

**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

**ST. LOUIS, MISSOURI
OCTOBER 31, 2011**

AGENDA
CRIMINAL RULES COMMITTEE MEETING
OCTOBER 31, 2011
ST. LOUIS, MISSOURI

I. PRELIMINARY MATTERS

- A. Chair's Remarks, Introduction of New Member, and Administrative Announcements
- B. Review and Approval of Minutes of April 2011 meeting in Portland, Oregon
- C. Status of Criminal Rules: Report of the Rules Committee Support Office

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved By the Supreme Court for Transmittal to Congress (No Memo)

- 1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.
- 2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.
- 3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.
- 4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.
- 5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.
- 6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.
- 7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video conferencing.
9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.
10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.
11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendments Approved by the Judicial Conference (No Memo)

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.
2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.
3. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.
4. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

C. Proposed Amendments Approved By the Standing Committee for Publication in August 2011 (Memo)

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.
2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.
3. Rule 34. Arresting Judgement; Conforming Changes to Implement Amendment to Rule 12.

III. NEW PROPOSALS FOR DISCUSSION

- A. Rule 16 (a)(2), Pretrial Disclosure of Government Work Product (Memo and Attachments)**
- B. Rule 17, Seal of Court on Subpoenas (Memo and Attachment)**
- C. Rule 6, Grand Jury Oaths (Memo and Attachments)**
- D. Rule 24 (b), Peremptory Challenges (Memo and Attachment)**
- E. Rule 29, Summary Judgment Prior to Trial (Memo and Attachment)**

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

- A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure (No Memo)**
- B. Other**

V. ORGANIZATION OF SUBCOMMITTEES AND DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

- A. Subcommittees (No Memo)**
- B. Spring Meeting, April 23-24, San Francisco (No Memo)**

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TAB 1

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

April 11-12, 2011, Portland Oregon

I. ATTENDANCE AND PRELIMINARY MATTERS

The Advisory Committee on Criminal Rules of the Judicial Conference of the United States met in Portland, Oregon, on April 11-12, 2011. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

The Hon. Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice (ex officio), participated in the meeting by telephone. One member, Judge James B. Zagel, was unable to attend.

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi.

Supporting the committee were:

Peter G. McCabe, Committee Secretary
Andrea Kuperman, Chief Counsel, Rules Committee Support Office
James Ishida, Attorney, Administrative Office
Jeffrey Barr, Attorney, Administrative Office
Holly Sellers, Supreme Court Fellow, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
Charlene Koski, law clerk to Judge Tallman

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director

of the Office of Policy and Legislation, Kathleen Felton, Deputy Chief of the Appellate Section, and Andrew Goldsmith, National Criminal Discovery Coordinator.

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

Judge Tallman welcomed everyone, particularly the committee's newest member, Chief Justice David E. Gilbertson of the Supreme Court of South Dakota, who is replacing Justice Edmunds. Judge Tallman also welcomed a distinguished visitor, Judge Emmet G. Sullivan of the United States District Court for the District of Columbia.

The committee noted that this was the last meeting for the chair, Judge Tallman. Judge Rosenthal conveyed the great thanks of the Standing Committee for the outstanding work of Judge Tallman and all that he has done.

The committee also noted that this was the last meeting for Mr. McNamara. Judge Tallman lauded Mr. McNamara as a wonderful representative of the Federal Public Defenders. The committee agreed that both Judge Tallman and Mr. McNamara had made superb contributions to the committee's work.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the September 2010 meeting.

The committee approved the minutes unanimously by voice vote.

C. Status of Criminal Rules; Report of the Rules Committee Support Office

Ms. Kuperman reported that the Supreme Court recently approved the committee's proposed amendments (see below) that will take effect on December 1, 2011, unless Congress were to act to the contrary. In addition, in fall 2010, the committee's proposed amendments to Rules 5, 58, and 37 were published for public comment. The public comment period ended in February 2011.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved By the Judicial Conference for Transmittal to the Supreme Court

Ms. Kuperman reported that the following proposed amendments had been approved by the Judicial Conference for transmittal to the Supreme Court, and now have been approved by the Supreme Court for transmittal to Congress:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.
3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.
4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.
5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.
6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.
7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.
8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.
9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.
10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.
11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendment Approved by the Standing Committee for Publication in August 2011

Ms. Kuperman further reported that the following amendment had been approved by the Standing Committee for publication:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

Prof. Beale reported that the Standing Committee approved this proposal for publication at its January 2011 meeting. The amendment will be published for comment in August 2011.

She added that the committee had discussed the idea that, in addition to the rule amendment, related changes might be made to the section of the judges' benchbook addressing the plea colloquy, perhaps touching on more issues than the rule amendment does. The committee had before it a draft letter to Judge Rothstein of the FJC requesting the changes in the benchbook. The committee that oversees the benchbook, chaired by Judge Irma Gonzalez, will make the final determination on such changes.

A member questioned whether it is a good idea to ask the defendant whether he has discussed the issue of immigration consequences with his attorney. This could lead into a morass. Another member responded that discussing this with your attorney is at the heart of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). That is the whole point, that the judge should not accept your plea if you have not discussed this with your attorney.

A member argued that the Rule 11 issue relates to advice from the court to the defendant about collateral consequences, which has nothing to do with what the defendant has discussed with his attorney. Even if the defendant has had discussions with his attorney, if he still doesn't understand, then the court cannot accept his plea. In *Padilla*, the issue was incorrect advice given defendant by his attorney, not a failure to have the conversation.

A member added that if the defendant says yes, I talked to my attorney about this, all that means is that the topic has come up. It does not mean that defendant got good advice, or full advice, or the right advice. Is the judge in any position to do anything about that? The judge cannot give the defendant any advice at all.

Judge Tallman emphasized that the committee is not writing a script for the plea colloquy here. The committee is merely trying to identify issues that need to be considered at the plea. Every judge will ask about this in the judge's own way.

Judge Tallman called for a vote on whether to include the language in the letter regarding the immigration consequences of a guilty plea.

The committee voted unanimously by voice vote to approve this language.

A member stated that the remaining issue, the language in the letter relating to sex offenses, is more complicated. It could be simplified by not getting into issues of civil commitment. Another member disagreed and argued that that language should be included, because these civil commitment issues are arising more often and are proving to be quite challenging for defense counsel.

Prof. Beale noted that under the statute addressed in *United States v. Comstock*, 560 U.S. ____ (2010), any defendant leaving the custody of the Bureau of Prisons can be subject to civil commitment, no matter what the offense for which the defendant was imprisoned, if the government can show that the defendant has committed a sex offense previously. Also, if someone pleads guilty to a federal sex offense, they are subject to both federal and state civil commitment and sex offender registration laws.

A member stated that with all of this added to the benchbook, the plea allocutions are going to be too lengthy. If it's not in the rule, the committee should not add it to the benchbook. A member agreed that every judge can decide for himself, but said it's a good idea to flag issues.

Mr. Wroblewski reported that in the Department of Justice manual, which discusses this topic, the coverage is limited to the consequences that flow directly from the guilty plea. Otherwise, you could go on forever. There are a whole host of possible indirect consequences.

Judge Tallman called for a vote on whether to include the language in the letter regarding the collateral consequences of a guilty plea to a sex offense.

The committee voted unanimously by voice vote to approve this language.

The chair subsequently transmitted the final letter to the benchbook committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2010

Ms. Kuperman reported that the following amendments had been published for public comment in August 2010.

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

Prof. Beale reported that the comments received on the proposed amendment were generally very positive.

There were comments suggesting that the rule should state that the initial appearance must take place without unnecessary delay. But a different part of the rule already says that, and the draft Committee Note mentions it, so there is no need for any change.

Some comments suggested that the rule should also require certain advice and warnings from the court to the defendant. This is something the government has long opposed. The language of the current rule amendment was carefully negotiated. It is not the court's responsibility to give the diplomatic notification. Perhaps, Prof. Beale suggested, language could be added to the draft Committee Note addressing this issue.

Judge Tallman stated that he does not think the committee needs to further tinker with the draft Committee Note.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

Prof. Beale reported that Rule 58 contains a provision parallel to the provision in Rule 5 that is to be amended. Accordingly, this is a conforming amendment to Rule 58.

The committee voted unanimously by voice vote to approve the amendment for transmission to the Judicial Conference.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

Prof. Beale reported that this amendment dovetails with similar provisions that have recently been adopted in the Civil and Appellate Rules governing indicative rulings. Among the comments received, the Federal Magistrate Judges Association has endorsed this. The National Association of Criminal Defense Lawyers approves of the rule, but has suggested changes to the Committee Note to help guide practitioners about the kinds of cases in which this procedure could be employed. Prof. Beale expressed doubt that the committee should expand the Note to specify more details. The Standing Committee prefers shorter Notes. Even if the committee gave more examples, that would not exhaust all the situations in which the rule might be employed. Listing more examples starts down a slippery slope.

She added that the draft Committee Note contains the words "if not exclusively," suggesting there might be no other proper uses of the procedure. The committee could delete those three words, but the Standing Committee added those words after much negotiation, because the Department of Justice had concerns. Those words reflect a considered policy judgment by the Standing Committee.

Judge Rosenthal added that this same language is now in the Committee Note accompanying the Appellate Rule. If the language is not here, and it remains there, that will create questions.

The committee voted unanimously by voice vote to approve the amendment, with no change in the draft Committee Note, for transmission to the Judicial Conference.

III. CONTINUING AGENDA ITEMS

A. Rule 12 (Pleadings and Pretrial Motions)

Judge Tallman noted that the committee's proposals to amend Rule 12 had been remanded back to the committee, once again, by the Standing Committee at its meeting in January. Judge England, the chair of the Rule 12 subcommittee, reported that the committee's effort to amend Rule 12 began in 2006 as a surgical attempt to simply require that a claim that the indictment failed to state an offense must be raised before trial. It turned out, however, that that change raised other, difficult issues surrounding the standard to be applied when such a claim was not timely brought before trial. The subcommittee has met many times to take up these issues, including issues specifically raised by the Standing Committee.

Judge England added that the subcommittee believes it is important that the reasons for the committee's latest round of modifications to its Rule 12 proposal are fully explained to the Standing Committee. The subcommittee believes that in the past there may have been a disconnect between what the committee recommended and the way the Standing Committee perceived it.

Prof. Beale explained that at the urging of the Standing Committee in 2010, the committee had reworked the proposal to address the relationship between Rule 12 and plain error review. The proposal the committee sent to the Standing Committee for its January 2011 meeting distinguished between those claims "waived" absent a showing of cause, as the current language of Rule 12 provides, and those claims "forfeited" and subject to plain error, the approach applied by the Supreme Court in *United States v. Cotton*, 535 U.S. 625 (2002). That proposal was again remanded by the Standing Committee, which expressed concerns about the confusion from the use of the terms "waiver" and "forfeiture" in the rule. The proposal now before the committee eliminates the terms "waiver" and "forfeiture" altogether.

But even without use of these terms, there still remains the continuing issue of distinguishing between the treatment of most untimely claims and the treatment given a smaller special group of untimely claims, e.g., the indictment's failure to state an offense and double jeopardy. The current proposal attempts to avoid confusing terms like "waiver" and "forfeiture" and instead clarify as much as possible the standard for raising an untimely claim. Thus the current proposal has some very different language from the proposal considered by the Standing Committee at its June 2011 meeting.

There is also the question of filing the claim late in the district court, as distinguished from raising the claim for the first time in the court of appeals. In *United States v. Vonn*, 535 U.S. 55

(2002), the Supreme Court held, with regard to the harmless error provisions of Rule 11, that because Rule 11 did not specifically state that Rule 52 did not apply to claims analyzed under Rule 11, Rule 52 did apply. For that reason the current proposal states explicitly, “Rule 52 does not apply.” If the amended Rule 12 does not specify that the Rule 52 “plain error” standard does not apply, then *Vonn* would appear to dictate that the Rule 52 standard will apply.

Prof. King noted that the committee’s new proposed language makes it clear that the two standards – i.e., the standard applied to late claims of an indictment’s failure to state an offense or of double jeopardy, and the standard applied to all other late claims – are exactly the same except for “cause.” That is all that stands between them. “Cause” must be shown to raise the latter claims late, but need not be shown to raise the former claims late.

A participant observed that the committee’s Rule 12 amendment process started with the purpose of eliminating from the rule, in the light of the Supreme Court’s ruling in *Cotton*, the exception permitting a claim of the indictment’s failure to state an offense to be raised at any time. But now, the proposed Rule 12 amendment has gone way beyond that. Under the current rules, all untimely motions can be heard under Rule 12(e) for good cause. Now, instead, the committee is considering a new review standard that would apply in both the district courts and the courts of appeals. It is not clear that this is the correct standard on appellate review in the court of appeals. It is good that the committee’s new proposal no longer uses the terms “waiver” and “forfeiture,” since use of those terms would create a morass. But the new proposal still threatens to mess with appellate review standards. The committee seems to believe that it’s not enough for the Supreme Court to tell the courts of appeals what the standard of review on appeal is, the committee also has to tell them in a rule. The courts of appeals may follow the Supreme Court, not the rule.

Prof. Beale disagreed, stating that the committee had researched the question and the current proposal for considering these untimely claims only after a showing of cause and prejudice states the current standard for review applied by most courts of appeals. A member agreed that this is the same standard. The only thing that is new under the current proposal is that it adds to the list of claims that must be raised before trial a claim that an indictment fails to state an offense. Also, the committee is trying to help the courts by making the existing standard clearer for everyone to understand.

