AYSCUE, JR.
Charlotte, North Carolina
1999-2000 MICHAEL E. MONE
Boston, Massachusetts
2000-2001 EARL J. SILBERT
Washington, District of Columbia
2001-2002 STUART D. SHANOR
Roswell, New Mexico

* Deceased

FEDERAL CRIMINAL PROCEDURE COMMITTEE

CHAIR

JAMES L. EISENBRANDT, Prairie Village, Kansas

MEMBERS

ELIZABETH K. AINSLIE, Philadelphia, Pennsylvania
HON. CHARLES R. BREYER, San Francisco, California
GORDON WILLIS CAMPBELL, Salt Lake City, Utah
J. W. CARNEY, JR., Boston, Massachusetts
R. J. CINQUEGRANA, Boston, Massachusetts
LOCKE T. CLIFFORD, Greensboro, North Carolina
TY COBB, Denver, Colorado
JOHN P. COONEY, JR., New York, New York
THOMAS W. CRANMER, Bloomfield Hills, Michigan
DAVID F. DuMOUCHEL, Detroit, Michigan
THOMAS E. DWYER, JR., Boston, Massachusetts
JAMES L. EISENBRANDT, Prairie Village, Kansas
LOUIS W. FRYMAN, Philadelphia, Pennsylvania
PAULINE F. HARDIN, New Orleans, Louisiana
FREDERICK G. HELMSING, Mobile, Alabama
JAMES R. HOBBS, Kansas City, Missouri
WILLIAM F. MANIFESTO, Pittsburgh, Pennsylvania
CHUCK MEADOWS, Dallas, Texas
R. STAN MORTENSON, Washington, District of Columbia
VERYL L. RIDDLE, St. Louis, Missouri
HON. GEORGE Z. SINGAL, Bangor, Maine
ROBERT W. TARUN, Chicago, Illinois
JAMES H. VOYLES, JR., Indianapolis, Indiana
MARK S. WERBNER, Dallas, Texas
RONALD E. WURTZ, Topeka, Kansas
DOUGLAS R. YOUNG, San Francisco, California
(PATRICIA C. BOBB, Chicago, Illinois, Regent Liaison)

TABLE OF CONTENTS

365

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 inculpating its star witness.[34] After analyzing the prosecution's failure to disclose this evidence, the Court reversed the defendant's conviction and death sentence, finding that "fairness [could not] be stretched to the point of calling this a fair trial."[35] The *Kyles* Court held that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[36]

In *Strickler v. Greene*,[37] the Supreme Court reviewed a prosecutor's failure to disclose in a capital murder case exculpatory materials in police files consisting of detective notes about a key witness and a letter written by the witness.[38] Justice Stevens clarified that "there are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[39] Finding that no prejudice had ensued from the non-disclosure, the Court declined to reverse the defendant's conviction.

C. The Special Role of the Prosecutor in Ensuring a Fair Trial

In *Berger v. United States*,[40] Justice Sutherland outlined the unique role and responsibilities of the federal prosecutor:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[41]
>
> (Emphasis supplied.)

---

[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 Massachusetts[64] which in 1998 promulgated the most extensive local

[63] Some local criminal rules require attorneys for the government and defense to confer with respect to a schedule for disclosure and provide that, in the absence of a stipulation, the court may intervene. *See, e.g.*, N.D. Ca. Criminal Local Rule 16-1(a). Many are silent as to *Brady* obligations (*see, e.g.*, E.D. Tn. L.R. 16.2 (Pre-trial Conferences in Criminal Cases); S.D. Tx. Criminal Rule 12 (Criminal Pretrial Motion Practice); S.D. Ca. Criminal Rule 16.1 (Pleadings and Motions Before Trial, Defenses and Objections); and M.D. Ala. L. Cr. R. IV (Arraignment and Preparation for Trial)), or address Federal Rule Criminal Procedure 16 obligations only. *See, e.g.*, E.D. Pa. Criminal Rule 16.1 (Pretrial Discovery and Inspection); D.Wy. L. Cr. R. 16.1. Still others encourage parties to meet and confer on discovery topics beyond Fed. R. Crim. P. 16 but not *Brady* material. *See, e.g.*, N.D. Ill. L. Cr. R. 16.1 (Pretrial Discovery and Inspection). Finally, some federal courts have no local criminal rules. *See, e.g.*, D.S.D. Local Rules of Practice.

[64] The Southern District of Florida has also promulgated extensive local criminal discovery rules which addresses *Brady* information. *See* S.D. Fla. General Rule 88.10 (requiring the government to disclose, within fourteen days of arraignment, not only the information required under Federal Rule Criminal Procedure 16, but also "all information ... favorable to the defendant on the issues of guilt or punishment within the scope of *Brady v. Maryland* ... and *United States v. Agurs*," as well as "the existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of *Giglio v. United States* ... and *Napue v. Illinois*").

criminal discovery rules in the nation. Massachusetts Local Rule 116.2[65] was enacted in response to federal prosecutors' indifference to pre-trial discovery obligations.

United States v. Mannarino,[66] frequently credited with precipitating the enactment of Massachusetts's Local Rule 116.2, decried "a pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities by the United States Attorney's Office."[67] *Mannarino* addressed a police officer's destruction of a star informant's self-authored narrative of his criminal history, before it could be produced to defendants, and in violation of the Jencks Act.[68] Calling the case "yet another example of concerted indolence in pursuing disclosure by the United States Attorney's Office and a willful blindness to the failure of its agents who had disclosure duties to fulfill them,"[69] Judge Woodlock cited a decade's worth of case law detailing "lame," "sloppy," "negligen[t]," "illusory," and "insensitiv[e]" criminal discovery practices by the U.S. Attorney's Office in Boston.[70] Declining to enter a judgment of acquittal, the court ordered the deposition of the government's key witness to be taken by defense counsel, to be followed by a new trial.[71] *Mannarino* highlights the practice of some prosecutors of ignoring the constitutional obligation to disclose favorable information material to guilt and punishment in a timely fashion.[72]

The Massachusetts local criminal rules establish a series of "automatic" discovery obligations imposed upon prosecutors and defendants alike.[73] The rules also require the government to disclose, under a mandated timeframe, any information that could "cast doubt" on the defendant's guilt, the admissibility or credibility of any evidence, or the degree of the defendant's culpability under the Guidelines.[74] This information expressly includes, *inter alia*, inducements rendered to government witnesses to testify, criminal records of and cases pending against such witnesses, and the failure of any such witnesses to positively identify the defendant.[75] The rules further require the government to inform "all federal, state, and local law enforcement agencies formally participating in the criminal investigation" of the local rules'

---

[65] Massachusetts Local Rule 116.2 is reprinted in its entirety in Appendix B.

[66] 850 F. Supp. 57, 59 (D. Mass. 1994).

[67] *Id.* at 59. *See also id.* at 71 (stating that repeated prosecutorial discovery violations are "of sufficient concern that the District of Massachusetts has determined to review its present local rules governing criminal discovery with a view toward increased prescriptiveness in discovery responsibilities").

[68] *Id.* at 59. *See also* 18 U.S.C. § 3500 (Jencks Act).

[69] 850 F. Supp. at 71.

[70] *Id.* at 71-72 (citations omitted). The court went on to call the government's current discovery practices "unwilling[]" and "rescusan[t]," among other adjectives. *Id.* at 72.

[71] *Id.* at 73.

[72] *See, e.g.*, Moushey, *Hiding The Facts Readout; Discovery Violations Have Made Evidence-Gathering A Shell Game*, Pittsburgh Post-Gazette, November 24, 1998, at A-1; Goldberg, *Your Clients'* Brady-Giglio *Rights Are Not Protected*, 22 Champion 41 (September/October 1998).

[73] *See* D. Mass. L.R. 116.1-117.1, *infra*, Appendix B. The rules require the government to provide not only all materials required by Fed. R. Crim. P. 16, but also the fruits yielded from any search warrants, electronic surveillance, and investigative identification procedures, as well as the names of all unindicted co-conspirators. *See id.* at 116.1(C).

[74] *Id.* at 116.2.

[75] *Id.*

discovery obligations, to obtain from such law enforcement agencies any information they have which would be subject to disclosure, and to require participating law enforcement agencies to preserve their "notes" and other relevant documents.[76] Finally, Massachusetts Local Rule 1.3 provides that failure to comply with any obligation or direction set forth by the rules of the district may result in dismissal.[77]

III. FEDERAL PLEA PRACTICE

A. Federal Rule of Criminal Procedure 11(e) Does Not Address Let Alone Require Disclosure of Favorable Information

The vast majority of federal criminal cases are resolved by pleas of guilty under Fed. R. Crim. P. 11. Plea agreements are governed by the law of contracts.[78] Most pleas are negotiated and involve bargained for consideration. The parties - the United States and the defendant(s) - may bargain for particular charges, sentences, sentencing ranges or the application of USSG guidelines, policies, factors or provisions.