Prof. King added that there is disagreement, not just confusion, about this question in the courts. The courts of appeals do not agree on what the correct standard should be. So the committee is trying to clarify this. If the committee wishes to make clear to a court of appeals that wants to review such questions for “plain error” that it should not do so, the best way to achieve that is to say expressly, “Rule 52 does not apply.”

A participant stated that to a district judge, the reference to Rule 52 means nothing. To the extent that the committee’s Rule 12 proposal is directed at district judges, any reference to Rule 52 muddies the waters. A member agreed that removing any reference to Rule 52 from the amendment will make the standard clear for district judges, and allow the courts of appeals to do whatever they normally do.

A member reported that the defense bar is opposed to any change at all to Rule 12, but if there must be an amendment, the defense bar wants a statement that Rule 52 will not apply. Otherwise the amendment will be even more unfair to defendants.

Prof. Beale reiterated that it would be very helpful, in light of *Vonn, supra*, to be explicit about whether or not Rule 52 applies. If the rule does not mention Rule 52, then courts will continue to struggle with the question whether Rule 52 should apply.

A member stated that the debate about the review standard in the courts of appeals is an exercise in futility. The committee should just clarify the standard for considering untimely claims in the district courts, and leave the court of appeals alone, making no mention of Rule 52. The committee can always return to the issue of the appellate standard in two or three years, if that is needed. Judge Tallman expressed hesitation about the committee having to revisit this yet again since this is our third effort at settling the language.

A member suggested that the committee publish the proposal with “Rule 52 does not apply” in brackets as an alternative. Judge Tallman noted that the rules committees typically use bracketed language as a method of flagging an issue in order to seek input on something the committee believes may be controversial or has had trouble resolving.

Prof. Beale reiterated that the committee originally wanted to just fix the *Cotton* problem, and the committee’s original proposal only addressed the failure-to-state-an-offense claim in *Cotton*. It was the Standing Committee that asked the committee to do more, stating that there was confusion among the courts of appeals on these issues generally, which the committee could dispel by revising Rule 12.

Judge Rosenthal advised that in sending its proposal to the Standing Committee, the committee should be clearer in explaining the arguments raised and the reasons for the committee’s decisions. Also, the committee should send the Standing Committee a clear signal about severability, whether the committee believes the committee’s Rule 12 amendment should still go forward if the issue of the appellate review standard is severed. The committee should explain the debate on this question to the Standing Committee, and solicit comment on how the appellate review standard can best be conveyed.

Prof. King noted that, in fact, the Rule 12 proposal started as a response to cases in which the defendant’s claim was raised for the first time on appeal. Judge Rosenthal acknowledged that, but reminded the committee of the need to step back from the history that brought the committee to this point, and look at the committee’s proposal instead from the viewpoint of someone reading it for the first time.

Judge Tallman called for a vote on proceeding with a Rule 12 amendment which includes the language, “In such a case, Rule 52 does not apply.”

The committee voted 8-3 in favor of proceeding with consideration of the proposed amendment containing this reference to Rule 52.

Prof. Beale reported that the category of “outrageous government conduct” had been deleted from the list of defects contained in the Rule 12 amendment. The Seventh Circuit has ruled that such a defect does not exist. If the committee includes it, it will look as though the committee concluded that nevertheless this defect does exist. The amendment’s list of defects is non-exhaustive, so excluding it does not mean or imply that it does not exist. This is an easy call to avoid taking an unnecessary position on a controversial question.

In addition, claims based on the statute of limitations have been removed from the list of favored untimely claims that are to receive a more generous standard of review. Under the current proposal, there are only two such claims, not three as before: claims that the indictment fails to state an offense, and double jeopardy claims. Removing statute of limitations claims from the list of favored claims would preserve the current case law.

Judge Tallman called for a vote on the Rule 12 amendment before the committee.

The committee voted 8-3 to approve for publication the proposed amendment to Rule 12, and a conforming amendment to Rule 34.

Prof. Beale reported that the committee had failed to delete two references in the draft Committee Note to statute of limitations claims. Now that statute of limitations claims have been deleted from the amendment’s list of favored claims, these Note references are obsolete.

The committee voted 8-3 to revise the draft Committee Note to delete these references to statute of limitations claims.

Judge Tallman asked whether the committee wanted to take a position on the severability of the question of including the reference to the application of Rule 52.

A member stated that the committee should make it clear that this issue is severable. If the Standing Committee wants to delete the reference to Rule 52, the remainder of the Rule 12 amendment stands and should be approved. The member added that if the reference is ultimately deleted, and the appellate standard of review is left to case law development in the appellate courts, then the Committee Note should not state a position on the question.

Judge Tallman noted the consensus of the committee that if the Standing Committee wants to delete the reference to Rule 52, the committee favors proceeding to publish the amendment without the Rule 52 language.

B. Rule 16 (Discovery and Inspection)

Judge Tallman reported that the Rule 16 subcommittee, which he chairs, has been unable to agree on any acceptable amendment to Rule 16. He had circulated a discussion draft of a proposed amendment in order to stimulate a full committee discussion. The Department of Justice, at Judge Tallman's request, also prepared language along the lines the Department had previously mentioned it would not oppose, merely incorporating or codifying the principles of the Supreme Court rulings in *Brady* and *Giglio*. The Department made clear that it is not advocating that this language be adopted, and that it was prepared solely at Judge Tallman's request.

Mr. Breuer reported that the Department has taken unprecedented steps to ensure that federal prosecutors meet their disclosure obligations. The Department has appointed Andrew Goldsmith as its first national criminal discovery coordinator. They have amended the U.S. Attorneys' Manual to address this issue. They have adopted a groundbreaking and transparent policy on criminal discovery, going beyond the basic Supreme Court requirements. They have directed each U.S. Attorney to develop granular discovery policies suiting the needs of that particular district. All federal prosecutors are now required to take annual discovery training.

The Department is also training thousands of law enforcement personnel in discovery practices, including personnel of the FBI, DEA, ATF, Marshals Service, and Bureau of Prisons. When that is done, they will train personnel from IRS and other agencies outside the Department of Justice. Then they will train district attorneys and local law enforcement.

The Department has also emphasized the use of software to manage discovery electronically. They have published a bluebook dealing with discovery requirements, written by senior prosecutors who have dealt with discovery matters for many years.

When, on rare occasions, the Department does not meet its discovery obligations, it's not for lack of a rule, but because of the demands on prosecutors and the lack of resources. The Department's comprehensive approach is what is needed to improve its performance. A rule change will not address anything. There will still be mistakes no matter what the rule says.

Mr. Goldsmith reported that he has traveled all over the nation addressing this issue. He now has a Deputy Coordinator helping him, another senior prosecutor. When he spoke to this committee in Chicago in April 2010, one participant lauded the performance of Attorney General Holder in this area, but expressed concern about what will happen when Attorney General Holder leaves. Mr. Goldsmith said that the Department has tried in a serious way to change the culture of the Department in this respect, so that compliance with disclosure obligations will be ongoing and will not depend on the efforts of a particular Attorney General.

Some have objected that the Department has been great at training prosecutors, but the prosecutors only know what the agents tell them. So now the Department is also training the agents, getting everyone on the same page with respect to disclosure obligations. If it is perceived as just a situation of prosecutors telling agents what to do, the agents won't listen. But now, with all this training, the agents are buying in. The Department is training 26,000 agents on a national basis, telling them, "When in doubt, disclose." Disclosure is the default position.

The Department has also trained federal prosecutors from around the nation, actually going out there and speaking with them. It's not just a situation of local prosecutors getting faceless memos from Washington about discovery. Meetings are also underway about training state and local prosecutors. Also, the Department has been interacting with Federal Public Defenders about the idea of coming up with a protocol for exchange of electronic information.

Mr. Wroblewski explained that the rule language the Department drafted at Judge Tallman's request recognizes that the disclosure obligations are not just those of the attorney for the government, but the entire prosecution team. The language refers to *Brady*, *Giglio* and their "progeny," because there is a lot of case law dealing with nuances of *Brady* and *Giglio*.

Judge Tallman wondered whether there are any current rules that cite cases in the text of the rule, as this proposal would. Judge Rosenthal responded no. The Standing Committee even worries about citing cases in Committee Notes because case law changes.

Judge Tallman stated that to the extent the committee wants to make a modest change in Rule 16, one way to do that would be to incorporate the two Supreme Court rulings. That would be a significant step. The question before the committee now is whether to go forward with any rule change at all. The Federal Judicial Center survey shows an even split among judges on the issue, with the Department of Justice opposing any rule amendment and the defense bar in favor of a rule amendment. Consequently, the chance that the committee can come up with a Rule 16 proposal that has any chance of success is slim.

Judge Tallman stated that Ms. Brill also had produced a draft of a Rule 16 amendment. Ms. Brill reported that she worked on the draft with several Federal Public Defenders and private defense lawyers around the country. Their draft attempts to be more descriptive than merely citing *Brady*, *Giglio*, and their progeny. Their idea, like the Department of Justice's approach, was just to codify the current law, but they did try to flesh out what that means. They stated that if their proposal is shown to go beyond current law, they will change their proposal. They are not trying to slip in a clandestine expansion of existing law.

Ms. Brill argued that the need for such a rule amendment is there. There have been instances of prosecutors not understanding discovery obligations after the Department started all its changes and training, and not just with complex electronic discovery, but with traditional kinds of materials not being disclosed. Further, there really is common ground to support such a modest proposal. The FJC survey reveals that 51% of judges favor a rule change, even though a majority of those judges are happy with prosecutors' performance of discovery obligations. This is compelling. The judges who oppose a rule change may be motivated by security issues, which she expressed willingness to accommodate by providing exceptions to disclosure.

A member responded that Ms. Brill's proposal does not even mention witness security. And it does not even mention the Jencks Act, which is a huge problem here. If prosecutors are determined to break the law governing disclosure obligations, then they will, rule or no rule.

A member stated that the member has received messages from Federal Public Defenders saying that they are still seeing disclosure problems out there. It is great that the Department of Justice is taking these steps, but why are they so afraid of a rule? With a rule, there are teeth there. The biggest problems are with agents. The prosecutor will give the defense at the last minute some statement he says he didn't know his agent had.

Mr. Wroblewski said that the Department does not deny that it faces challenges in complying with existing discovery obligations. There are complex electronic repositories of information, and a lot of federal and state actors. But changing the rule does not help with any of that. If the goal is to increase the amount of material that is actually disclosed, then it's not about the rule. Merely codifying the existing law in a rule would not affect that. A member agreed that the Department has problems with limited budgets and expanding technology.

Members lauded the admirable job done by the Department in this area, but asked, how do you institutionalize these policies and practices without a rule change, without black letter law requiring them? A member expressed doubt that some future administration's Department of Justice is going to place much emphasis on this. The committee needs to provide real guidance in a rule. With a rule, the particular policies of each future Attorney General may matter less.

Mr. Wroblewski responded that the Department needs to put all the information about discovery in one place, and that's what they are doing now. Errors typically are not about a bad decision the prosecutor made about disclosure of a particular document – and, in any event, no rule change will help with that. The typical situation is that the prosecutor finds out about the information late, so the prosecutor turns it over late. Rule changes won't help with that either. The Department does not believe that a rule is the best way to ensure compliance with discovery obligations. And the proposed rule amendments do not address victims' rights and witness security.

Mr. Goldsmith responded that he has worked for years at the Department, and he rejects the notion that if the Republicans win the White House in 2012, all his work on criminal discovery will go up in flames. He would be beyond shocked if that happened. That's not how the Department works. Making the Department's policies clear and well-disseminated is far more important than a rule change; it gives prosecutors meaningful guidance, which a rule amendment would not do. A member agreed that a new administration is not going to remove these procedures from the U.S. Attorneys' manual.

A member expressed skepticism about the value of trying to capture moving, changing case law in a rule. That would be very difficult, and perhaps not very useful.

A member stated that the timing issues only come up with impeachment materials. Core *Brady* materials must be turned over immediately. Mr. Wroblewski agreed. He predicted that the committee could come to some agreement fairly quickly on just core *Brady* materials. It is the timing of disclosure of impeachment materials that is the most complex issue.

A member stated that whatever rule is adopted, any rule amendment will create additional satellite litigation. In a large district like the Southern District of New York, games playing is simply what lawyers do. Litigation already takes forever, and any rule amendment will add another layer of satellite litigation. Another member agreed, arguing that prosecutors are not intentionally violating the *Brady* principle. No rule would have changed what happened in the Sen. Ted Stevens case. If a prosecutor is going to ignore 47 years of Supreme Court case law, they'll ignore a rule. Budget limitations may be a factor when the prosecution falls short.

Judge Tallman added that he worries that the Department won't get the money it needs for the steps it wants to take to meet its disclosure obligations in the electronic discovery area.

A participant pointed to Fed. R. Evid. 901, which is unique in that it provides a non-exhaustive checklist of possible methods to authenticate evidence and satisfy the requirements of Fed. R. Evid. 901. That rule comes closest to merging the concept of a checklist with a Department of Justice manual, and gives some rule teeth to it. There are no teeth to a mere checklist or manual, no penalty if you fail to comply.