Federal Rule of Criminal Procedure 11(e) governs the conduct of the government and the defendant during plea negotiations. Rule 11[79] establishes guidelines to ensure that a guilty plea is made knowingly and voluntarily.[80] Before accepting a plea of guilty, a court must address the defendant personally in open court and inform the defendant that he has a right to plead not guilty, the right to be tried by a jury and at that trial he has the right to assistance of counsel, the right to confront and cross examine adverse witnesses and the right against compelled self-incrimination.[81] A waiver of an important constitutional or statutory right must be known and voluntary to be valid,[82] but Rule 11 does not require the court to specify each and every constitutional right that the defendant waives by pleading guilty.[83]

A defendant who acknowledges his plea is knowingly and voluntarily entered at his plea hearing must overcome a strong presumption of voluntariness when he subsequently seeks to challenge that plea.[84] A plea entered into without the benefit of *Brady* information is inherently suspect in this regard. Without *Brady* information, the defendant and counsel may not

---

[76] *Id.* at 116.8, 116.9. Massachusetts's local rules promote enforcement by requiring the magistrate and presiding judges to hold at least three pre-trial conferences designed to effect compliance with the local rules.

[77] D. Mass. L.R. 1.3.

[78] *See Santobello v. New York*, 404 U.S. 257, 262 (1971).

[79] Fed. R. Crim. P. 11(e) is reprinted in its entirety as Appendix C.

[80] Fed. R. Crim. P. 11(c)-(d).

[81] Fed. R. Crim. P. 11(c)(3).

[82] *See United States v. Mezzanatto,* 513 U.S. 196 (1995).

[83] Fed. R. Crim. P. (c)(4). *See, e.g., Brady v. United States*, 357 U.S. 742, 748 (1970) (waiver of the constitutional rights to a trial and to remain silent); *McMann* v. *Richardson*, 397 U.S. 759, 766 (1970) (waiver of the right to contest the admissibility of evidence the government may have offered against the defendant).

[84] *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

be able to make informed decisions about whether and when to plead guilty. The common argument that a defendant knows whether he is guilty and whether there is mitigating evidence is simply not true in many cases.[85] A defendant may not know all the elements of an offense or understand that certain evidence known only to the prosecutor may negate an essential element. Further, a defendant may not know of facts that establish a legal defense and without disclosure a defendant's counsel may not become aware of facts that establish a legal defense.[86] A defendant with limited mental faculties or a significantly reduced mental capacity may not be able to fully communicate with counsel or appreciate the importance of facts critical to the defendant's guilt or innocence.

The federal circuits are split on whether *Brady* applies to plea negotiations. The Fifth[87] and Eighth[88] circuits have held that defendants waive their rights to *Brady* material in pleading. However, the Second,[89] Sixth,[90] Ninth[91] and Tenth[92] circuits have held that *Brady* does apply to guilty pleas. The Ninth Circuit in *Sanchez*, taking the strongest position, has concluded that a plea "*cannot* be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[93]

B. Federal Plea Agreement Policies Which Require the Defendant to Waive the Right to *Brady* Material Undermine the Due Process Goal of Ensuring a Fair Sentencing Process

A closely related question is whether a defendant can waive his right to receive *Brady* information. Some United States Attorneys Offices, notably the Southern and Northern District of California, have expressly incorporated into plea agreements a *Brady* waiver. A representative sample states:

> The defendant understands that discovery may have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendants agree to waive his right to receive additional

---

[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 means[106] or a loss exceeding certain dollar levels[107] that can significantly increase the defendant's period of incarceration. They frequently argue that for offenses committed by more than one participant, the court should consider the defendant's aggravating[108] or mitigating[109] role in the offense. In each of these instances, government attorneys may have access to, and in some cases the only access to, favorable information that diminishes the defendant's culpability or lowers the offense level under the Guidelines.

For example, witnesses may differ in describing the role of a defendant as a manager, supervisor, organizer or leader[110] - designations that can greatly affect the ultimate sentence. Similarly, government witnesses may dispute whether the loss claimed by the United

---

[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

384

particular meeting); *Spicer v. Roxbury*, 194 F.3d 547 (4th Cir. 1999) (upholding petition for writ of habeas corpus because state failed to turn over evidence of conflicting statements by main prosecution witness); *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (prosecution concealment of coerced testimony of key witness); *Lindsey v. King*, 769 F.2d 1034 (5th Cir. 1985) (granting petition for writ of habeas corpus when petitioner showed that the prosecution failed to turn over a report indicating that a key witness could not positively identify the petitioner as the shooter in a murder case); *Carriger v. Stewart*, 132 F.3d 463, 479-482 (9th Cir. 1997) (reversing conviction where prosecution failed to disclose witness's prior criminal history); *United States v. Brumel-Alvarez*, 991 F.2d 1452 (9th Cir. 1992) (overturning drug trafficking convictions for government's *Brady* violation in not turning over a law enforcement official's report that raised serious doubts regarding the truthfulness of the prosecution's key witness); *United States v. Pope*, 529 F.2d 112 (9th Cir. 1976) (prosecution's failure to disclose immunity to key witness); and *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999) (overturning conviction for misuse of banking funds because of the failure to disclose prosecutorial intimidation of witnesses).

The proposed Rule 16(f) requires the prosecutor to turn over all information favorable to the defendant within 14 days of the date the defendant requests it. Timely disclosure of favorable information to the defense is essential to meaningful compliance with *Brady*. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d Ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (1984). It is anticipated that, like many other discovery deadlines, this one can be extended by agreement of the parties, and if necessary, the government may apply to the court for a protective order, under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time. The proposed rule requires a request from the defense in order to trigger the 14-day time frame, but the rule is not intended to obviate the prosecution's obligation to provide information favorable to the defense even in the absence of a defense request, *United States v. Agurs, supra.*

The drafters anticipate that before or at the time of guilty pleas, government attorneys will furnish to the defense favorable information that mitigates the offense or punishment. As a result of the promulgation of the United States Sentencing Guidelines and the increased importance of even minor facts that can affect punishment by diminishing the degree of a defendant's culpability or Offense Level, the drafters believe that timely production of *Brady* information in the sentencing context is far more significant and critical today than ever before.

Proposed Rule 16(f) requires government attorney(s) to turn over "all information, in any form, whether or not admissible . . ." The rule thus contemplates disclosure of not only written documents but also of tape recordings, computer data, electronic communications, and oral information acquired through interviews or any other means. The proposed rule does not burden the government with the responsibility of assessing whether information is likely admissible.

The proposed Rule 16(f) contains no requirement that the information be "material" to the defense. The drafters believe that the Rule's definition of "Information favorable to the defendant" is sufficiently clear to guide the government attorneys at the pre-trial stage. A materiality standard is only appropriate in the context of an appellate review since determinations of materiality are best made in light of all the evidence addressed at trial. A materiality analysis cannot realistically be applied by a trial court facing a pre-trial discovery request. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Sudikoff*, 39 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999). In cases where a failure to disclose favorable information is uncovered after the trial or sentencing, of course, the reviewing court will presumably employ concepts of materiality in determining the degree of prejudice, if any, suffered by the defense as a result of the government's failure.

Proposed Rule 16(f)'s requirement of a written disclosure and certification by the government attorney is, the drafters believe, critical to its operation. It is anticipated that government attorneys will describe the disclosures being made in sufficient detail to permit the defense to investigate the information. Likewise, the government's certification should specifically confirm that the attorney signing it has exercised due diligence in locating and attempting to locate all information favorable to the defendant within the files or knowledge of the government. There is due diligence precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant: Rule 16(a)(1)(B), Defendant's Prior Record, and Rule 16(a)(1)(D), Reports of Examinations and Tests.

It may be prudent for the government to maintain a record of the manner in which this due diligence inquiry was conducted so as to facilitate its response in any post-trial proceedings, but the Rule does not require this nor does it require the government to turn any such record over to the defense at the time of the certification. The drafters anticipate that in the event any government agency refuses to respond to a request from the prosecutor for information favorable to the defendant, the prosecutor's certification will identify the refusing agency and official so as to permit the defense to investigate and, if necessary, seek redress from the court.

The proposed rule contains no separate provision for sanctions for intentional violations or inadvertent noncompliance. The drafters anticipate that the full range of remedial and punitive sanctions, ranging from a trial or sentencing continuance to dismissal of the indictment, is already available to the court under Rule 16(d)(2) as is the Court's general-supervisory power to craft a remedy or punishment appropriate to the circumstances. Few courts have dismissed criminal charges as a result of *Brady* violations. *See, e.g., United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). The drafters believe that the far more common remedy of a new trial for *Brady* violations has in many instances proven impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government of a retrial is under most circumstances inconsequential. Second, the remedy of a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.