A participant expressed skepticism about the committee's ability to create a rule to give rule-effect to the principles of *Brady* and *Giglio*. It is a false premise that the current administration is somehow the first to discover *Brady* obligations. Another false premise is that half of all judges want a rule amendment. Studies are useful but do not provide conclusive information. 50% of judges indicated some approval of a rule, but also 60% said they had seen no *Brady* violations in the last five years. A rule amendment may be a solution without a problem, since there have really been only a handful of highly publicized violations.

People keep saying that we need a rule, with teeth. But there already is a "rule," it's *Brady* and *Giglio*. There are hundreds of cases about sanctions for violations of *Brady* or *Giglio*. That's already out there, and sanctions are teeth. What some people are really looking for are consequences beyond what *Brady* and *Giglio* already provide. A rule will just create a lot of satellite litigation for those who will game the system.

Judge Tallman noted this discussion underscores the complete lack of consensus about what the committee should do. He tried, in his discussion draft of a proposed amendment, to break out what would be exculpatory material and what would be impeachment material. The feedback he got was that any rule language, even closely based on existing case law, would create more litigation over the precise meaning of the language. He stated that he does not know of any way to draft around that. He is concerned about the time courts would have to devote to such satellite litigation, and the expense that would impose on defense counsel and the Department of Justice. The result would be to transform criminal litigation into civil discovery practice.

In addition, the Jencks Act is almost an insurmountable obstacle. Judge Tallman stated that his attempt to work around the Jencks Act would have provided that prosecutors need not disclose witness statements until later, as the Act provides, but would nevertheless require earlier disclosure of summaries of the witness statements. But DOJ objected that preparing these summaries is going

to take time. And then there will be a new wave of satellite litigation over the content and accuracy of the summaries. His draft also contained “trump” language that would permit the government to withhold disclosure of dangerous information upon the filing of an unreviewable statement of the need to do so. That provision, too, would invite satellite litigation.

Judge Tallman reiterated that he is not now advocating adoption of his discussion draft, which many have opposed. But he noted no consensus draft has emerged. He suggested that the committee could vote to abandon, at least for now, its consideration of any Rule 16 amendment.

A member argued that the committee could issue a proposed amendment for public comment, and see what develops. Judge Tallman reminded the committee that the Standing Committee would need to approve such publication. In 2007, the Standing Committee refused to publish a proposed Rule 16 amendment after hearing impassioned objections from the Department of Justice, which had made changes to the U.S. Attorneys’ manual on this issue. The Standing Committee instead remanded the issue back to this committee. The issue then was reopened in light of the Sen. Ted Stevens case after the chair received a letter from Judge Emmett Sullivan requesting reconsideration. If the committee decides to take no action now, the committee can still revisit the subject down the road. The Department has done a lot more this time than the last time. For that reason, it may be even tougher to win Standing Committee approval for publication, given that the Department’s position opposing any rule amendment has not changed.

A member stated that, speaking for the defense side, the defense bar is interested only in putting forth a proposal that would have the support of – or at least that would not be actively opposed by – the Department of Justice. That is why representatives of the defense bar attempted to draft a proposal that found common ground, hoping that the Department would not oppose a mere codification of the existing case law.

Judge Tallman called for a vote on whether to make any change at all in Rule 16. A yes vote would favor proceeding to consider some change. A no vote would oppose making any change in Rule 16.

The committee voted 6-5 against any amendment to Rule 16.

Judge Tallman stated that in light of the committee’s vote, the committee would table any further work on amending Rule 16. The committee will not go forward with any rule change. But that does not mean that the committee will abandon its initiatives that do not involve a rule change, such as working with the Federal Judicial Center to include this issue as a checklist in the judges’ benchbook, asking the FJC to compile a “best practices” guide for criminal discovery, and expanding judicial education efforts. He emphasized that the issue of improving criminal discovery by amending rule 16 – which the committee has looked at for forty years – will not go away.

Judge Rosenthal observed that there can be beneficial effects and improvements as a result of the rulemaking process, even if there is no rule change. This is the best example of that she has ever seen. Because of the committee’s process, the Department of Justice and others have

undertaken major policy changes and extensive education initiatives that they would not otherwise have done, or at least would not have done so quickly.

Judge Tallman promised that the issue of non-rule initiatives on criminal discovery will be pursued with the FJC. He pointed to the materials in the current agenda book listing specific points the committee might recommend that the FJC include in the judges' benchbook, and in a best-practices manual, on this issue.

Ms. Hooper reported that the FJC will probably conduct nationwide interviews with judges about best practices. As for the benchbook, there is a judges' committee, chaired by Judge Irma Gonzalez, that oversees changes in the benchbook. Judge Tallman stated that he would follow up by letter with that committee and be sure that this issue gets on that committee's agenda. Subsequent to the meeting the chair transmitted the committee's proposals to the FJC.

A participant suggested that it is imperative that the FJC conduct annual education of judges – not just new judges, but all judges – about criminal discovery. Judge Tallman stated that he has already discussed this with Judge Rothstein of the FJC and she is very supportive.

A participant suggested that any transmittal to the FJC make clear that the committee is looking for a list of best practices, not some kind of exhaustive checklist that encourages judges to turn their brains off. Judges must stay aware of a wide variety of unforeseen problems that can arise. Judges must understand the difference between what the law mandates, and the actual practices favored across the courts. Judges should not conclude that once they go through the checklist, they don't have to think about *Brady* any further.

A member asked if this material goes in a benchbook, what does a judge do with it? Meet with the lawyers and tell them to do what's in the benchbook? If they don't, what should be the consequence? Judge Tallman responded that this issue does require more active judicial involvement in criminal discovery. A member agreed that the civil model of the Fed. R. Civ. P. 16 and 26 conferences might be useful. Mr. Wroblewski emphasized that the timing is important. If such a conference is held just before trial, a lot of this makes sense. But at the start of a case, a lot of this material will not yet have been disclosed.

Prof. King stated that a big point of contention will be whether such a criminal discovery conference has to happen before a guilty plea. Judge Tallman responded that the Supreme Court already has decided that is not constitutionally required. Prof. King agreed as to impeachment material, but noted that the Court's decision in *Ruiz* did not directly address known information establishing factual innocence.

A participant stated that sometimes guilty pleas are negotiated precisely to resolve the case quickly and spare the government additional investigation costs. The committee should not require the government to prepare every case for trial when the defendant is ready to plead guilty. A member agreed, but suggested that prosecutors be required to disclose material that the prosecutor actually knows about, without imposing any further duty on the prosecutor to investigate. Mr.

Wroblewski stated that usually the defendant is ready to plead right away, and warned that requiring the government to put off plea negotiations pending a *Brady* investigation would be a big change in practice. A member observed that sometimes defendants want to plead right away to avert any further government investigation, because defendants are afraid of what more the government will discover. Another member added that if defendants are going to re-plead after receiving *Brady* disclosures, that will wreak havoc in a busy district.

A participant objected that nevertheless this material has to be produced. A defendant cannot plead guilty, for example, without knowing of a recanting witness' statement. Prof. King noted that she'd read that some states consider it unethical for a prosecutor to sign a plea agreement in which the defendant waives the right to known exculpatory information. This is seen as the prosecutor gaining a waiver of the prosecutor's own misconduct.

A participant noted that the FJC will survey judges to ask what best practices judges are actually using. They are not going to find many judges requiring *Brady* disclosures before guilty pleas.

A member stated that the current draft checklist contains too many adverbs, too many quantitative words and intensifiers. These kinds of words plant the seeds of future disputes and should be removed from the checklist. Prof. King responded that most of that language was lifted from the U.S. Attorneys' manual. Judge Tallman agreed that the checklist is not a rule, and does not need to be so precise and didactic. The actual wording lies in the jurisdiction of the Benchbook Committee chaired by Judge Gonzalez.

A member stated that some of the objections to codifying disclosure obligations in a rule have to do with the dicey proposition of correctly characterizing the current case law, which is a moving target. It might be better to create in a rule an early conference to discuss the timing of disclosure of certain items, and then a pre-trial conference to discuss what has been disclosed. This could be placed in Rule 17.1 (pre-trial conference). The committee could graft ideas from Civil Rule 16 about such conferences into Rule 17.1. A whole variety of issues could be worked out at such a conference. This approach would not impose black-letter requirements on the government and, flexibly administered, it would not bog down the processing of routine cases.

Judge Tallman asked what judges' current practices are. Two members responded that they conduct a very general conference early on, and following that conference, issue an order setting schedules and deadlines. Another member reported that only one judge in the member's district does this, the other judges are "old-school" and do not. Another member reported that every judge in the member's district holds a conference almost immediately. There are several conferences, usually, in the average case, with a pre-trial conference usually two weeks before trial. Another member reported that in the member's district, three of the seven judges set a trial date in a vacuum, without any conference, which creates chaos every time.

A participant expressed skepticism about the notion of trying to create a formula for a Rule 17.1 conference. This cannot simply copy civil procedures, with Fed. R. Civ. P. 16 and 26 conferences. There are usually many more than two conferences in a criminal case.

A member objected to forcing mandatory conferences on judges. Another member agreed, but stated that the proposal was not mandatory and would maintain judicial discretion. The proposal is merely an attempt to set forth best practices with some kind of formality.

Judge Tallman stated that the committee had already voted not to amend the rules now to address *Brady*, and instead to pursue best practices and education through the FJC and others. Accordingly, he stated, he was concerned that this Rule 17.1 proposal is meant to address the same subject indirectly and is thus inconsistent with the committee's vote. And in any event, what would this Rule 17.1 proposal accomplish that the FJC best practices approach could not?

Judge Rosenthal added that there is a real concern in the civil area that judges and lawyers are not adequately using Civil Rule 16. Until the committee identifies some concrete problem that an amendment to Rule 17.1 would seek to solve, the committee is going to face opposition from district judges, who do not want mandatory practices imposed on them.

Judge Tallman stated that he will refer the Rule 17.1 proposal to the criminal discovery subcommittee. But, in light of the vote, amending Rule 16 is off the table for now.

C. Rule 15 (Depositions)

Judge Keenan, chair of the Rule 15 subcommittee, reported that years ago the Department of Justice pointed out to the committee that in terrorist or certain international criminal cases, there is some need for foreign depositions outside the physical presence of the defendant. Suppose a witness in a foreign country refuses to, or is unable to, come to the U.S. to testify. For whatever reason, the defendant cannot get to the foreign country to be present at a deposition of that witness. The committee drafted a proposed Rule 15 amendment to address this problem. The amendment would authorize the deposition outside the presence of the defendant – with the defendant participating by video technology – only under very limited circumstances. The court must first make case-specific findings on a whole list of requirements.

The Standing Committee and Judicial Conference approved this proposal, but the Supreme Court sent it back, apparently on Confrontation Clause grounds. The committee has been informally advised that the Court was concerned that the rule did not clarify that compliance with the procedures for gathering the evidence did not resolve the ultimate admissibility of such a deposition at trial. The committee has added language to the Committee Note further explaining that the rule amendment only addresses the taking of the deposition, and the later admissibility of such evidence at trial is determined by the Federal Rules of Evidence and the Constitution.

Judge Tallman explained that the committee had considered this issue before, and a sentence at the end of the current Committee Note addresses this. Now the committee has elevated that discussion to an entire paragraph at the beginning of the Committee Note to clarify the point.

Judge Rosenthal cautioned that the informal advice given about the Supreme Court's view of this amendment was just advice. There are no guarantees that the Court will accept what the committee has done. Judge Tallman agreed.

Prof. King pointed out that, nevertheless, the second-to-last paragraph of the Committee Note is about the admissibility of the evidence. She suggested that that paragraph be deleted. A member suggested deleting everything in that paragraph except the first sentence, and moving that first sentence to be the concluding sentence of the preceding paragraph.

The member also suggested, in the second paragraph of the Committee Note, inserting the language, "*As is true of every other deposition*, questions of admissibility of the evidence" This would make clear that the committee is not creating some new creature governed by new standards – the standards are the same as for any other deposition.

Judge Rosenthal suggested that it would be useful to run this Committee Note language, as revised, by the chair and reporter of the Advisory Committee on Evidence Rules.

Judge Tallman called for a vote on the above revisions to the draft Committee Note.

The committee unanimously by voice vote approved the above revisions to the Committee Note.

Judge Tallman called for a vote on final approval of the rule amendment and Committee Note, to be sent to the Judicial Conference.

The committee by voice vote, with a single dissenting vote, approved the amendment for transmission to the Judicial Conference.

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

A. Status Report on Legislation and Other Matters Affecting the Federal Rules of Criminal Procedure

Ms. Kuperman reported that nothing is happening on the legislative front right now that would affect the Criminal Rules.

She stated that the Standing Committee is in the process of revising the procedures under which the rules committees operate. One change from the current procedures will be to recognize

that there is now a rules web-site, and to specify what items must be posted there. The revised procedures will be presented to the Standing Committee at its June 2011 meeting.

Judge Rosenthal noted that the current procedures are not very readable, and are being restyled. Also, it is useful to think about what it means to be a sunshine committee in an electronic age, and what must be posted on-line. Mr. McCabe added that these procedures have not been changed since 1983.

B. Rule 45(c) and the “Three Days Added” Rule

Prof. Beale reported that Rule 45(c) on computation of time is parallel to the time-computation provisions in the other federal rules, and is modeled on Fed. R. Civ. P. 6(d). An academic published an article noting that a styling change to these provisions had produced an unintended consequence. The party who made service may benefit from the extra three days, which were intended only to benefit the party receiving service.