* * *

1. **Discussion**

a. **Definition of Favorable Evidence**

Proposed Language:

Information favorable to the defendant is all information in any form, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate punishment.

Without a clear definition of what constitutes *Brady* material, prosecutors have exercised a hodgepodge of judgments about the nature and extent of favorable information to be disclosed to defendants.[114] A clear definition of favorable information will help eliminate disparate interpretations of the *Brady* obligation by both prosecutors and defense counsel and give prosecutors clear guidance, thereby promoting equal treatment of similarly situated defendants under the law.

The definition clarifies the nature and scope of favorable information by providing that favorable information includes evidence or information, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or 4) mitigate the punishment. The first category addresses classic *Brady* or exculpatory evidence. The second category makes clear that *Giglio* or impeachment material must also be produced. Categories three and four are intended to cover the disclosure of evidence favorable to punishment or sentencing. This definition makes clear that the admissibility and nature or form of the information, i.e., written, oral or electronic, is irrelevant in the determination of both its exculpatory nature and disclosability.

There may be instances where fairness requires that the defense make specific *Brady* requests for information from the government. Such requests must be sufficiently clear and directed to give reasonable notice about what is sought and why the information may be material to the case.[115] Absent specific defense requests the government may, notwithstanding the proposed definition, be able to fully respond to *Brady* requests and provide responsive material.

---

[114] Section II.A., *infra*.

[115] *United States v. McVeigh*, 954 F. Supp. 1441, 1451 (D. Colo. 1997).

b. **Timing of Disclosure**

Proposed Language:

Within fourteen days of a defendant's request, attorney(s) for the government shall disclose in writing and provide all information favorable to the defendant.

Absent local rules with a *Brady* disclosure timetable, there is no uniformity as to when federal defendants receive exculpatory information as to guilty or punishment. The Judicial Members of the District of Massachusetts Committee that recommended the local criminal rule changes observed that "cases too often go to trial without legally required discovery having been provided."[116] Almost invariably *Brady* material is disclosed well after the explicit Rule 16 obligations have been satisfied by the government. A major criticism of the current federal discovery practice is that prosecutors too often disclose favorable information at a stage well after it can benefit the defense. Unfortunately, the case law has left the prosecution and defense with little precise timing guidance.

In *United States v. Coppa*,[117] the Second Circuit recently addressed whether as a general rule due process of law requires that the government, disclose all exculpatory and impeachment material immediately upon demand by a defendant. In reversing a district judge's order to immediately supply this material to the defendants, the Second Circuit noted that as long as a defendant possesses *Brady* evidence in time for its effective use at trial or at a plea proceeding, the government has not deprived the defendant of due process of law.[118] *Coppa* granted the government's mandamus petition and remanded the cause to "afford the District Court an opportunity to determine what disclosure order, if any, it deems appropriate as a matter of case management."[119]

Because disclosure of favorable information affects a defendant's plea decisions, trial strategy, and sentencing, it is critical to the fair administration of justice that this discovery take place as early as practicable in the criminal process. There is no discernible benefit to fair-minded prosecutors in delaying the disclosure of constitutionally-mandated favorable information. To the extent the government has favorable evidence and is required to timely disclose it, the disclosure may affect the government's charging decision and properly lessen its sentencing position. This in turn may cause the defendant and counsel to compromise, to plead and to receive the benefit of acceptance of responsibility under the Guidelines.[120] Thus, prompt disclosure may well foster an earlier exchange of favorable information and guilty plea decisions. Furthermore, a criminal justice system with a *Brady* definition, a due diligence

---

[116] *Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the U.S. District Court in the District of Massachusetts Concerning Criminal Cases*, at 8 (October 28, 1998).

[117] 267 F.3d 132 (2d Cir. 2001).

[118] *Id.* at 144.

[119] *Id.* at 146.

[120] U.S.S.G. § 3E1.1 (acceptance of responsibility).

requirement, a disclosure timetable and clear sanctions may promote a system that parties have confidence in both the rule's compliance and effective sanctions. Under that system defendants and counsel, who timely have received the required disclosure or have been assured in writing that the United States possesses no exculpatory information, are more likely to reach plea decisions earlier and lessen the congestion of the trial dockets.

While timely disclosure of favorable information is mandated and essential to the defense in all cases, it is of particular importance in complex federal prosecutions where defendants and their counsel can be forced to trial with comparatively inadequate time to prepare. Federal authorities often investigate complex cases for years. The Speedy Trial Act of 1974[121] requires that a trial must begin within seventy days of an indictment or initial appearance. While defense requests for continuances are frequently granted to meet "the ends of justice,"[122] pre-trial defense preparation time is often limited. The United States will in most cases still have had at least twice as long a time to prepare for trial as the defendant. The government usually also has far more investigative resources. Fourteen days following a defense request is not an unreasonable period of time for the government to disclose in writing favorable evidence as to guilt or punishment. By the time of indictment, the government has concluded most of its investigation and is in a position to disclose any information known to be exculpatory or mitigating for the defendant. It will be thereafter under a continuing obligation to disclose additional evidence or material subject to discovery under the rule.[123]

c. **Due Diligence**

Proposed Language:

> The written disclosure shall certify that: a) the government attorney has exercised due diligence in locating all information favorable to the defendant; b) the government has disclosed and provided to the defendant all such information; and c) the government acknowledges its continuing obligation until final judgment is entered: i) to disclose such information; and ii) to furnish any additional information favorable to the defendant immediately upon such information becoming known.

This due diligence requirement ensures that government attorneys will fully consult with law enforcement agents by the time of indictment about potential favorable information and that the former will address not only federal agents, but law enforcement officers or joint federal-state local investigators about the nature and scope of the information required to be turned over. Several decisions have upheld the duty of the prosecution to consult

[121] 18 U.S.C. §§ 3151-3174 (2000).

[122] *Id.* § 3151(h)(8)(A).

[123] Fed. R. Crim. P. 16(c).

with the appropriate law enforcement personnel or agency[124] as simply determined that the prosecution includes law enforcement officers[125]

The due diligence language requires that government attorneys exercise due diligence in locating all favorable information. The language is intended to avoid *Kyles*-type situations where favorable evidence is known to law enforcement officers, but not to the prosecutor. The due diligence language finds precedent in three sections of Rule 16: Rule 16(a)(1)(A), Statement of Defendant; Rule 16(a)(1)(B), Defendant's Prior Record; and Rule 16(a)(1)(D), Reports of Examinations and Tests.

The certification requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post-sentencing litigation about what may have been orally communicated. As important, this requirement conveys to the government attorney the importance of accuracy, consultation and prompt disclosure. This requirement too has precedent in Rule 16(e) Expert Witnesses which requires both parties to provide a written summary of testimony they intend to use.

Finally, the due diligence provision does not mandate an "open file" by the government, as favored by some commentators.[126] Open file cases do not cure *Brady-Giglio* problems,[127] and in particular, do not compel prosecutors to consult with law enforcement agents about the nature or existence of information favorable to the accused[128] or to disclose in writing favorable evidence that has not been memorialized. The provision does not impose upon the court the burden of reviewing government files for favorable information, as recommended by other legal commentators.[129] While such a review might be ideal, courts have neither the time nor the resources for such reviews, and they cannot be expected at the pre-trial stage to be familiar enough with the case or likely trial issues to appreciate which information is favorable.[130]

d. Sanctions

In addressing failures to comply with discovery requests, Fed. R. Crim. P. 16 (d)(2) provides that the court may order a party to permit the discovery or inspection, grant a

---

[124] *See, e.g., Kyles*, 527 U.S. at 266; *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995).

[125] *United States v. Boyd*, 833 F. Supp. 1277, 1357 (N.D. Ill. 1993), *aff'd* 55 F.3d 239 (7th Cir. 1995); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

[126] *See* Bass, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 113 (1972).

[127] *See, e.g., United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.C. Cir. 1998) (stating that "open file discovery does not relieve the government of its *Brady* obligations by claiming [the defendant] had access to 600,000 documents and should have been able to find the exculpatory information in the haystack").

[128] *See Strickler*, 527 U.S. 263.

[129] *See, e.g.*, Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391 (Dec. 1984).

[130] *McVeigh*, 954 F. Supp at 1451.

continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. Few courts have dismissed indictments as a remedy for the government's failure to disclose exculpatory information.[131] At present prosecutional misconduct must not only be flagrant, but must prejudice the defendant such that he does not receive a fair trial, or be intended to abort the trial to result in a dismissal.[132] Some circuits do not even permit dismissal of an indictment for a *Brady* violation.[133]. The less drastic and far more common remedy for a *Brady* violation is the granting of a new trial.[134] This remedy has been impractical and ineffective for two reasons. First, many defendants are simply unable to afford a retrial while the cost to the government is under most circumstances inconsequential. Second, a new trial does not adequately discourage prosecutors from committing improper, incompetent or prejudicial discovery violations.[135] For these reasons, the Official Commentary to Rule 16(f) urges courts to consider dismissal of an indictment for failure to comply with Rule 16 upon a showing of substantial prejudice to the defendant or intentional misconduct by the government.

e. **Regulation of Discovery.**

Rule 16(d) will continue to provide that a party may under a sufficient showing demonstrate that particular discovery or inspection should be denied, restricted or deferred. The government may still seek a protective or modifying order if it can establish that disclosure of exculpatory information within the time contemplated by the amendment will create an unacceptable risk of facilitating obstruction of justice or of discouraging the testimony of witnesses.

---

[131] *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala. 1998). See generally, *United States v. Carter*, 1 Fed. Appx. 716, 2001 WL 32068 (9th Cir. Jan. 12, 2001) (unpublished); *United States v. Manthei*, 979 F.2d 124, 126-27 (8th Cir. 1992); *United States v. Osorio*, 929 F.2d 753, 763 (1st Cir. 1991); *United States v. Campagnuolo*, 592 F.2d 852, 865 (5th Cir. 1979), discussing the requirements for a defendant to obtain a dismissal of the indictment for a *Brady* violation. *Cf. Demjanjuk v. Petrovsky*, 10 F.3d 338, 356 (6th Cir. 1993) (vacating a denaturalization and extradition order because the government failed to disclose *Brady* information).

[132] *United States v. Vozzella*, 124 F.3d 389 (2d Cir. 1997); *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993); *United States v. McLaughlin*, 89 F. Supp. 2d 617 (E.D. Pa. 2000) (failure to disclose witness' exculpatory grand jury testimony necessitated new trial); *United States v. Patrick*, 985 F. Supp. 543 (E.D. Pa. 1997).

[133] *See, e.g., United States v. Davis*, 578 F.2d 277, 279-80 (10th Cir. 1978) ("[A] violation of due process under *Brady*, does not entitle a defendant to an acquittal, but only to a new trial in which the convicted defendant has access to the wrongfully withheld evidence.").

[134] *See United States v. Blueford*, No. 00-10210, 2002 WL 193023 (9th Cir. Feb. 8, 2002); *United States v. Service Deli, Inc.*, 151 F.3d 938 (9th Cir. 1998); *United States v. Arnold*, 117 F. 3d 1308 (11th Cir. 1997); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995); *United States v. Peterson*, 116 F. Supp. 2d 366 (N.D.N.Y. 2000); *United States v. McLaughlin*, 89 F. Supp. 2d (E.D. Pa. 2000).

[135] *United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989) (pattern of United States attorneys not providing exculpatory evidence until very late only warranted two week continuance).

B. Proposed Amendment to Rule 11

Fed. R. Crim. P. 11(e)(7)

(7) Disclosure of Favorable Evidence

The attorney for the government shall disclose in writing to the defendant all exculpatory and mitigating information as provided in Rule 16(f) fourteen days before the defendant enters a plea of guilty or nolo contendere to a charged offense.

Official Commentary

This amendment is intended to ensure that a party intent on pleading guilty timely receives favorable information. The emphasis on *Brady* material by the government is too often focused on the guilt aspect rather than the sentencing impact of mitigating evidence. Since over ninety percent of all federal criminal cases are resolved by plea dispositions, it is essential that prosecutors not only provide information that can significantly affect punishment but also that they do so in time to make the information meaningful at sentencing. Belated disclosure or inadvertent nondisclosure of mitigating evidence undermines the fairness essential to the sentencing process. This proposed amendment reduces the likelihood that favorable evidence will not be disclosed or disclosed too late.

1. Discussion

a. Purpose and Cross Reference

This amendment is designed to ensure that favorable information is made known to the defendant during the plea negotiation process and to the court in the sentencing process. Rather than restate the five-part definition of favorable information, the due diligence obligation and the available sanctions, Rule 11(e)(7) cross references Fed. R. Crim. P. 16(f). The Rule 11(e)(7) amendment is also designed to avoid plea agreements where the United States requires a defendant to waive his right to exculpatory information without knowing what that information is.

b. Timing of Disclosure

Fourteen days is a reasonable period for the government to disclose in writing information favorable to the defendant on either guilt or punishment. As a practical matter, the majority of criminal cases have been investigated by the time of indictment. To the extent that investigation is ongoing, the government is required to only disclose favorable information to the defendant then known through the exercise of due diligence. Any subsequent discovery of additional favorable evidence or material can be later disclosed to the defendant.

Furthermore, to the extent some districts have in place "fast track" programs,[136] there is nothing in Rule 11(e)(7)'s language that prevents the government from providing favorable information to the defendant before an indictment. Thus, the government may still comply with this rule and enable the defendant to plead guilty at the initial arraignment and plea and receive credit under a fast track program. As with the companion Fed. R. Crim. P. 16(f) amendment, the writing requirement ensures a clear record of what was disclosed and not disclosed and avoids unnecessary post-trial and post sentencing litigation about what may have been orally communicated.

c. Sanctions

A guilty plea can be set aside in limited circumstances if a defendant can establish prejudice from prosecutorial misconduct.[137] Normally, the withheld information must be material to the prosecution of the defendant.[138] The proposed Rule 11(e)(7) is silent with respect to sanctions but does cross reference proposed Rule 16(f) which provides for a variety of sanctions, including dismissal.

In most instances the appropriate remedy for non-disclosure of information that reduces punishment will be resentencing. While the Guidelines have a basic objective of enhancing the ability of the criminal justice system to combat crime through an effective, fair sentencing system,[139] they do not at present directly provide a remedy to a defendant who has not been provided mitigating evidence under *Brady v. Maryland*. The only remedy available to federal prisoners who have been deprived of *Brady* evidence favorable to sentencing is a motion under 28 U.S.C. §2255 alleging an error that involves "a fundamental defect which results in a complete miscarriage of justice."[140]

CONCLUSION

The American College of Trial Lawyers respectfully recommends that the Judicial Conference of the United States Committee on Rules of Practice and Procedure amend Federal Rules of Criminal Procedure 11 and 16 to codify *Brady* and its progeny. The proposed amendments will ensure the timely, fair and consistent application of *Brady v. Maryland* and will aid Federal Courts in the sound administration of justice.

---

[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.

394

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

[(4) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(b) The Defendant's Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which

the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's or attorneys.

[(3) Failure to Call Witness.] (Deleted Dec. 12, 1975)

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure To Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

B. Federal Rule of Criminal Procedure 11(e)

(e) Plea Agreement Procedure.

(1) **In General.** The attorney for the government and the attorney for the defendant -- or the defendant when acting pro se -- may agree that, upon the defendant's entering a plea of guilty or nolo contendere to a charged offense, or to a lesser or related offense, the attorney for the government will:

(A) move to dismiss other charges; or

(B) recommend, or agree not to oppose the defendant's request for a particular sentence or sentencing range, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor is or is not applicable to the case. Any such recommendation or request is not binding on the court; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court.

The court shall not participate in any discussions between the parties concerning any such plea agreement.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(!)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) **Acceptance of a Plea Agreement.** If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) **Rejection of a Plea Agreement.** If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) **Time of Plea Agreement Procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussion, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

C. District of Massachusetts Local Rules 116.02 and 1.3

RULE 116.2 DISCLOSURE OF EXCULPATORY EVIDENCE

(A) Definition. Exculpatory information includes, but may not be limited to, all information that is material and favorable to the accused because it tends to:

(1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;

(2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731;

(3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its, case-in-chief; or

(4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

(B) Timing of Disclosure by the Government. Unless the defendant has filed the Waiver or the government invokes the declination procedure under Rule 116.6, the government must produce to that defendant exculpatory information in accordance with the following schedule:

(1) *Within the time period designated in L.R. 116.1(C)(1):*

(a) Information that would tend directly to negate the defendant's guilt concerning any count in the indictment or information.

(b) Information that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. 5 3731.

(c) A statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

(d) A copy of any criminal record of any witness identified by name whom the government anticipates calling in its case-in-chief.

(e) A written description of any criminal cases pending against any witness identified by name whom the government anticipates calling in its case-in-chief.

(f) A written description of the failure of any percipient witness identified by name to make a positive identification of a defendant, if any identification procedure has been held with such a witness with respect to the crime at issue.

399

(2) *Not later than twenty-one (21) days before the trial date established by the judge who will preside:*

(a) Any information that tends to cast doubt on the credibility or accuracy of any witness whom or evidence that the government anticipates calling or offering in its case-in-chief.

(b) Any inconsistent statement, or a description of such a statement, made orally or in writing by any witness whom the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(c) Any statement or a description of such a statement, made orally or in writing by any person, that is inconsistent with any statement made orally or in writing by any witness the government anticipates calling in its case-in-chief, regarding the alleged criminal conduct of the defendant.

(d) Information reflecting bias or prejudice against the defendant by any witness whom the government anticipates calling in its case-in-chief.