But in the Criminal Rules, only one provision, Rule 12.1(b)(2), could even conceivably be affected by this, and even then only in limited circumstances. The Civil Rules, by contrast, contain a number of affected provisions. For that reason it would be best for the committee to let the Advisory Committee on Civil Rules take the lead on this.

Judge Rosenthal agreed. If the committee doesn't like what the Civil Rules committee is doing, let them know. This is part of a potential larger project to remove from all the rules the vestigial remnants of the paper age. If the default filing method is electronic, not paper, then adjustments are needed. But doing that is tricky, where there are still a lot of paper filers such as pro se litigants. There is also a question whether to make such changes piecemeal, thereby pestering the bar with many small changes dribbling out over time, or instead to do it all at once in a large future project.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting of the committee would be held on October 31-November 1, 2011, in St. Louis. After discussion, Judge Tallman stated that the spring 2012 meeting of the committee would be held on April 23-24, 2012, in San Francisco.

TAB 2

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

Rule 1. Scope; Definitions

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(b) Definitions. The following definitions apply to these

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rules:

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(11) “Telephone” means any technology for

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transmitting live electronic voice communication.

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~~**(11)**~~**(12)** “Victim” means a “crime victim” as defined in

8

18 U.S.C. § 3771(e).

9

Committee Note

Subdivisions (b)(11) and (12). The added definition clarifies that the term “telephone” includes technologies enabling live voice conversations that have developed since the traditional “land line” telephone. Calls placed by cell phone or from a computer over the internet, for example, would be included. The definition is limited to live communication in order to ensure contemporaneous communication and excludes voice recordings. Live voice

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

communication should include services for the hearing impaired, or other contemporaneous translation, where necessary.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

The text was rephrased by the Committee to describe the telephone as a “technology for transmitting live electronic voice communication” rather than a “form” of communication.

Rule 3. The Complaint

1 The complaint is a written statement of the essential
2 facts constituting the offense charged. ~~It~~ Except as provided
3 in Rule 4.1, it must be made under oath before a magistrate
4 judge or, if none is reasonably available, before a state or
5 local judicial officer.

Committee Note

Under the amended rule, the complaint and supporting material may be submitted by telephone or reliable electronic means; however, the rule requires that the judicial officer administer the oath or affirmation in person or by telephone. The Committee concluded that the benefits of making it easier to obtain judicial oversight of the arrest decision and the increasing reliability and accessibility to electronic communication warranted amendment of the rule. The amendment makes clear that the submission of a complaint to a judicial officer need not be done in person and may instead be made

by telephone or other reliable electronic means. The successful experiences with electronic applications under Rule 41, which permits electronic applications for search warrants, support a comparable process for arrests. The provisions in Rule 41 have been transferred to new Rule 4.1, which governs applications by telephone or other electronic means under Rules 3, 4, 9, and 41.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

Rule 4. Arrest Warrant or Summons on a Complaint

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(c) Execution or Service, and Return.

(3) Manner.

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's

4 FEDERAL RULES OF CRIMINAL PROCEDURE

11 existence and of the offense charged and, at
12 the defendant's request, must show the
13 original or a duplicate original warrant to the
14 defendant as soon as possible.

15 * * * * *

16 (4) ***Return.***

17 (A) After executing a warrant, the officer must
18 return it to the judge before whom the
19 defendant is brought in accordance with Rule
20 5. The officer may do so by reliable
21 electronic means. At the request of an
22 attorney for the government, an unexecuted
23 warrant must be brought back to and
24 canceled by a magistrate judge or, if none is
25 reasonably available, by a state or local
26 judicial officer.

27 * * * * *

28 **(d) Warrant by Telephone or Other Reliable Electronic**
 29 **Means. In accordance with Rule 4.1, a magistrate judge**
 30 **may issue a warrant or summons based on information**
 31 **communicated by telephone or other reliable electronic**
 32 **means.**

Committee Note

Rule 4 is amended in three respects to make the arrest warrant process more efficient through the use of technology.

Subdivision (c). First, Rule 4(c)(3)(A) authorizes a law enforcement officer to retain a duplicate original arrest warrant, consistent with the change to subdivision (d), which permits a court to issue an arrest warrant electronically rather than by physical delivery. The duplicate original warrant may be used in lieu of the original warrant signed by the magistrate judge to satisfy the requirement that the defendant be shown the warrant at or soon after an arrest. *Cf.* Rule 4.1(b)(5) (providing for a duplicate original search warrant).

Second, consistent with the amendment to Rule 41(f), Rule 4(c)(4)(A) permits an officer to make a return of the arrest warrant electronically. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically.

Subdivision (d). Rule 4(d) provides that a magistrate judge may issue an arrest warrant or summons based on information submitted electronically rather than in person. This change works in conjunction with the amendment to Rule 3, which permits a magistrate judge to consider a criminal complaint and accompanying documents that are submitted electronically. Subdivision (d) also incorporates the procedures for applying for and issuing electronic warrants set forth in Rule 4.1.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

**Rule 4.1. Complaint, Warrant, or Summons by
Telephone or Other Reliable Electronic Means**

- 1 **(a) In General.** A magistrate judge may consider
2 information communicated by telephone or other
3 reliable electronic means when reviewing a complaint or
4 deciding whether to issue a warrant or summons.
- 5 **(b) Procedures.** If a magistrate judge decides to proceed
6 under this rule, the following procedures apply:
- 7 **(1) Taking Testimony Under Oath.** The judge must
8 place under oath — and may examine — the

9 applicant and any person on whose testimony the
10 application is based.

11 **(2) *Creating a Record of the Testimony and Exhibits.***

12 (A) *Testimony Limited to Attestation.* If the
13 applicant does no more than attest to the
14 contents of a written affidavit submitted by
15 reliable electronic means, the judge must
16 acknowledge the attestation in writing on the
17 affidavit.

18 (B) *Additional Testimony or Exhibits.* If the
19 judge considers additional testimony or
20 exhibits, the judge must:

21 (i) *have the testimony recorded verbatim*
22 *by an electronic recording device, by a*
23 *court reporter, or in writing;*

8 FEDERAL RULES OF CRIMINAL PROCEDURE

- 24 (ii) have any recording or reporter's notes
25 transcribed, have the transcription
26 certified as accurate, and file it;
27 (iii) sign any other written record, certify its
28 accuracy, and file it; and
29 (iv) make sure that the exhibits are filed.

30 **(3) Preparing a Proposed Duplicate Original of a**
31 **Complaint, Warrant, or Summons.** The applicant must
32 prepare a proposed duplicate original of a complaint,
33 warrant, or summons, and must read or otherwise
34 transmit its contents verbatim to the judge.

35 **(4) Preparing an Original Complaint, Warrant, or**
36 **Summons.** If the applicant reads the contents of the
37 proposed duplicate original, the judge must enter those
38 contents into an original complaint, warrant, or
39 summons. If the applicant transmits the contents by

40 reliable electronic means, the transmission received by
41 the judge may serve as the original.

42 **(5) *Modification.*** The judge may modify the complaint,
43 warrant, or summons. The judge must then:

44 (A) transmit the modified version to the applicant by
45 reliable electronic means; or

46 (B) file the modified original and direct the applicant
47 to modify the proposed duplicate original
48 accordingly.

49 **(6) *Issuance.*** To issue the warrant or summons, the judge
50 must:

51 (A) sign the original documents;

52 (B) enter the date and time of issuance on the warrant
53 or summons; and

54 (C) transmit the warrant or summons by reliable
55 electronic means to the applicant or direct the

10 FEDERAL RULES OF CRIMINAL PROCEDURE

56 applicant to sign the judge’s name and enter the
57 date and time on the duplicate original.
58 **(c) Suppression Limited.** Absent a finding of bad faith,
59 evidence obtained from a warrant issued under this rule
60 is not subject to suppression on the ground that issuing
61 the warrant in this manner was unreasonable under the
62 circumstances.

Committee Note

New Rule 4.1 brings together in one rule the procedures for using a telephone or other reliable electronic means for reviewing complaints and applying for and issuing warrants and summonses. In drafting Rule 4.1, the Committee recognized that modern technological developments have improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval. Rule 4.1 prescribes uniform procedures and ensures an accurate record.

The procedures that have governed search warrants “by telephonic or other means,” formerly in Rule 41(d)(3) and (e)(3), have been relocated to this rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

With one exception noted in the next paragraph, the new rule preserves the procedures formerly in Rule 41 without change. By

using the term “magistrate judge,” the rule continues to require, as did former Rule 41(d)(3) and (e)(3), that a federal judge (and not a state judge) handle electronic applications, approvals, and issuances. The rule continues to require that the judge place an applicant under oath over the telephone, and permits the judge to examine the applicant, as Rule 41 had provided. Rule 4.1(b) continues to require that when electronic means are used to issue the warrant, the magistrate judge retain the original warrant. Minor changes in wording and reorganization of the language formerly in Rule 41 were made to aid in application of the rules, with no intended change in meaning.

The only substantive change to the procedures formerly in Rule 41(d)(3) and (e)(3) appears in new Rule 4.1(b)(2)(A). Former Rule 41(d)(3)(B)(ii) required the magistrate judge to make a verbatim record of the entire conversation with the applicant. New Rule 4.1(b)(2)(A) provides that when a warrant application and affidavit are sent electronically to the magistrate judge and the telephone conversation between the magistrate judge and affiant is limited to attesting to those written documents, a verbatim record of the entire conversation is no longer required. Rather, the magistrate judge should simply acknowledge in writing the attestation on the affidavit. This may be done, for example, by signing the jurat included on the Administrative Office of U.S. Courts form. Rule 4.1(b)(2)(B) carries forward the requirements formerly in Rule 41 to cases in which the magistrate judge considers testimony or exhibits in addition to the affidavit. In addition, Rule 4.1(b)(6) specifies that in order to issue a warrant or summons the magistrate judge must sign all of the original documents and enter the date and time of issuance on the warrant or summons. This procedure will create and maintain a complete record of the warrant application process.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

Published subdivision (a) referred to the action of a magistrate judge as “deciding whether to approve a complaint.” To accurately describe the judge’s action, it was rephrased to refer to the judge “reviewing a complaint.”

Subdivisions (b)(2) and (3) were combined into subdivisions (b)(2)(A) and (B) to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. The clauses in subparagraph (B) were reordered and further divided into items (i) through (iv). Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).

In subdivision (b)(5), language was added requiring the judge to file the modified original if the judge has directed an applicant to modify a duplicate original. This will ensure that a complete record is preserved. Additionally, the clauses in this subdivision were broken out into subparagraphs (A) and (B).

In subdivision (b)(6), introductory language erroneously referring to a judge’s approval of a complaint was deleted, and the rule was revised to refer only to the steps necessary to issue a warrant or summons, which are the actions taken by the judicial officer.

In subdivision (b)(6)(A), the requirement that the judge “sign the original” was amended to require signing of “the original documents.” This is broad enough to encompass signing a summons, an arrest or search warrant, and the current practice of the judge signing the jurat on complaint forms. Depending on the nature of the case, it might also include many other kinds of documents, such as the jurat on affidavits, the certifications of written records

14 FEDERAL RULES OF CRIMINAL PROCEDURE

11 must promptly and in writing report the lack of
12 concurrence to the magistrate judge.

13 * * * * *

Committee Note

Subdivision (f). The amendment expressly allows a judge to take a grand jury return by video teleconference. Having the judge in the same courtroom remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding. But there are situations when no judge is present in the courthouse where the grand jury sits, and a judge would be required to travel long distances to take the return. Avoiding delay is also a factor, since the Speedy Trial Act, 18 U.S.C. § 3161(b), requires that an indictment be returned within thirty days of the arrest of an individual to avoid dismissal of the case. The amendment is particularly helpful when there is no judge present at a courthouse where the grand jury sits and the nearest judge is hundreds of miles away.

Under the amendment, the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. Utilizing video teleconference, the judge could participate by video from a remote location, convene court, and take the return. Indictments could be transmitted in advance to the judge for review by reliable electronic means. This process accommodates the Speedy Trial Act, 18 U.S.C. § 3161(b), and preserves the judge's time and safety.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

Rule 9. Arrest Warrant or Summons on an Indictment or Information

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* * * * *

(d) Warrant by Telephone or Other Means. In accordance with Rule 4.1, a magistrate judge may issue an arrest warrant or summons based on information communicated by telephone or other reliable electronic means.

Committee Note

Subdivision (d). Rule 9(d) authorizes a court to issue an arrest warrant or summons electronically on the return of an indictment or the filing of an information. In large judicial districts the need to travel to the courthouse to obtain an arrest warrant in person can be burdensome, and advances in technology make the secure transmission of a reliable version of the warrant or summons possible. This change works in conjunction with the amendment to Rule 6 that permits the electronic return of an indictment, which similarly eliminates the need to travel to the courthouse.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the amendment as published.

Rule 32. Sentencing and Judgment

1 * * * * *

2 **(d) Presentence Report.**

3 * * * * *

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

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

8 (i) any prior criminal record;

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

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

- 14 (B) information that assesses any financial,
15 social, psychological, and medical impact on
16 any victim;
- 17 (C) when appropriate, the nature and extent of
18 nonprison programs and resources available
19 to the defendant;
- 20 (D) when the law provides for restitution,
21 information sufficient for a restitution order;
- 22 (E) if the court orders a study under 18 U.S.C.
23 § 3552(b), any resulting report and
24 recommendation;
- 25 ~~(F) any other information that the court requires,~~
26 ~~including information relevant to the factors~~
27 ~~under 18 U.S.C. § 3553(a); and~~
- 28 ~~(G) specify whether the government seeks~~
29 ~~forfeiture under Rule 32.2 and any other~~
30 ~~provision of law;~~

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- 31 (F) a statement of whether the government seeks
32 forfeiture under Rule 32.2 and any other law;
33 and
34 (G) any other information that the court requires,
35 including information relevant to the factors
36 under 18 U.S.C. § 3553(a).

37 * * * * *

Committee Note

Subdivision (d)(2). This technical and conforming amendment reorders two subparagraphs describing the information that may be included in the presentence report so that the provision authorizing the inclusion of any other information the court requires appears at the end of the paragraph. It also rephrases renumbered subdivision (d)(2)(F) for stylistic purposes.

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

1 * * * * *

- 2 (d) **Video Teleconferencing.** Video teleconferencing may
3 be used to conduct an appearance under this rule if the

4 defendant consents.

Committee Note

Subdivision (d). The amendment provides for video teleconferencing in order to bring the rule into conformity with Rule 5(f).

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

The amendment was rephrased to track precisely the language of Rule 5(f), on which it was modeled.

Rule 41. Search and Seizure

1 * * * * *

2 **(d) Obtaining a Warrant.**

3 * * * * *

4 **(3) *Requesting a Warrant by Telephonic or Other***

5 **Reliable Electronic Means.** In accordance with

6 Rule 4.1, a magistrate judge may issue a warrant

7 based on information communicated by telephone

8 or other reliable electronic means.

20 FEDERAL RULES OF CRIMINAL PROCEDURE

9 ~~(A) *In General.* A magistrate judge may issue a~~
10 ~~warrant based on information communicated~~
11 ~~by telephone or other reliable electronic~~
12 ~~means.~~

13 ~~(B) *Recording Testimony.* Upon learning that an~~
14 ~~applicant is requesting a warrant under Rule~~
15 ~~41(d)(3)(A), a magistrate judge must:~~

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

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

23 ~~(C) *Certifying Testimony.* The magistrate judge~~
24 ~~must have any recording or court reporter's~~
25 ~~notes transcribed, certify the transcription's~~

26 accuracy, and file a copy of the record and
27 the transcription with the clerk. Any written
28 verbatim record must be signed by the
29 magistrate judge and filed with the clerk.

30 ~~(D) *Suppression Limited.* Absent a finding of bad~~
31 ~~faith, evidence obtained from a warrant~~
32 ~~issued under Rule 41(d)(3)(A) is not subject~~
33 ~~to suppression on the ground that issuing the~~
34 ~~warrant in that manner was unreasonable~~
35 ~~under the circumstances.~~

36 **(e) Issuing the Warrant.**

37 * * * * *

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

39 * * * * *

40 (C) *Warrant for a Tracking Device.* A tracking-
41 device warrant must identify the person or
42 property to be tracked, designate the magistrate

22 FEDERAL RULES OF CRIMINAL PROCEDURE

43 judge to whom it must be returned, and specify a
44 reasonable length of time that the device may be
45 used. The time must not exceed 45 days from the
46 date the warrant was issued. The court may, for
47 good cause, grant one or more extensions for a
48 reasonable period not to exceed 45 days each. The
49 warrant must command the officer to:

- 50 (i) complete any installation authorized by
51 the warrant within a specified time no
52 longer than 10 ~~calendar~~ days;
- 53 (ii) perform any installation authorized by
54 the warrant during the daytime, unless
55 the judge for good cause expressly
56 authorizes installation at another time;
57 and
- 58 (iii) return the warrant to the judge
59 designated in the warrant.

60 ~~(3) *Warrant by Telephonic or Other Means.* If a~~
61 ~~magistrate judge decides to proceed under Rule~~
62 ~~41(d)(3)(A), the following additional procedures~~
63 ~~apply:~~

64 ~~(A) *Preparing a Proposed Duplicate Original*~~
65 ~~*Warrant.* The applicant must prepare a~~
66 ~~“proposed duplicate original warrant” and~~
67 ~~must read or otherwise transmit the contents~~
68 ~~of that document verbatim to the magistrate~~
69 ~~judge.~~

70 ~~(B) *Preparing an Original Warrant.* If the~~
71 ~~applicant reads the contents of the proposed~~
72 ~~duplicate original warrant, the magistrate~~
73 ~~judge must enter those contents into an~~
74 ~~original warrant. If the applicant transmits the~~
75 ~~contents by reliable electronic means, that~~

24 FEDERAL RULES OF CRIMINAL PROCEDURE

76 ~~transmission may serve as the original~~
77 ~~warrant.~~

78 ~~(C) *Modification.* The magistrate judge may~~
79 ~~modify the original warrant. The judge must~~
80 ~~transmit any modified warrant to the~~
81 ~~applicant by reliable electronic means under~~
82 ~~Rule 41(e)(3)(D) or direct the applicant to~~
83 ~~modify the proposed duplicate original~~
84 ~~warrant accordingly.~~

85 ~~(D) *Signing the Warrant.* Upon determining to~~
86 ~~issue the warrant, the magistrate judge must~~
87 ~~immediately sign the original warrant, enter~~
88 ~~on its face the exact date and time it is issued,~~
89 ~~and transmit it by reliable electronic means to~~
90 ~~the applicant or direct the applicant to sign~~
91 ~~the judge's name on the duplicate original~~
92 ~~warrant.~~

93 (f) **Executing and Returning the Warrant.**

94 (1) ***Warrant to Search for and Seize a Person or***
95 ***Property.***

96 * * * * *

97 (D) *Return.* The officer executing the warrant
98 must promptly return it — together with a
99 copy of the inventory — to the magistrate
100 judge designated on the warrant. The officer
101 may do so by reliable electronic means. The
102 judge must, on request, give a copy of the
103 inventory to the person from whom, or from
104 whose premises, the property was taken and
105 to the applicant for the warrant.

106 (2) ***Warrant for a Tracking Device.***

107 (A) *Noting the Time.* The officer executing a
108 tracking-device warrant must enter on it the

26 FEDERAL RULES OF CRIMINAL PROCEDURE

109 exact date and time the device was installed
110 and the period during which it was used.

111 (B) *Return.* Within 10 ~~calendar~~ days after the use
112 of the tracking device has ended, the officer
113 executing the warrant must return it to the
114 judge designated in the warrant. The officer
115 may do so by reliable electronic means.

116 (C) *Service.* Within 10 ~~calendar~~ days after the use
117 of the tracking device has ended, the officer
118 executing a tracking-device warrant must
119 serve a copy of the warrant on the person
120 who was tracked or whose property was
121 tracked. Service may be accomplished by
122 delivering a copy to the person who, or
123 whose property, was tracked; or by leaving a
124 copy at the person's residence or usual place
125 of abode with an individual of suitable age

126 and discretion who resides at that location
 127 and by mailing a copy to the person’s last
 128 known address. Upon request of the
 129 government, the judge may delay notice as
 130 provided in Rule 41(f)(3).

131 * * * * *

Committee Note

Subdivisions (d)(3) and (e)(3). The amendment deletes the provisions that govern the application for and issuance of warrants by telephone or other reliable electronic means. These provisions have been transferred to new Rule 4.1, which governs complaints and warrants under Rules 3, 4, 9, and 41.

Subdivision (e)(2). The amendment eliminates unnecessary references to “calendar” days. As amended effective December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include “every day, including intermediate Saturdays, Sundays, and legal holidays[.]”

Subdivisions (f)(1) and (2). The amendment permits any warrant return to be made by reliable electronic means. Requiring an in-person return can be burdensome on law enforcement, particularly in large districts when the return can require a great deal of time and travel. In contrast, no interest of the accused is affected by allowing what is normally a ministerial act to be done electronically. Additionally, in subdivision (f)(2) the amendment eliminates unnecessary references to “calendar” days. As amended effective

December 1, 2009, Rule 45(a)(1) provides that all periods of time stated in days include “every day, including intermediate Saturdays, Sundays, and legal holidays[.]”

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

Obsolescent references to “calendar” days were deleted by a technical and conforming amendment not included in the rule as published. No other changes were made after publication.

Rule 43. Defendant’s Presence

1

2

(b) When Not Required. A defendant need not be present

3

under any of the following circumstances:

4

(1) *Organizational Defendant.* The defendant is an

5

organization represented by counsel who is

6

present.

7

(2) *Misdemeanor Offense.* The offense is punishable

8

by fine or by imprisonment for not more than one

9

year, or both, and with the defendant’s written

10

consent, the court permits arraignment, plea, trial,

11 and sentencing to occur by video teleconferencing
12 or in the defendant's absence.

13 * * * * *

Committee Note

Subdivision (b). This rule currently allows proceedings in a misdemeanor case to be conducted in the defendant's absence with the defendant's written consent and the court's permission. The amendment allows participation through video teleconference as an alternative to appearing in person or not appearing. Participation by video teleconference is permitted only when the defendant has consented in writing and received the court's permission.

The Committee reiterates the concerns expressed in the 2002 Committee Notes to Rules 5 and 10, when those rules were amended to permit video teleconferencing. The Committee recognized the intangible benefits and impact of requiring a defendant to appear before a federal judicial officer in a federal courtroom, and what is lost when virtual presence is substituted for actual presence. These concerns are particularly heightened when a defendant is not present for the determination of guilt and sentencing. However, the Committee concluded that the use of video teleconferencing may be valuable in circumstances where the defendant would otherwise be unable to attend and the rule now authorizes proceedings in absentia.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

Because the Advisory Committee withdrew its proposal to

Subdivision (e). Filing papers by electronic means is added as new subdivision (e), which is drawn from Civil Rule 5(d)(3). It makes it clear that a paper filed electronically in compliance with the Court's local rule is a written paper.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

No changes were made in the rule as published.

TAB 3

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

Rule 5. Initial Appearance

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* * * * *

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

* * * * *

(4) Procedure for Persons Extradited to the United States. If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(D) any right to a preliminary hearing; ~~and~~

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

2 FEDERAL RULES OF CRIMINAL PROCEDURE

17 (E) the defendant's right not to make a
18 statement, and that any statement made
19 may be used against the defendant; and

20 (F) if the defendant is held in custody and is
21 not a United States citizen, that an attorney
22 for the government or a federal law
23 enforcement officer will:

24 (i) notify a consular officer from the
25 defendant's country of nationality that
26 the defendant has been arrested if the
27 defendant so requests; or

28 (ii) make any other consular notification
29 required by treaty or other
30 international agreement.

31 * * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

* * * * *

Rule 15. Depositions

1

* * * * *

2

(c) Defendant’s Presence.

3

(1) *Defendant in Custody.* Except as authorized by

4

Rule 15(c)(3), the ~~The~~ officer who has custody of

5

the defendant must produce the defendant at the

6

deposition and keep the defendant in the witness’s

7

presence during the examination, unless the

8

defendant:

9

(A) waives in writing the right to be present; or

10

(B) persists in disruptive conduct justifying

11

exclusion after being warned by the court that

12

disruptive conduct will result in the

13

defendant’s exclusion.

14

(2) *Defendant Not in Custody.* Except as authorized

15

by Rule 15(c)(3), a ~~A~~ defendant who is not in

16

custody has the right upon request to be present at

17

the deposition, subject to any conditions imposed

18 by the court. If the government tenders the
 19 defendant's expenses as provided in Rule 15(d) but
 20 the defendant still fails to appear, the defendant —
 21 absent good cause — waives both the right to
 22 appear and any objection to the taking and use of
 23 the deposition based on that right.

24 **(3) Taking Depositions Outside the United States**

25 **Without the Defendant's Presence.** The
 26 deposition of a witness who is outside the United
 27 States may be taken without the defendant's
 28 presence if the court makes case-specific findings
 29 of all the following:

30 (A) the witness's testimony could provide
 31 substantial proof of a material fact in a felony
 32 prosecution;

33 (B) there is a substantial likelihood that the
 34 witness's attendance at trial cannot be
 35 obtained;

36 (C) the witness's presence for a deposition in the
 37 United States cannot be obtained;

6 FEDERAL RULES OF CRIMINAL PROCEDURE

- 38 (D) the defendant cannot be present because:
39 (i) the country where the witness is located
40 will not permit the defendant to attend
41 the deposition;
42 (ii) for an in-custody defendant, secure
43 transportation and continuing custody
44 cannot be assured at the witness's
45 location; or
46 (iii) for an out-of-custody defendant, no
47 reasonable conditions will assure an
48 appearance at the deposition or at trial
49 or sentencing; and
50 (E) the defendant can meaningfully participate in
51 the deposition through reasonable means.

52 * * * * *

- 53 (f) **Admissibility and Use as Evidence.** An order
54 authorizing a deposition to be taken under this rule does
55 not determine its admissibility. A party may use all or
56 part of a deposition as provided by the Federal Rules of
57 Evidence.

Committee Note

Subdivisions (c)(3) and (f). This amendment provides a mechanism for taking depositions in cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court’s subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness’s attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness’s location for a deposition.