(e) A written description of any prosecutable federal offense known by the government to have been committed by any witness whom the government anticipates calling in its casein-chief.

(f) A written description of any conduct that may be admissible under Fed. R. Evid. 608(b) known by the government to have been committed by a witness whom the government anticipates calling in its case-in-chief.

(g) Information known to the government of any mental or physical impairment of any witness whom the government anticipates calling in its case-in chief, that may cast doubt on the ability of that witness to testify accurately or truthfully at trial as to any relevant event.

(3) *No later than the close of the defendant's case:* Exculpatory information regarding any witness or evidence that the government intends to offer in rebuttal.

(4) *Before any plea or to the submission by the defendant of any objections to the Pre-Sentence Report, whichever first occurs:* A written summary of any information in the government's possession that tends to diminish the degree of the defendant's culpability or the defendant's offense Level under the United States Sentencing Guidelines.

(5) If an item of exculpatory information can reasonably be deemed to fall into more than one of the foregoing categories, it shall be deemed for purposes of determining when it must be produced to fall into the category which requires the earliest production.

RULE 1.3 SANCTIONS

Failure to comply with any of the directions or obligations set forth herein or obligations set forth herein, or authorized by, these Local Rules may result in dismissal, default or the imposition of other sanctions as deemed appropriate by the judicial officer.

400

D. Bibliography

ABA Standards for Criminal Justice, *Prosecution Function and Defense Function* 3-3.11(a) (1993)

ABA Model Rules of Professional Conduct, *Model Rule 3.8* (1984)

Bass, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112 (1972)

Binimow, *Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to Accused*, 158 A.L.R. Fed. 401 (1999)

Blank, Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation, 68 Fordham L. Rev. 2011, 2085 (2000)

Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*?, 1963 Wash. U.L.Q. 279 (June 1963)

Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report,* 68 Wash. U.L.Q. 1 (1990)

Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391 (December 1994)

District of Massachusetts Local Rules Concerning Criminal Cases 116.1-117.1 (1998)

Federal Rules of Criminal Procedure 11 and 16

Fisher, *Symposium: The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 Fordham L. Rev. 1379 (April 2000)

Franklin, Note: *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate o the Merits of "Discovery" Waivers,* 51 Stan. L. Rev. 567 (1999)

Gershman, "Suppression of Evidence" *Prosecutorial Misconduct* (West Group 1991) (Ch. 5)

Goldberg, *Your Clients' Brady-Giglio Rights Are Not Protected*, 22 Champion 41 (September/October 1998)

Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 Ga. St. U.L. Rev. 601 (1999)

Joy and McMunnigal, *Disclosing Exculpatory Material in Plea Negotiations*, 16 CRIMINAL JUSTICE (ABA Fall 2001)

Moushey, "*Hiding The Facts Readout; Discovery Violations Have Made Evidence-Gathering A Shell Game*," Pittsburgh Post-Gazette, November 24, 1998, at A-1

401

O'Sullivan, *Federal White Collar Crime* (West 2001)

Potter, *Discovery*, 87:1267 Geo. L.J. 1382 (May 1999)

Tarun, *Brady v. Maryland: An Underutilized Sentencing Sword*, 2001 White Collar Crime (ABA 2001)

Weihl, *Keeping Files on the File Keepers: When Prosecutors are Forced to turn Over the Personnel Files of Federal Agents to Defense Lawyers*, 72 Wash. L. Rev. 73 (1997)

FEDERAL JUDICIAL CENTER REPORT

RE:
TREATMENT OF *BRADY v. MARYLAND* MATERIAL

TO BE DISTRIBUTED SEPARATELY

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

May 14, 2007

Peter G. McCabe
Secretary, Committee Rules of Practice and Procedure
Administrative Office of the United States Courts
1 Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendment to Rule 16, Federal Rules of Criminal Procedure

Dear Mr. McCabe:

I write on behalf of Federal Public and Community Defenders to support the proposal to amend Rule 16, Fed. R. Crim. P. The proposal is modest and simply requires the government, upon request, to make available to the defense evidence that is exculpatory or impeaching. As the Committee Notes indicate, the proposal is founded on the principle of fundamental fairness and does little more than supplement what is ethically required of prosecutors. Because the proposal seemed uncontroversial, we did not comment when it was first published. The Advisory Committee for the Criminal Rules of Procedure recommended it be adopted. We understand that the Department of Justice (DOJ) hopes to persuade the Standing Committee to reject that recommendation. We believe the Standing Committee should support the proposed amendment.

We understand DOJ believes it is in the best position to monitor its *Brady* obligations and to that end has modified its manual to emphasize the importance of its obligation. This is not enough! The significance of a prosecutor's obligation to disclose exculpatory or impeaching information has been signaled by courts and commentators for decades. Nonetheless, Federal Reporters are pocked with examples of *Brady* violations, law review articles have been devoted to the problem and full chapters in treatises on prosecutorial misconduct detail the regularity and variety of *Brady* miscues. There is no reason to believe an amendment to DOJ's manual will heighten compliance with *Brady* obligations given the government's history of relentless non-compliance.

The frequency of *Brady* violations suggests that the problem is a product, in part, of prosecutorial indifference and even inability to grasp what exculpatory or impeaching evidence is. Judge Jon Newman's famous observations made before the Second Circuit Judicial Conference in 1967 illustrate this point. At the time he was a United States Attorney and he told the Conference:

1601 Fifth Avenue, Room 700, Seattle, Washington 98101 - Telephone (206) 553-1100 Fax (206) 553-0120

> I recently had occasion to discuss [*Brady*] at a PLI Conference in New York City before a large group of State prosecutors. . . . I put to them this case: you are prosecuting a bank robbery. You have talked to two or three of the tellers and one or two of the customers at the time of the robbery. They have all taken a look at your defendant in a lineup, and they have said, "This is the man." In the course of your investigation you also have found another customer who was in the bank that day, who viewed the suspect, and came back and said, "This is *not* the man."
>
> The question I put to these prosecutors was, do you believe you should disclose to the defense the name of the witness who, when he viewed the suspect, said "That is not the man"? In a room of prosecutors not quite as large as this group but almost as large, only two hands went up. There were only two prosecutors in that group who felt that they should disclose or would disclose that information. Yet I was putting to them what I thought was the easiest case – the clearest case for disclosure of exculpatory information![1]

Judge Newman's observations were manifest in my district several years ago when the district court questioned a federal prosecutor's failure to provide to the defense the statement of a witness who said the defendant was not the perpetrator of the crime. The prosecutor explained that he did not believe the witness was telling the truth and if it wasn't the truth, then it wasn't exculpatory. This is how advocates think and why the court, not the government, should be in charge of monitoring and enforcing *Brady* obligations.

We have provided the Advisory Committee's Reporter with a number of examples of Brady violations that have resulted in sanctions. It is important to emphasize **and recognize** that sanctions occur infrequently but *Brady* violations occur often. Critics of *Brady* jurisprudence argue this disparity results from the judiciary's retrospective approach

---

[1]J. Newman, *A Panel Discussion Before the Judicial Conference of the Second Circuit* (September 8, 1967), reprinted in *Discovery in Criminal Cases*, 44 F.R.D. 481, 500-501 (1968); quoted in *United States v. Bagley*, 473 U.S. 667, 697 (1985) (Justice Marshall dissenting).

1601 Fifth Avenue, Room 700, Seattle, Washington 98101 - Telephone (206) 553-1100 Fax (206) 553-0120

to deciding the materiality of nondisclosures.[2] Significantly, the proposed amendment to Rule 16 does not require that the exculpatory or impeaching information be "material." The Committee Notes emphasize this point and its salutary purpose: prosecutors will be less likely to "play the odds" by withholding information felt to be of marginal value to the defense.[3] The clearer the rule the more likely compliance.[4]

This proposal will not cure problems associated with *Brady* evidence. Anachronistic limitations on discovery in federal criminal cases have spawned a culture of non-disclosure. *See, e.g., United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files."), *vacated sub nom. United States v. Pflaumer*, 473 U.S. 922 (1985) (mem.). But the proposal can only assist in ameliorating the harm that is part and parcel of our controversial and archaic system of criminal discovery.

The proposal has no down side. It embraces the rule of law and the principle of fairness. Despite the government's belief that it is in the best position to monitor compliance with *Brady*, the evidence overwhelmingly demonstrates otherwise. For these reasons, we urge the Standing Committee to accept the proposed amendment to Rule 16.

Very truly yours,

Thomas W. Hillier, II
Federal Public Defender

TWH/mp

---

[2]Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 690 (2006).

[3]*United States v. Bagley*, *supra* at 701 (Justice Marshall dissenting).

[4]Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, Wis. L. Rev. 399, 428-430 (2006).