While a party invokes Rule 15 in order to preserve testimony for trial, the rule does not determine whether the resulting deposition will be admissible, in whole or in part. Subdivision (f) provides that in the case of all depositions, questions of admissibility of the evidence obtained are left to the courts to resolve on a case by case basis. Under Rule 15(f), the courts make this determination applying the Federal Rules of Evidence, which state that relevant evidence is admissible except as otherwise provided by the Constitution, statutes, the Rules of Evidence, and other rules prescribed by the Supreme Court. Fed. R. Evid. 402.

Rule 15(c) as amended imposes significant procedural limitations on taking certain depositions in criminal cases. The amended rule authorizes a deposition outside a defendant’s physical presence only in very limited circumstances after the trial court makes case-specific findings. Amended Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant’s presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — on the elements that must be shown. The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved.

This amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

**CHANGES MADE TO PROPOSED AMENDMENT
RELEASED FOR PUBLIC COMMENT**

The limiting phrase “in the United States” was deleted from Rule 15(c)(1) and (2) and replaced with the phrase “Except as authorized by Rule 15(c)(3).” The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant’s presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive. In subdivision (c)(3)(D) the introductory phrase was revised to the simpler “because.”

In order to restrict foreign depositions outside of the defendant’s presence to situations where the deposition serves an important public interest, the limiting phrase “in a felony prosecution” was added to subdivision (c)(3)(A).

The text of subdivision (f) and the Committee Note were revised to state more clearly the limited purpose and effect of the amendment, which is providing assistance in pretrial discovery. Compliance with the procedural requirements for the taking of the foreign testimony does not predetermine admissibility at trial, which is determined on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Other changes were also made in the Committee Note. In conformity with the style conventions governing the rules, citations to cases were deleted, and other changes were made to improve clarity.

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Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

1 **(a) Relief Pending Appeal.** If a timely motion is made for

10 FEDERAL RULES OF CRIMINAL PROCEDURE

2 relief that the court lacks authority to grant because of
3 an appeal that has been docketed and is pending, the
4 court may:

- 5 (1) defer considering the motion;
6 (2) deny the motion; or
7 (3) state either that it would grant the motion if the
8 court of appeals remands for that purpose or that the
9 motion raises a substantial issue.

10 **(b) Notice to the Court of Appeals.** The movant must
11 promptly notify the circuit clerk under Federal Rule of
12 Appellate Procedure 12.1 if the district court states that
13 it would grant the motion or that the motion raises a
14 substantial issue.

15 **(c) Remand.** The district court may decide the motion if
16 the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without

a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an “indicative ruling.” (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals’ discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for

that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

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Rule 58. Petty Offenses and Other Misdemeanors

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(b) Pretrial Procedure.

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

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(F) the right to a jury trial before either a magistrate judge or a district judge — unless the charge is a petty offense; ~~and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

(H) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

14 FEDERAL RULES OF CRIMINAL PROCEDURE

- 22 (i) notify a consular officer from the
23 defendant's country of nationality that the
24 defendant has been arrested if the
25 defendant so requests; or
26 (ii) make any other consular notification
27 required by treaty or other international
28 agreement.
29 * * * * *

Committee Note

Subdivision (b)(2)(H). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

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TAB 4

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Amendments Approved for Publication by the Standing Committee

DATE: September 28, 2011

At its June meeting the Standing Committee approved the publication of the proposed amendments to Rules 12 (as well as the conforming amendment to Rule 34). The Standing Committee had previously approved the Committee's proposed amendment to Rule 11 at its meeting in January. The proposed amendments, which follow this memorandum, have now been published online, and hard copies have been widely distributed.

This memorandum provides information regarding the issues raised in the Standing Committee's discussion of Rule 12, the procedures for public comment concerning the proposed amendments to Rules 11, 12, and 34, and how the Advisory Committee will proceed in evaluating the public comments.

1. The Standing Committee

Although the Standing Committee approved the publication of the proposed amendment to Rule 12 by a voice vote, members of the Standing Committee raised several issues which may warrant further consideration by the Advisory Committee.

First, members noted that some judges may object to the proposed rule change because of its treatment of double jeopardy claims. After discussion of the Advisory Committee's consideration of this issue and the research prepared and summarized by the reporters, a member suggested that the issue of double jeopardy be highlighted for public comment. The issue is highlighted in the explanatory materials accompanying the proposed amendment, and we anticipate receiving further comments.

Another member noted that the present rule gives the district courts great flexibility before trial to forgive the failure to raise matters in a timely fashion, and expressed concern that the proposed amendment might deprive the courts of needed flexibility.

Finally, other members made various suggestions about the language of the proposed rule, which

can be considered with any additional issues raised during the public comment period.

2. Procedures for Public Comments

Public comments may be provided in writing or orally at public hearings. Written comments must be submitted no later than February 15, 2012; experience suggests that most comments are submitted close to the deadline.

Two dates for hearings before the Advisory Committee have been set: January 6, 2012, in Phoenix, Arizona, and February 12, 2012, in Washington, D.C. Anyone who wishes to testify must notify the Secretary to the Committee on Rules no later than 30 days prior to the hearing date. If no requests to testify are received, the hearings will be cancelled.

3. Follow up by the Subcommittees and the Advisory Committee

Prior to the Advisory Committee's April meeting the Subcommittees for Rule 11 and Rule 12 will meet by teleconference to review any public comments on the proposed rules. As noted, we anticipate that most written comments will be received in February. Accordingly, the Subcommittees will likely begin their work in late February or early March.

The reporters will prepare any additional research required to assist the Subcommittees, and will prepare a report for the April Agenda Book summarizing the comments received, any pertinent research, and the recommendations of each Subcommittee.

23 or to collaterally attack the sentence;
24 and:
25 (O) that, if convicted, a defendant who is
26 not a United States citizen may be
27 removed from the United States,
28 denied citizenship, and denied
29 admission to the United States in the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement concerning the potential immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship.

Rule 12. Pleadings and Pretrial Motions *

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(b) Pretrial Motions.

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(1) *In General.* Rule 47 applies to a pretrial motion.

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(2) ~~*Motions That May Be Made Before Trial.*~~ A party

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may raise by pretrial motion any defense,

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objection, or request that the court can determine

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without a trial of the general issue: *Motion That*

8

May Be Made at Any Time. A motion that the

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court lacks jurisdiction may be made at any time

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while the case is pending.

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(3) *Motions That Must Be Made Before Trial.* The

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following defenses, objections, and requests must

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be raised by motion before trial if the basis for the

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motion is then reasonably available and the motion

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can be determined without a trial on the merits:

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(A) ~~a motion alleging~~ a defect in instituting the

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prosecution, including:

18

(i) improper venue;

19

(ii) preindictment delay;

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

20 (iii) a violation of the constitutional
21 right to a speedy trial;
22 (iv) double jeopardy;
23 (v) the statute of limitations;
24 (vi) selective or vindictive prosecution;
25 (vii) outrageous government conduct; and
26 (viii) an error in the grand jury proceeding or
27 preliminary hearing;
28 (B) ~~a motion alleging a defect in the indictment~~
29 ~~or information, including:~~
30 (i) joining two or more offenses in the
31 same count (duplicity);
32 (ii) charging the same offense in more than
33 one count (multiplicity);
34 (iii) lack of specificity;
35 (iv) improper joinder; and
36 (v) failure to state an offense;
37 ~~— but at any time while the case is pending, the~~
38 ~~court may hear a claim that the indictment or~~
39 ~~information fails to invoke the court’s jurisdiction~~
40 ~~or to state an offense;~~

- 41 (C) ~~a motion to suppression of~~ evidence;
- 42 (D) ~~a Rule 14 motion to severance of~~ charges or
- 43 defendants under Rule 14; and
- 44 (E) ~~a Rule 16 motion for discovery~~ under Rule
- 45 16.

46 **(4) *Notice of the Government's Intent to Use***

47 ***Evidence.***

48 (A) *At the Government's Discretion.* At the

49 arraignment or as soon afterward as

50 practicable, the government may notify the

51 defendant of its intent to use specified

52 evidence at trial in order to afford the

53 defendant an opportunity to object before

54 trial under Rule 12(b)(3)(C).

55 (B) *At the Defendant's Request.* At the

56 arraignment or as soon afterward as

57 practicable, the defendant may, in order to

58 have an opportunity to move to suppress

59 evidence under Rule 12(b)(3)(C), request

60 notice of the government's intent to use (in

61 its evidence-in-chief at trial) any evidence

62 that the defendant may be entitled to discover
63 under Rule 16.

64 (c) **Motion Deadline.** The court may, at the arraignment or
65 as soon afterward as practicable, set a deadline for the
66 parties to make pretrial motions and may also schedule
67 a motion hearing.

68 (d) **Ruling on a Motion.** The court must decide every
69 pretrial motion before trial unless it finds good cause to
70 defer a ruling. The court must not defer ruling on a
71 pretrial motion if the deferral will adversely affect a
72 party's right to appeal. When factual issues are involved
73 in deciding a motion, the court must state its essential
74 findings on the record.

75 (e) ~~**Waiver of a Defense, Objection, or Request.**~~

76 **Consequence of Not Making a Motion Before Trial**
77 **as Required.**

78 (1) **Waiver.** A party waives any Rule 12(b)(3)
79 defense, objection, or request – other than failure
80 to state an offense , double jeopardy, or the statute
81 of limitations – not raised by the deadline the
82 court sets under Rule 12(c) or by any extension the
83 court provides. ~~For good cause~~ Upon a showing of

84 cause and prejudice, the court may grant relief
85 from the waiver. Otherwise, a party may not raise
86 the waived claim.

87 **(2) *Forfeiture.*** A party forfeits any claim based on
88 the failure to state an offense, double jeopardy, or
89 the statute of limitations, if the claim was not
90 raised by the deadline the court sets under Rule
91 12(c) or by any extension the court provides. A
92 forfeited claim is not waived. Rule 52(b) governs
93 relief for forfeited claims..

Committee Note

Subdivision (b)(2). The amendment deletes the provision providing that “any defense, objection, or request that the court can determine without trial of the general issue” may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Subdivision (b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is “available” and the motion must be one that the court can determine “without trial on the merits.” The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The “then reasonably available” language is intended to ensure that the failure to raise a claim a party could not have raised on time is not deemed to be “waiver” or “forfeiture” under the Rule. Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were “discovered or could have been discovered by the exercise of due diligence”). Additionally, only those issues that can be determined “without a trial on the merits” need be raised by motion before trial. The more modern phrase “trial on the merits” is substituted for the more archaic phrase “trial of the general issue” that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule’s command that motions alleging “a defect in instituting the prosecution” and “errors in the indictment or information” must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the “indictment or information fails . . . to state an offense.” This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), “[i]nsofar as it held that a defective indictment deprives a court of jurisdiction”).

Subdivision (e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the “waiver” standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or

that the charge fails to state an offense. The rule retains the language that provides a party “waives” all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as “good cause.” “Good cause” for securing relief for an untimely claim “waived” under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (1) “cause” for the failure to raise the claim on time, and (2) “prejudice” resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – “cause” and “prejudice” – is well-developed in case law applying Rule 12. To clarify this standard, with no change in meaning intended, the words “for good cause” in the existing rule have been replaced by “upon a showing of cause and prejudice.”

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the “cause” showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court’s holding in *Cotton*, that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631.

Rule 34. Arresting Judgment

(a) **In General.** Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. if:

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the “indictment or information fails . . . to state an offense.” The amended Rule 12 instead requires that such a defect be raised before trial.

TAB 5

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 16(a)(2), Pretrial Disclosure of Government Work Product

DATE: September 28, 2011

The issue for discussion is whether Rule 16(a)(2) should be amended to eliminate any confusion caused by the 2002 restyling with respect to the scope of protection afforded government work product. The matter comes to the Advisory Committee as a result of Standing Committee Chair Lee Rosenthal calling attention to *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004) (included at the end of the memorandum). In *Rudolph*, the court identified what it characterized as a “scrivener’s error” in the restyling of Rule 16 concerning the protection afforded to government work product. The court also suggested an amendment to respond to the problem it identified.

This memorandum (a) describes the *Rudolph* decision (which had not previously been drawn to the Advisory Committee’s attention), and (b) discusses the possible amendment of Rule 16 to address this issue. It evaluates a possible amendment according to the following criteria:

- (1) what is the concern or issue;
- (2) how does an existing rule (or lack of a rule) contribute to the concern;
- (3) how would a new (or amended) rule alleviate the concern;
- (4) the advantage and disadvantages of requiring uniformity on the matter;
- (5) any legal concerns with rule action; and
- (6) any practical concerns with rule action.

A. The *Rudolph* decision and the restyling of Rule 16

The defendant in *Rudolph* sought pretrial disclosure under Rule 16(a)(1)(E) of government agents’ rough notes of witness interviews. He argued that the notes constituted “papers” or “documents” that were “within the government’s possession” and were “material to preparing the defense.” The government responded that the notes were work product that is excluded from pretrial disclosure under Rule 16(a)(2), which refers to “reports, memoranda, or other internal government documents made by an attorney for the government in connection with investigating or prosecuting the case.”

As noted in the district court's thorough opinion, prior to restyling in 2002 it was clear that work product falling within Rule 16(a)(2) was not subject to pretrial disclosure, even if that work product in question was a "paper" or "document" that was material to the preparation of the defense. Restyling relettered the subparagraphs of Rule 16(a)(1); the material in question here (papers, books and documents in the government's possession and material to the defense) was in subparagraph (a)(1)(C). Before restyling, the work product provision, Rule 16(a)(2), stated that "except as provided in paragraphs (A),(B), (D), and (E), the rule does not authorized the discovery" of work product as defined in that provision. Because subparagraph (C) was not included in this list, materials that fell within (C) were work product and not subject to pretrial disclosure under paragraph (a)(2). Thus before restyling, Rudolph's claim to pretrial disclosure of interview notes would have been denied under (a)(2).