1601 Fifth Avenue, Room 700, Seattle, Washington 98101 - Telephone (206) 553-1100 Fax (206) 553-0120

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 impeachment of 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 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.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2006

MEMORANDUM

TO: Holders of the United States Attorneys' Manual, Title 9

FROM: THE DEPUTY ATTORNEY GENERAL PJM

SUBJECT: Principles of Federal Prosecution

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 9.
3. Insert in front of affected sections.

AFFECTS: 9-5.000

PURPOSE: The Department of Justice is proud of the long record of federal prosecutors meeting or exceeding their obligation, pursuant to *Brady v. Maryland* and *Giglio v. United States*, to disclose exculpatory and impeachment evidence to criminal defendants in preparation for trial. The purposes of this amendment to the U.S. Attorneys' Manual are to ensure that all federal prosecutors are fully aware of their constitutional obligation to disclose exculpatory and impeachment evidence, and to further develop the Department's guidance to federal prosecutors in relation to disclosure of information favorable to a defendant. The policy embodied in this bluesheet requires prosecutors to go beyond the minimum obligations required by the Constitution and establishes broader standards for the disclosure of exculpatory and impeachment information. It requires prosecutors to take the necessary steps to fulfill their constitutional disclosure obligation and further, to make disclosure in a manner and to an extent that promotes fair proceedings. At the same time, the policy recognizes the need to safeguard witnesses from harassment, assault, and intimidation and to make disclosure at a time and in a manner consistent with the needs of national security.

The policy embodied in this bluesheet is intended to be flexible yet produce regularity. As first stated in the preface to the original 1980 edition of the Principles of Federal Prosecution, "they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility." Through the use of circumscribed standards and principles outlined herein, federal prosecutors must exercise their judgment and discretion so as to build confidence in criminal trials and the criminal justice system, while protecting national security, keeping witnesses safe and allowing for efficient resolution of cases.

The bluesheet creates a new section 9-5.001 and amends section 9-5.100 in your United States Attorneys' Manual.

Attachment

[NEW SECTION] USAM § 9-5.001

POLICY REGARDING DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION

A. **Purpose.** Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important, *see* USAM § 9-21.000, and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act). This policy is not a substitute for researching the legal issues that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, *see* USAM § 9-11.233.

B. **Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

1. **Materiality and Admissibility.** Exculpatory and impeachment evidence is material to a finding of guilt – and thus the Constitution requires disclosure – when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

2. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles*, 514 U.S. at 437.

C. **Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.** Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

1. **Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

3. **Information.** Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.

4. **Cumulative impact of items of information.** While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

D. **Timing of disclosure.** Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.

1. **Exculpatory information.** Exculpatory information must be disclosed reasonably promptly after it is discovered. This policy recognizes that exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act).

2. **Impeachment information.** Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interests – such as witness security and national security – and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

3. **Exculpatory or impeachment information casting doubt upon sentencing factors.** Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation.

4. **Supervisory approval and notice to the defendant.** A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

E. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case. As the Supreme Court has explained, disclosure is required when evidence in the possession of the prosecutor or prosecution team is material to guilt, innocence or punishment. This policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element

of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. Under this policy, the government's disclosure will exceed its constitutional obligations. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. Prosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation.

POLICY REGARDING THE DISCLOSURE TO PROSECUTORS OF POTENTIAL IMPEACHMENT INFORMATION CONCERNING LAW ENFORCEMENT AGENCY WITNESSES ("GIGLIO POLICY")

On December 9, 1996, the Attorney General issued a Policy regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"). It applies to all Department of Justice Investigative agencies that are named in the Preface, below. On October 19, 2006, the Attorney General amended this policy to conform to the Department's new policy regarding disclosure of exculpatory and impeachment information, *see* USAM § 9-5.001.

The Secretary of the Treasury has issued the same policy for all Treasury investigative agencies.

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

Preface: The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purposes of this policy are to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), and to ensure that trials are fair, while protecting the legitimate privacy rights of Government employees. NOTE: This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior

to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees

1. **Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Nevertheless, in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.

2. **Agency Officials.** Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.

3. **Requesting Officials.** Each of the Department of Justice prosecuting offices shall designate an appropriate senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.

4. **Request to Agency Officials.** When a prosecutor determines that it is necessary to request potential impeachment information from an Agency Official(s) relating to an agency employee identified as a potential witness or affiant ("the employee") in a specific criminal case or investigation, the prosecutor shall notify the appropriate Requesting Official. Upon receiving such notification, the Requesting Official may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").

5. **Agency Review and Disclosure.** Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the OIG and DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee. The employing Agency Official(s), the OIG and DOJ-OPR shall advise the Requesting Official of: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.

6. **Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration.** Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration. NOTE: With regard to allegations disclosed to a prosecuting office under this paragraph, the head of the prosecuting office shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraph 13 below. At the conclusion of the case, if such information was not disclosed to the defense, the head of the prosecuting office shall ensure that all materials received from an investigative agency regarding the allegation, including any and all copies, are expeditiously returned to the investigative agency. This does not prohibit a prosecuting office from keeping motions, responses, legal memoranda, court orders, and internal office memoranda or correspondence, in the relevant criminal case file(s).

7. **Prosecuting Office Records.** Department of Justice prosecuting offices shall not retain in any system of records that can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit Department of Justice prosecuting offices from keeping motions and Court orders and supporting documents in the relevant criminal case file.

8. **Copies to Agencies.** When potential impeachment information received from Agency Officials has been disclosed to a Court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information and to the employing Agency Official for retention in the employing agency's system of records. The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court but not to the defense in a manner that allows expeditious access upon the request of the Requesting Official.

9. **Record Retention.** When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, may be retained by the Requesting Official, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee.

10. **Updating Records.** Before any federal prosecutor uses or relies upon information included in the prosecuting office's system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information and shall add any additional information provided to the prosecuting office's system of records.

11. **Continuing Duty to Disclose.** Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.

12. **Removal of Records Upon Transfer, Reassignment, or Retirement of Employee.** Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee.

13. **Prosecuting Office Plans to Implement Policy.** Within 120 days of the effective date of this policy, each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the agency about the disclosure of potential impeachment information to the Court or defense counsel, including allowing the agency to express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the

security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte*, *in camera* review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; and, (e) allowing the relevant agencies the timely opportunity to fully express their views.

14. **Investigative Agency Plans to Implement Policy.** Within 120 days of the effective date of this policy, each of the investigative agencies shall develop a plan to effectuate this policy.

Summaries of Federal Cases Raising *Brady* Issues After 2001

This list (which is not exhaustive) includes both cases where relief granted, and cases where exculpatory or impeaching evidence was not disclosed (or was disclosed belatedly), but no relief was granted.

United States Courts of Appeals

United States v. Oruche, 2007 WL 1296601 (D.C. Cir. 2007). District court's grant of new trial was reversed. Government's failure to disclose information that a prosecution witness had previously lied to police and that she had another possible drug source was not material because the witness was already thoroughly impeached at trial.

United States v. Velarde, 2007 WL 1252482 (10th Cir. 2007). Defendant was entitled to either a hearing on whether the government suppressed the information or discovery on the veracity of the victim's supposed accusations. Evidence of prior false accusations made by the victim may be material, even if not admissible, because discovery could have led to facts that the defense could use to cross-examine the victim about her truthfulness.

Unites States v. Barraza Cazares, 465 F.3d 327 (8th Cir. 2006). Government's failure to disclose co-defendant's statement that he did not previously know the defendant was clearly exculpatory. However, the information had not been not suppressed because it was otherwise available to the defense and was not material because it would not have undermined the government's strong case against the defendant, so the defendant's conviction was affirmed.

United States v. Conley, 415 F.3d 183 (1st Cir. 2005). Brady violation warranting new trial occurred when government withheld FBI memorandum indicating that key witness had expressed uncertainty about his recollection of incident.

United States v. Blanco, 392 F.3d 382 (9th Cir. 2004). Brady violation found where the government failed to disclose highly relevant impeachment information that its confidential informant was given a special visa in return for his cooperation with the DEA. The government must turn over all information related to the confidential informant.

United States v. Sipe, 388 F.3d 471 (5th Cir. 2004). 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). Defendant's conviction reversed because government withheld a critical piece of evidence – that government's chief witness, not defendant, brought drugs onto ship – that supported the defense theory.

Unites States v. Casas, 356 F.3d 104 (1st Cir. 2004). No prejudice when government delayed

disclosing witnesses' cooperation agreements and a failed drug test, because both were disclosed at trial. Defendant's conviction affirmed.

United States v. Martinez, 78 F.App'x 679 (10th Cir. 2003). Defendant's conviction was affirmed. Court concluded he was not prejudiced by the delay in discovering evidence uncovered by the defense on cross examination, because, considering the totality of the evidence, the impeachment value was slight.

United States v. Jackson, 345 F.3d 59 (2d Cir. 2003). Suppression of evidence favorable to the defendant was not material when the government failed to disclose statements made by a non-testifying confidential informant. Because the verdict was supported by compelling evidence, there was not a reasonable probability of a different result. Defendant's conviction affirmed.

United States v. Winston, 55 F.App'x 289 (6th Cir. 2003). Defendant's conviction was affirmed, because the government's failure to disclose that a prosecution witness had earlier fabricated letters of good character to the court was not material. When considered in conjunction with the rest of the evidence, this witness's testimony was incidental.

Unites States v. Gil, 297 F.3d 93 (2d Cir. 2002). Government's belated disclosure of exculpatory and impeachment evidence on the eve of trial violated Brady. Evidence was material and prejudicial when the evidence would have shown that a meeting could have occurred which would have born directly on the central issue of the defendant's authorization. The district court's denial of defendant's motion for a new trial was reversed.

United States District Courts

United States v. Safavian, 233 F.R.D. 12 (D. D.C. 2005). Because the definition of "materiality" discussed in Strickler and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. Before trial the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed--with the benefit of hindsight--as affecting the outcome of the trial.

Ferrara v. United States, 372 F. Supp. 2d 108 (D. Mass. 2005). Defendant resentenced 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.

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.

St. Germain v. United States, 2004 WL 1171403 (S.D.N.Y. 2004). Defendant was granted a new trial for a Brady violation when the government delayed in producing grand jury testimony that could have been used to impeach the government's key witness. The evidence was turned over immediately before trial and not identified as Brady material.

United States v. Washington, 294 F.Supp.2d 246 (D. Conn. 2003). Late disclosure of evidence prejudiced the defendant and warranted a new trial when the government waited until trial began to disclose that its key witness had previously been convicted for making a false police report.

United States v. Diabate, 90 F.Supp.2d 140, 148-49 (D.Mass. 2000). Case dismissed because of delayed Brady disclosures.

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. Tincher, 907 F.2d 600 (6th Cir. 1989). "Deliberate misrepresentation" where prosecutor withheld grand jury testimony of cop, after defense requested any Jencks Act or Brady material and prosecutor responded that none existed. Convictions reversed.

United States v. Wayne, 903 F.2d 1188 (8th Cir. 1990). Government's failure to disclose Brady material required new trial where drug transaction records would have aided cross-exam of key witness.

United States v. Tincher, 907 F.2d 600 (6th Cir. 1990). Prosecutor's response to Jencks Act and Brady request was deliberate misrepresentation in light of knowledge of testimony of government agent before grand jury. Reversal was required since misconduct precluded review of the agent's testimony by the district court.

United States v. Spagnoulo., 960 F.2d 990 (11th Cir. 1992). New trial ordered on basis of Brady violation where prosecution failed to disclose results of a pre-trial psychiatric evaluation of defendant which would have fundamentally altered strategy and raised serious competency issue.

United States v. Minsky, 963 F.2d 870 (6th Cir. 1992). Government improperly refused to disclose statements of-witness that he did not make at trial. Disclosure could have resulted in loss of credibility with jury based on false statements to FBI.

United States v. 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 ofthe 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)

158 A.L.R. Fed. 401

American Law Reports
ALR Federal

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.

TABLE OF CONTENTS

ARTICLE OUTLINE

I. PRELIMINARY MATTERS

INDEX

INDEX AND

CROSS REFERENCES

PAGES DELETED

Federal Rules of Criminal Procedure. 109 ALR Fed 363.

Books, papers, and documents subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure. 108 ALR Fed 380.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness. 59 ALR Fed 657.

When is dismissal of indictment appropriate remedy for misconduct of government official. 57 ALR Fed 824.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis. 53 ALR Fed 762.

Time limitations in connection with motions for new trial under Rule 33 of Federal Rules of Criminal Procedure . 51 ALR Fed 482.

What constitutes "newly discovered evidence" within meaning of Rule 33 of Federal Rules of Criminal Procedure relating to motions for new trial. 44 ALR Fed 13.

What is "oral statement" of accused subject to disclosure by government under Rule 16(a)(1)(A), Federal Rules of Criminal Procedure. 39 ALR Fed 432.

Application, in federal civil action, of governmental privilege of nondisclosure of identity of informer. 8 ALR Fed 6.

Proper procedure for determining whether alleged statement or report of government witness should be produced on accused's demand, under Jencks Act (18 USC § 3500). 1 ALR Fed 252.

§ 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

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

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

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

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]

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

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,

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 allegeding 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

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

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

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 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 Envtl. 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

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

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

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. Tincher, 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

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.

§ 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.

Dist. Ct. App. 5th Dist. 2004).

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.

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

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

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).

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).

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

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).

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

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 Bradyobligation 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

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).

§ 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).

§ 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).

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.

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

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.

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

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. Antonakeas, 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).

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).

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 inculpation 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

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

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 Envtl. 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,

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.

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.

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

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.

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

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

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

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

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

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:

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.

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

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

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

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.

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.

[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).

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 coconspirator 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).

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.

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 timeous 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

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. Irorere, 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

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

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

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.

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 co-operation, 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

§ 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).

[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 demonstrated 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.

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

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 affect 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. 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).

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.

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

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

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

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.

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.

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,

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.

Annotations

Encyclopedias and Texts

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.

9A Federal Procedure, L Ed, Criminal Procedure §§ 22:1631-22:1634.

Practice Aids

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:439, 20:455, 20:468.

Federal Statutes

U.S.C.A. Const Amend 5.

Digests and Indexes

ALR Digest Constitutional Law § 669.5.

ALR Digest Criminal Law § 110.

ALR Digest Trial § 32.

ALR Index Exclusion and Suppression of Evidence.

Research Sources

The following are the research sources that were found to be helpful in compiling this annotation.

West Digest Key Numbers

Constitutional Law ⚯ 257, 268(5).

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.

[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).

[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).

[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

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]. SeeU.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).

APPENDIX E

Rules 7(c), 32, 32.2.

- **Copy of Rules**
- **Committee Notes**

Rule 7. The Indictment and the Information

(c) Nature and Contents.

* * * * *

~~(2) *Criminal Forfeiture.* No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.~~

~~(3)~~(2) ***Citation Error.*** Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

* * * * *

Committee Note

The provision regarding forfeiture is obsolete. In 2000 the same language was repeated in subdivision (a) of Rule 32.2, which was intended to consolidate the rules dealing with forfeiture.

The committee's proposed Booker amendment to Rule 32(d)(2)(F) – shown as a single underline below -- has been approved by the Supreme Court. The Rules Committee has proposed a further amendment to the rule, which is shown below as a double underline.

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

* * * * *

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

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

(i) any prior criminal record;

(ii) the defendant's financial condition; and

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

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

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

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

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

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

(G) whether the Government seeks forfeiture under Rule 32.2.

Committee Note

Subdivision (d)(2)(G). Rule 32.2(a) requires that the indictment or information provide notice to the defendant of the government's intent to seek forfeiture as part of the sentence. The amendment provides that the same notice be provided as part of the presentence report to the court. This will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process.

Rule 32.2. Criminal Forfeiture

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture

(1) ~~***In General.***~~ ***Forfeiture Phase of the Trial.***

(A) *Forfeiture Determination.* As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) *Evidence and Hearing.* The court's determination may be based on evidence already in the record, including any written

plea agreement, ~~or~~ and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If ~~if~~ the forfeiture is contested, on either party's request the court must conduct a hearing ~~on evidence or information presented by the parties at a hearing~~ after the verdict or finding of guilt.

(2) ***Preliminary Order.***

(A) *Contents of Order.* If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, ~~or~~ directing the forfeiture of specific property, and directing the forfeiture of any substitute assets if the government has met the statutory criteria, ~~without regard to any third party's interest in all or part of it~~.

The order must be entered without regard to any third party's interest in the forfeited property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) *Timing of Order.* Unless doing so is impractical, the court must enter the preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) *General Orders.* If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order listing any

identified property, describing other property in general terms, and stating that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) ***Seizing Property.*** The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third party rights. ~~At sentencing – or at any time before sentencing if the defendant consents – the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment.~~ The

court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) ***Sentence and Judgment.***

(A) *When Final.* At sentencing–or at any time before sentencing if the defendant consents–the preliminary order of forfeiture becomes final as to the defendant. If the order directs the defendant to forfeit specific assets, it remains preliminary as to third parties until the ancillary proceeding is concluded under to Rule 32.2 (c).

(B) *Notice and Inclusion in Judgment.* The district court must include the forfeiture in the oral announcement of the sentence or otherwise ensure that the defendant is aware of the forfeiture at time of sentencing. The court must also include the order of

forfeiture, directly or by reference, in the judgment. The court's failure to include the order in the judgment may be corrected at any time under Rule 36.