However, during restyling Rule 16(a)(2) was revised to draw no distinction between the various paragraphs of Rule 16(a)(1). Rule 16(a)(2) now states "Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery" of work product. Thus any material that is subject to disclosure under Rule 16(a)(1) – including any "papers, documents, [and] data" in the government's possession that would be material to the defense under 16(a)(1)(E) – appears to receive no protection as work product under Rule 16(a)(2). (A side-by-side comparison is included at the end of this memorandum.)

As the *Rudolph* court correctly noted, the Advisory Committee's report on the restyled rules, the report of the Judicial Conference, and the Committee Notes accompanying the amendment to Rule 16 all state that—with a limited number of exceptions not relevant here—the restyling of Rule 16 was intended to be "stylistic only." See 244 F.R.D. at 510 (citing and quoting the relevant reports). There was no suggestion that the Advisory Committee intended to work a major change in the scope of the protection afforded to government work product.

Accordingly, the *Rudolph* court invoked the doctrine of the scrivener's error and declined to order discovery of the agents' notes of witness interviews. It stated:

... Defendant's "plain reading" of the language of Rule 16(a)(2) produces much more than stylistic changes. If this court were to adopt defendant's strict construction of the amended Rule, a future defendant could compel pre-trial disclosure of not only rough notes of government agents, but all those items that fall within the wider net of government "work product" generated in connection with the investigation and prosecution of persons who are accused of committing federal criminal offenses. That would be contrary to the Eleventh Circuit's holding in *Jordan*, [316 F.3d 1215 (11th Cir. 2003)] and the Supreme Court's opinion in *Armstrong*, [517 U.S. 456 (1996)] among many others. Defendant's interpretation of Rule 16(a)(2), while perhaps literally correct, turns the stated purpose of the Advisory Committee and Congress on its head.

In conclusion, the "genuinely intended" meaning of Rule 16(a)(2) was "inadequately expressed" by an obvious drafting oversight, thus triggering the scrivener's error doctrine, and permitting this court to look beyond the plain meaning of the rule's language to non-textual

sources. In light of the drafting materials discussed, and the long line of cases interpreting the government's pre-trial disclosure obligations under the pre-2002 language of Rule 16(a)(2), a departure from the rule's previous meaning has occurred—a departure that is contrary to the objective stated in the Advisory Committee Notes to the 2002 amendment. It would not be proper to infer that the Advisory Committee and Congress, in reorganizing Rule 16 for “stylistic” purposes, intended to effect such a dramatic change without a single statement of that intention.

224 F.R.D. at 510-11.

The court concluded with the suggestion that the introductory clause of subsection (a)(2) be revised to include this language: “Except as Rule 16(A), (B), (C), (D), (F), and (G) provide otherwise....”

B. Possible Amendment of Rule 16(a)(2)

1. What is the concern?

The 2002 restyling of Rule 16(a)(2) could be understood to have effected an unintended substantive change in the rule, eliminating work product protection formerly expressly afforded to papers and documents prepared by the prosecution.

2. How does an existing rule contribute to the problem identified in *Rudolph*?

The reporters agree with the *Rudolph* court's conclusion that the restyling of Rule 16 inadvertently eliminated the language making it clear that various categories of government work product should be exempt from pretrial disclosure. The restyling process was intended to avoid substantive changes, and there is no indication that the Advisory Committee intended to make a major change in the protection afforded to government work product contained in “papers” or “documents.” Unfortunately, the text of the restyled rule does not reflect the full scope of the protection afforded government work product before restyling.

3. How would an amended rule alleviate the concern?

Although the *Rudolph* court was able to use the doctrine of the scrivener's error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. Rule 16 should clearly state the relationship between the required pretrial disclosure and the exemption for government work product.

As noted, the *Rudolph* court proposed specific language to address the problem that it had identified. Professor Kimble, our style consultant, has suggested a very slight modification; with that modification, the proposed amendment to Rule 16(a)(2) would read:

(2) Information Not Subject to Disclosure. Except as permitted by Rule 16(A), (B), (C), (D), (F), and (G) Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Because the new exceptions clause does not include subparagraph (a)(1)(E) – which governs government work product – it solves the problem identified by the *Rudolph* court.

4. The advantage and disadvantages of requiring uniformity

Since this is a matter already addressed by Rule 16, a uniform standard is already applicable. The error during the restyling process, however, might result in unintended variations if some districts failed to apply the doctrine of the scrivener’s error.

5. Any legal concerns with rule action

We have identified no pertinent concerns.

6. Any practical concerns with rule action

If the Committee concludes an amendment is warranted, that raises the question of timing. Although an amendment is desirable, it does not seem to be a matter of urgency. There is no indication that the oversight which occurred in the 2002 restyling has caused any serious problems. No court or litigant brought the problem to the Advisory Committee’s attention for nearly a decade after the restyled rules went into effect, and it has been seven years since the *Rudolph* decision. The *Rudolph* decision demonstrates that courts can employ the scrivener’s error doctrine to continue the protection of government work product, and other courts have adopted the *Rudolph* court’s analysis. *See United States v. Fort*, 472 F.3d 1106, 1110 (9th Cir. 2007); *United States v. Frederick*, 2010 WL 3981421 (D.S.D. Oct 06, 2010), and *United States v. Villa*, 2010 WL 1487990 (D.Or. Apr 13, 2010). We have found no decision that rejects this analysis.

In some instances, it may be wise to defer action on an amendment. There has been some discussion on other committees, for example, of gathering a package of amendments generated by the restyling process. There have also been occasions when amendments have been deferred so that they can be proposed with other related amendments. (For example, the Standing Committee held our proposed amendment to Rule 6 for the electronic return of indictments so that it could be included in our comprehensive package of technology amendments.) Amendments that are not regarded as urgent may also be deferred if a committee’s agenda is so full that it would be difficult to give another matter full consideration.

In this case, however, we have identified no persuasive reasons for delay. We are not aware of other amendments arising from the restyling (which took place nearly a decade ago), and it seems

unlikely that we will propose other amendments to Rule 16 in the near future. Further, consideration of the proposed amendment itself will not be an undue strain on the Committee's resources: the amendment involves only one subparagraph, it presents a simple drafting issue, and we believe that it is relatively uncontroversial.

COMPARISON OF PRE- AND POST-2002 AMENDMENT VERSIONS
OF TWO SUBSECTIONS OF RULE 16(a)

Strike-throughs indicate text omitted from the Pre-2002 version of the rule, whereas underlining is used to indicate text added to the 2002 language of the same rule.

Rule 16(a)(1)(C) Pre-2002 Language	Rule 16(a)(1)(E) Post-2002 Language
<p>Upon request of the defendant a defendant's request, the government shall must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof of any of these items, which are if the item is within the government's possession, custody or control of the government, and: which are (i) the item is material to the preparation of preparing the defendant's defense; or are intended for use by the government as evidence in chief at the trial, (ii) the government intends to use the item in its case-in-chief at trial; or were (iii) the item was obtained from or belong to the defendant</p>	<p>Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:</p> <p style="margin-left: 40px;">(i) the item is material to preparing the defense;</p> <p style="margin-left: 40px;">(ii) the government intends to use the item in its case-in-chief at trial; or</p> <p style="margin-left: 40px;">(iii) the item was obtained from or belongs to the defendant.</p>
Rule 16(a)(2) Pre-2002 Language	Rule 16(a)(2) Post-2002 Language
<p>Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1) Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by 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.</p>	<p><i>Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500. [Emphasis supplied.]</i></p>

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UNITED STATES of America,

v.

Eric Robert RUDOLPH.

No. CR-00-S-422-S.

United States District Court,
N.D. Alabama,
Southern Division.

Oct. 5, 2004.

Background: Defendant in federal prosecution sought pretrial order directing government to preserve rough notes of witness interviews and to either submit those notes for in camera review or produce them to defense counsel.

Holdings: The District Court, Smith, J., held that:

- (1) under “scrivener’s error” exception to plain meaning rule, defendant was not entitled to compel pretrial disclosure of government’s witness-interview notes based on procedure rule which, on its face, provided for compelled disclosure of government’s pretrial work product if it was material to preparation of defense, but which was obviously not intended to so provide, but
- (2) limited in camera review was warranted, of witness notes used to compile FBI summaries in which defendant had identified inconsistencies.

Motion granted in part.

1. Courts ⇌85(2)

Statutes ⇌263, 270

In federal prosecutions, general rule is that new statute or rule applies to cases pending on date of its enactment unless manifest injustice would result; amendments that are procedural or remedial in nature apply retroactively.

2. Courts ⇌85(3)

Principle that plain language of rule of procedure promulgated by Supreme Court and adopted by Congress governs, if it does not lead to absurd or impracticable results in

instant case, applies to federal criminal procedure rules.

3. Statutes ⇌200

Under “scrivener’s error” exception to plain meaning rule, non-textual sources may be consulted to determine meaning of statute or rule if drafting error is obvious and meaning genuinely intended is also obvious.

4. Criminal Law ⇌627.5(6)

Under “scrivener’s error” exception to plain meaning rule, federal defendant was not entitled to compel pretrial disclosure of government’s rough notes of witness interviews by virtue of amendment to criminal procedure rule which, on its face, provided for compelled disclosure of government’s pretrial work product if it was material to preparation of defense; drafters’ history made clear that amendment to section of rule governing defendant’s discovery requests was intended as stylistic change only, and should have left in place work-product exception to compelled-disclosure rule. Fed.Rules Cr. Proc.Rule 16(a)(1)(E)(i), (a)(2), 18 U.S.C.A.

5. Constitutional Law ⇌268(5)

Federal criminal defendants have due process right to disclosure of evidence that is favorable to accused on issues of guilt and punishment, or evidence that would impeach government’s witnesses, including inconsistent statements by witness, or plea and immunity agreements. U.S.C.A. Const.Amend. 5.

6. Criminal Law ⇌627.8(4)

Federal defendant’s highlighting of inconsistencies in several out of thousands of FBI summaries of witness interviews produced to defendant before trial did not warrant in camera review of all FBI agents’ rough notes used to compile all summaries, on theory that notes could reveal *Brady* or *Giglio* violations suggested by inconsistencies; however, limited review was warranted, of those notes used to compile highlighted summaries. U.S.C.A. Const.Amend. 5; Fed. Rules Civ.Proc.Rule 16, 28 U.S.C.A.

Richard S. Jaffe, J. Derek Drennan, Howard H. Dodd, Jr., Jaffe Strickland & Drennan PC, William M. Bowen, Jr., White Arnold Andrews & Dowd, Birmingham, AL, Judy Clarke, San Diego, CA, for Defendant.

Alice H. Martin, U.S. Attorney, Robert J. McLean, Michael W. Whisonant, William Russell Chambers, Jr., U.S. Marshal, U.S. Probation, Birmingham, AL, for Plaintiff.

MEMORANDUM OPINION

This case is before the court on defendant's "Application for Review and Appeal of Magistrate Judge's Order of July 9, 2004[,] Denying the Defendant's Motion for Preservation and *In Camera* Inspection and/or Discovery of Rough Interview Notes,"¹ and the government's response.²

Defendant's original motion sought not only an order directing government agents to preserve rough notes of witness interviews, but also an order requiring the notes to be submitted for *in camera* review, or produced for inspection by defense counsel.³ The magistrate judge granted the first aspect of defendant's motion, ordering government agents to preserve rough notes, but denied defendant's request for either *in camera* review, or inspection by defense counsel.⁴ This appeal followed.

I. DISCUSSION

Federal Rule of Criminal Procedure 16 defines the pre-trial disclosure obligations of parties to criminal prosecutions. "The rule 'is intended to prescribe the minimum amount of discovery to which the parties are entitled,' and leaves intact a court's 'discretion' to grant or deny the 'broader' discovery

requests of a criminal defendant." *United States v. Jordan*, 316 F.3d 1215, 1249 n. 69 (11th Cir.2003) (quoting Notes of Advisory Committee on 1974 Amendments to Fed. R.Crim.P. 16). Two provisions of Rule 16 are pertinent to this appeal: Rule 16(a)(1)(E) and Rule 16(a)(2).

Defendant relies upon Rule 16(a)(1)(E)(i), which requires the government to disclose to the defendant items that are "material" to the preparation of his defense.

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense; . . .

Fed.R.Crim.P. 16(a)(1)(E)(i). Defendant argues that this provision requires the government to produce rough notes of witness interviews for pre-trial inspection,⁵ because he has satisfied each foundational element: he served a written request for the notes on the government; the rough notes are "papers [or] documents . . . within the government's possession, custody, or control";⁶ and, the rough notes are "material to preparing the defense."⁷ The government appears to concede that defendant satisfies all prerequisites of Rule 16(a)(1)(E)(i), including the materiality standard.⁸ Moreover, the magistrate judge concluded that the "witness statements and agent memoranda [which defendant seeks] are undoubtedly 'material' to the de-

including "materials in the hands of a governmental investigatory agency closely connected to the prosecutor." *United States v. Jordan*, 316 F.3d 1215, 1249 (11th Cir.2003) (citing *United States v. Scruggs*, 583 F.2d 238, 242 (5th Cir. 1978)) (footnote omitted).