(C) *Time for Appeal.* The time for a party to file an appeal from the order of forfeiture, or from the district court's failure to enter an order, begins to run when judgment is entered. If after entry of judgment the court amends or declines to amend an order of forfeiture to include an additional asset under Rule 32.2(e), a party may file an appeal regarding that asset under Federal Rule of Appellate Procedure 4(b). The time to appeal will run from the date when the order granting or denying the amendment becomes final.

(~~4~~ 5) ***Jury Determination.***

(A) *Retaining Jury.* ~~In any case that is tried to a jury, the co~~Upon a party's request in a case ~~in which a jury returns a verdict of guilty, the jury must~~ In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) *Special Verdict Form.* If a timely request to have the jury determine the forfeiture is made, the government must submit a proposed Special Verdict Form listing each asset subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the

property and the offense committed by the defendant.

(6) ***Notice of the Order of Forfeiture.***

(A) *Publishing and Sending Notice.* If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) *Content of Notice.* The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) *Means of Publication.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) *Means of Sending Notice.* The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)-(v) of the Federal Rules of Civil Procedure.

(7) ***Interlocutory Sale.*** At any time before entry of a final order of forfeiture, the court may, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, order the interlocutory sale of property alleged to be forfeitable.

* * * * *

Committee Note

Subdivision (a). The amendment responds to some uncertainty regarding the form of the required notice that the government will seek forfeiture as part of the sentence, making it clear that the notice should not be designated as a separate count in an indictment or information. The amendment also makes it clear that the indictment or information need only provide general notice that the government is seeking forfeiture, without identifying the specific property being sought. This is consistent with the 2000 Committee Note, as well as many lower court decisions.

The court may direct the government to file a bill of particulars to inform the defendant of the identity of the property that the government is seeking to forfeit or the amount of any money judgment sought [if necessary] to enable the defendant to prepare a defense [or to avoid unfair surprise]. *See, e.g.*, *United States v. Moffitt, Zwerdling, & Kemler, P.C.*, 83 F.3d 660, 665 (4th Cir. 1996) (holding that government need not list each asset subject to forfeiture in the indictment because notice can be provided in a bill of particulars); *United States v. Vasquez-Ruiz*, 136 F. Supp.2d 941, 944 (N.D. Ill. 2001) (directing government to identify in a bill of particulars, at least 30 days before trial, the specific items of property, including substitute assets, that it claims are subject to forfeiture); *United States v. Best*, 657 F. Supp. 1179, 1182 (N.D. Ill. 1987) (directing the government to provide a bill of particulars apprising the defendants as to the time periods during which they obtained the specified classes of property through their alleged racketeering activity and the interest in each of these properties that was allegedly obtained unlawfully).

Subdivision (b)(1). Rule 32.2(b)(1) sets forth the procedure for determining if property is subject to forfeiture. Subparagraph (A) is carried forward from the current Rule without change.

Subparagraph (B) clarifies that the parties may submit additional evidence relating to the forfeiture in the forfeiture phase of the trial, which may be necessary even if the forfeiture is not contested. Subsection (B) makes it clear that in determining what evidence or information should be accepted, the court should consider relevance and reliability. Finally, subsection (B) requires the court to hold a hearing when forfeiture is contested. The Committee foresees that in some instances live testimony will be needed to determine the reliability of proffered information. [Cf. Rule 32.1(b)(1)(B)(iii) (providing the defendant in a proceeding for revocation of probation or supervised release with the opportunity, upon request, to question any adverse witness unless the judge determines this is not in the interest of justice).]

Subdivision (b)(2)(A). Current Rule 32.2(b) provides the procedure for issuing a preliminary order of forfeiture once the court finds that the government has established the nexus between the property and the offense (or the amount of the money judgment). The amendment makes clear that the preliminary order may include substitute assets if the government has met the statutory criteria.

Subdivision (b)(2)(B). This new subparagraph focuses on the timing of the preliminary forfeiture order, stating that the court should issue the order "sufficiently in advance of sentencing to allow the parties the opportunity to suggest revisions or modifications to the order before it becomes final." Many courts have delayed entry of the preliminary order until the time of sentencing. This is undesirable because the parties have no opportunity to advise the court of omissions or errors in the order before it becomes final as to the defendant (which occurs upon oral announcement of the sentence and the entry of the criminal judgment). Once the sentence has been announced, the rules give the sentencing court only very limited authority to correct errors or omissions in the preliminary forfeiture order. Pursuant to Rule 35(a), the district court may correct a sentence, including an incorporated order of forfeiture, within seven

days after oral announcement of the sentence. During the seven day period, corrections are limited to those necessary to correct "arithmetical, technical, or other clear error." *See United States v. King*, 368 F. Supp. 2d 509, 512-13 (D. S.C. 2005). Corrections of clerical errors may also be made pursuant to Rule 36. If the order contains errors or omissions that do not fall within Rules 35(a) or 36, and the court delays entry of the preliminary forfeiture order until the time of sentencing, the parties may be left with no alternative to an appeal, which is a waste of judicial resources. The amendment requires the court to enter the preliminary order in advance of sentencing to permit time for corrections, unless "it is not practical to do so" in an individual case.

Subdivision (b)(2)(C). The amendment explains how the court is to reconcile the requirement that it make the order of forfeiture part of the sentence with the fact that in some cases the government will not have completed its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue an order of forfeiture describing the property in "general" terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation's assets in the United States, permitting the government to continue discovery necessary to identify those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother's back yard).

Subdivisions (b)(3) and (4). The amendment moves the language explaining when the order of forfeiture becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the order of forfeiture in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the order of forfeiture in the judgment and commitment order, and the time to appeal.

Subparagraph (b)(5)(A). The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court

to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

Subparagraph (b)(5)(B) explains that "the Government must submit a proposed Special Verdict Form as to each asset subject to forfeiture." Use of such a form is desirable, and the government is in the best position to draft the form.

Subdivisions (b)(6) and (7). These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

APPENDIX F

Rule 41(e)(2) and (f)(1).

- **Copy of Rule**
- **Committee Note**

Rule 41. Search and Seizure

* * * * *

(e) Issuing the Warrant.

* * * * *

(2) ***Contents of the Warrant.***

* * * * *

(B) *Warrant to Search for Electronically Stored Information.* A warrant may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes subsequent review of the storage media or electronically stored information consistent with the warrant. The time for the execution of the warrant in Rule 41(e) and (f) refers to the seizing or on-site copying of the storage media or electronically stored information, and not to any subsequent

review of the media or electronically stored information.

(~~B~~C) *Warrant for a Tracking Device.* A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used. The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

* * * * *

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(B) *Inventory.* An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied. The officer may maintain a copy of the electronically stored information seized or copied.

* * * * *

Committee Note

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers ay seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term "electronically stored information" is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which defines it as " writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained." The 2006 Advisory Committee Note to Rule 34(a) explains that the definition is intended to cover all current types of computer-based information and to encompass future changes and developments. This same broad and flexible definition is intended under Rule 41.

In addition to addressing the "two step process" inherent in searches for electronically stored information, the Rule limits the 10 [14]** day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive time period within which any subsequent offsite review of the media or electronically stored information would take place, the practical reality is that there is no basis for a "one size fits all" presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does

---

**The ten day period under Rule 41(e) may change to 14 days under the current proposals associated with the time computation amendments to Rule 45.

not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the Court for additional time.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the "person aggrieved" to seek an order from the Court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the "person aggrieved" requires earlier access to the storage media or the electronically stored information than anticipated by law enforcement or ordered by the Court, the Court on a case by case basis can fashion an appropriate remedy taking into account the time needed to image and search the data, and any prejudice to the aggrieved party.

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media, and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the "paper world." In circumstances where filing cabinets of documents are seized, routine practice is to list the storage devices, i.e. the cabinets, on the

inventory, as opposed to making a document by document list of the contents.

APPENDIX G

Rules 11 of the Rules Governing §§ 2254 and 2255 Cases.

- **Copy of Rules**
- **Committee Notes**

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2254 CASES FOR THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Motion for Reconsideration; ~~Time to~~ Appeal

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the § 2255 proceedings. Federal Rules of Civil Procedure [52(b),

59(b),][***] and 60(b) may not be used in § 2255 proceedings.

(c) **Time for Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Committee Note

Subdivisions (a) and (b). As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2255 Proceedings have not previously provided a mechanism by which a litigant can seek

---

[***]The Committee invites comment on the desirability of including these rules.

reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a

"defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments.

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 CASES FOR THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Motion for Reconsideration

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the petitioner, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the petitioner's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may raise only a defect in the integrity of the § 2254 proceedings.Federal Rules of Civil Procedure [52(b),

59(b).][****] and 60(b) may not be used in § 2254 proceedings.

Committee Note

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2254 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2254. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re

[****]The Committee invites comment on the desirability of including these rules.

Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct. at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or

clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2254 and the finality of criminal judgments.

Rule 12 ~~11~~. Applicability of the Federal Rules of Civil Procedure.