1. Doc. no. 276 ("Application for Review and Appeal").

2. Doc. no. 288 ("Government's Response to Defendant's Motion for Review").

3. See doc. no. 221.

4. See doc. no. 260 (Magistrate Judge's Jul. 9, 2004 Order) ("Magistrate Order").

5. Doc. no. 276 (Application for Review and Appeal), at 2.

6. Courts have construed the phrase "within the government's possession, custody, or control" as

7. Doc. no. 276 (Application for Review and Appeal), at 2-3.

8. See doc. no. 288 (Government's Response to Defendant's Motion for Review), at 11-14 (failing to address materiality standard under Rule 16).

fense in the sense that having them would be 'helpful.'"⁹ This court will assume for the sake of discussion that defendant has demonstrated the "materiality" of the items sought under Rule 16(a)(1)(E)(i), as neither party contests this aspect of the magistrate judge's Order.

The government relies upon Rule 16(a)(2), and contends that it limits the scope of those items that Rule 16(a)(1)(E)(i) otherwise would compel the government to disclose prior to trial.

The rules relied upon by the parties as the basis for their respective positions are linked to one another and must be read in tandem, as the first clause of Rule 16(a)(2) clearly indicates:

*Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500 [i.e., the "Jencks Act"].*¹⁰ Fed.R.Crim.P. 16(a)(2) (emphasis supplied).

Defendant's position pivots upon the wording of the first clause of Rule 16(a)(2). He argues that it plainly exempts those items

described in Rule 16(a)(1)(E)(i) from the protection of Rule 16(a)(2). Defendant's argument has considerable force. A plain reading of the two rules in conjunction with one another leads to the conclusion that a defendant can compel the government to disclose rough notes of witness interviews, *if* the defendant demonstrates the notes are material to the preparation of his defense—a showing the magistrate judge concluded defendant has made.¹¹

Even so, the magistrate judge also concluded that Rule 16(a)(2) limits defendant's right to compel disclosure of such documents.¹² His Order states that defendant's plain meaning argument is "unpersuasive," when it is considered in the light of the Eleventh Circuit's decision in *United States v. Jordan*, *supra*, which held that Rule 16(a)(2) limited a defendant's pre-trial disclosure rights under Rule 16(a)(1)(C), the predecessor of the present Rule 16(a)(1)(E).¹³

[1] It is indeed important to observe that *Jordan* interpreted Rule 16(a) as it read *before* Congress amended the Rule in 2002. *See Jordan*, 316 F.3d at 1224 & n. 11, 1225 & n. 12, 1227 & n. 17. Defendant's argument hinges on the current version of Rule 16, not its predecessor.¹⁴ Defendant contends the plain meaning of the language in the present rule cannot be ignored based on the interpretation of prior versions of Rule 16(a)(2). The government appears to recognize the merits of the defendant's argument.¹⁵

9. Magistrate Order, at 3.

10. The *Jencks Act* was enacted by Congress in response to the Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), holding that the government must make available a trial witness's pre-trial statements insofar as they relate to the witness's trial testimony. The Act is codified at 18 U.S.C. § 3500, and provides that "statements" of a government witness must be disclosed to a defendant, but only *after* that witness has testified on direct examination at trial. The term "statement" is defined in § 3500(e). The substance of the *Jencks Act* was incorporated into Fed.R.Crim.P. 26.2 in 1979. *See, e.g., Jordan*, 316 F.3d at 1227 n. 17. That rule essentially provides that a "statement" of a government witness shall not be subject to pre-trial discovery, nor disclosed to the defendant, until that witness has testified on direct examination during the trial of the case. "Statement" is defined in Rule 26.2(f).

11. See the text accompanying note 9 *supra*.

12. Magistrate Order, at 3.

13. *Id.* at 2–3 (citing *Jordan*, 316 F.3d at 1251).

14. In its brief, the government cites two cases from the United States District Court for the Southern District of New York to support the magistrate judge's conclusion that Rule 16 continues to limit defendant's discovery rights, as it did prior to the 2002 amendments. *See United States v. Savoca*, 2004 WL 1179312 (S.D.N.Y.), and *United States v. Ceballos*, 2003 WL 21961123 (S.D.N.Y.). These cases fail to persuade as they do not attempt to analyze Rule 16 as it currently exists, but instead rely upon case law interpreting Rule 16 prior to the 2002 amendments.

15. *See* doc. no. 288 (Government's Response to Defendant's Motion for Review), at 11–14 (failing to argue textual interpretation of Rule 16 rebut-

A. “Plain Meaning” Analysis

The “plain meaning rule” provides that, whenever the language of a rule of procedure promulgated by the Supreme Court and adopted by Congress is plain on its face, “and does not lead, in the case before the court, to absurd or impracticable results, there is no occasion or excuse for judicial construction . . . and the courts have no function but to apply and enforce the [rule] accordingly.”¹⁶

[2] The Supreme Court appears to have adopted this approach for the Federal Rules of Criminal Procedure in *Carlisle v. United States*, 517 U.S. 416, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996), when addressing the interpretative guidance provided by Rule 2. Rule 2 instructs courts to interpret the rules in a manner which provides for “the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.” Fed.R.Crim.P. 2. The Supreme Court said this instruction

sets forth a principle of interpretation to be used in construing *ambiguous* rules, *not* a principle of law superseding *clear* rules that do not achieve the stated objectives. *It does not . . . provide that rules shall be construed to mean something other than what they plainly say*

Carlisle, 517 U.S. at 424, 116 S.Ct. at 1465 (emphasis supplied).

ting defendant’s analysis). The government properly does not contest that the current version of Rule 16 applies. The order accompanying the submission of the proposed amendments to Congress in 2002 states that they “shall take effect on December 1, 2002, and shall govern in all proceedings in criminal cases thereafter commenced *and, insofar as just and practicable, all proceedings then pending.*” Order of April 29, 2002 of the Supreme Court of the United States Adopting and Amending the Federal Rules of Criminal Procedure, 207 F.R.D. 89, 92 (emphasis added). This language is not unique, “but is the language submitted by the Court with all such amendments to the Federal Rules.” *United States v. Bowler*, 252 F.3d 741 (5th Cir.2001). The general rule is that a new statute or rule “should apply to cases pending on the date of its enactment unless manifest injustice would result.” *United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir.1985). Further, it is well established that amendments that are “procedural or remedial in nature apply retroactively.”

In another rule interpretation decision, *United States v. John Doe, Inc. I*, 481 U.S. 102, 107 S.Ct. 1656, 95 L.Ed.2d 94 (1987), which pivoted upon the plain meaning of the rule language at issue there, the Court said:

Because we decide this case based on our reading of the Rule’s plain language, there is no need to address the parties’ [other arguments]. While such arguments are relevant when language is susceptible of more than one plausible interpretation, we have recognized that in some cases “[w]e do not have before us a choice between a ‘liberal’ approach toward [a Rule], on the one hand, and a ‘technical’ interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. *We accept the Rule as meaning what it says.*”

Id. at 109, 107 S.Ct. at 1661 (emphasis supplied) (quoting *Schiavone v. Fortune*, 477 U.S. 21, 30, 106 S.Ct. 2379, 2384, 91 L.Ed.2d 18 (1986)) (footnote omitted).

The most recent decision in which the Supreme Court applied the plain meaning rule to the text of a statute is *Lamie v. United States Trustee*, 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004), in which the Court examined section 330(a)(1) of the United States Bankruptcy Code, 11 U.S.C. § 330(a)(1), regulating court awards of professional fees, including fees for services rendered by attorneys in connection with bank-

United States v. Vanella, 619 F.2d 384, 386 (5th Cir.1980). Accordingly, the 2002 amendments to Rule 16 apply to this case, even though defendant was indicted in the year 2000.

16. E.F. Hennessey, *Judges Making Law* 28 (1994) (footnotes omitted). See also Reed Dickerson, *The Interpretation and Application of Statutes* 229 (1975), where the author observed:

On its positive side, the plain meaning rule states a tautology: Words should be read as saying what they say. The rule tells us to respect meaning but it does so without disclosing what the specific meaning is. At best, it reaffirms the preeminence of the statute [or rule] over materials extrinsic to it. In its negative aspect, on the other hand, the rule has sometimes been used to read ineptly expressed language out of its proper context, in violation of established principles of meaning and communication. To this extent it is an impediment to interpretation.

ruptcy proceedings. The Court noted that Congress amended the Code in 1994, and that five words were deleted from § 330 in the course of those revisions. According to the Court, “the deletion created [an] apparent legislative drafting error.” *Id.* at —, 124 S.Ct. at 1028. The Court, nevertheless, held fast to the principle that courts should rely on the unambiguous, plain meaning of a statute.

The starting point in discerning congressional intent is *the existing statutory text . . . and not the predecessor statutes*. It is well established that “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”

Id. at —, 124 S.Ct. at 1030 (emphasis supplied) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 1947, 147 L.Ed.2d 1, 7 (2000)). Stated differently, the *Lamie* court found that, despite the obvious legislative drafting error resulting in the omission of five words from the predecessor statutory text, the revised bankruptcy code provision was plain on its face and did not lead to absurd results; accordingly, it would be interpreted and enforced in accordance with its plain meaning. *Lamie*, 540 U.S. at —, 124 S.Ct. at 1031. The Court reasoned that, if “Congress enacted into law something different from what it intended, then it should

17. Justice Stevens concurred in the *Lamie* judgment, but harshly criticized the majority’s insistence on adhering to the plain meaning of the statute.

As the majority recognizes . . . a leading bankruptcy law treatise concluded that the 1994 amendments [to the Code] contained an unintended error. . . . *Whenever there is such a plausible basis for believing that a significant change in statutory law resulted from scrivener’s error, I believe we have a duty to examine legislative history.*

Lamie, 540 U.S. at —, 124 S.Ct. at 1035 (Stevens, J., concurring) (emphasis supplied). Justice Stevens’ dissent is relevant to the “scrivener’s error exception” to the plain meaning rule, discussed in the following section of this opinion.

18. Under the absurdity doctrine, a court should adhere to a statute’s plain meaning unless doing so would produce absurd results. Courts should invoke this “absurdity exception” to the plain meaning rule under only the most extraordinary circumstances. The Supreme Court has ob-

amend the statute to conform it to its intent. ‘It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.’” *Id.* at —, 124 S.Ct. at 1034 (quoting *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 1275, 127 L.Ed.2d 611, 635 (1994) (Kennedy, J., concurring)).¹⁷ *Lamie* thus strongly suggests that this court should adhere to the plain meaning of the present version of Rule 16(a)(2), and enforce the language as it reads.

1. The “scrivener’s error exception” to the plain meaning rule

[3] Even so, the government presents compelling evidence in the form of Rule 16’s history and Advisory Committee Notes, both of which indicate that the drafters of the present version of the Federal Rules of Criminal Procedure did not intend what the plain meaning of Rule 16(a)(2) now effects. The critical issue then is: how, *if at all*, should this court weigh this non-textual evidence?

To answer that question, the court will employ a recognized exception to the plain meaning rule that was not discussed by either party: the so-called “scrivener’s error exception.” One commentator described this exception as a variation on another recognized exception to the plain meaning rule—the “absurdity doctrine.”¹⁸

served that it “rarely invokes [an absurd results test] to override unambiguous legislation.” *Barnhart v. Sigmon Coal Company*, 534 U.S. 438, 460, 122 S.Ct. 941, 955, 151 L.Ed.2d 908 (2002). A leading treatise on statutory construction explained that “the absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.” 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:07 (6th ed.2000).

Although the government contends that the plain meaning of amended Rule 16 would result in a startling shift in the rules governing criminal discovery, the mere fact that the amended Rule 16 effects broader discovery rights for a criminal defendant is not, in and of itself, an absurd result. Thus, the court does not find the absurdity doctrine applicable under these circumstances.

Justice Scalia, in discussing what I have called the absurd results exception, often uses a different name: he calls it the doctrine of “scrivener’s error.” Moreover, this different name seems to embody a different doctrine with a subtly, but significantly, different standard defining the limits of judicial power. Justice Scalia appears to believe that the judicial power of correcting congressional mistakes is not strictly limited to cases in which the result of following the statutory language is absurd, but can be exercised in some cases of non-absurd error. . . . [Most importantly,] Justice Scalia believes that the “obviousness” of a statutory drafting error and of the statute’s intended meaning, rather than the absurdity of the statute as written, is the ultimate criterion of the “scrivener’s error” exception.

Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 Geo. Wash. L.Rev. 309, 329–332 (2001). “The *sine qua non* of any ‘scrivener’s error’ doctrine . . . is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the [rule] rather than correcting a technical mistake.” *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82, 115 S.Ct. 464, 474, 130 L.Ed.2d 372 (1994) (Scalia, J., dissenting); see also *Green v. Bock Laundry Machine Company*, 490 U.S. 504, 527, 109 S.Ct. 1981, 1994, 104 L.Ed.2d 557 (1989) (Scalia, J., concurring) (“I think it entirely appropriate to consult all public materials, including the background of [a rule] and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of. . .”).

a. Rule 16(a) prior to 2002 amendments

The government argues that a strict construction of Rule 16(a)(2) produces unintended results at odds with the Rule’s purposes.¹⁹ Prior to the effective date of the 2002 amendments, Rule 16(a)(2) limited the government’s obligation to disclose work product,

even when the items were “material” to the preparation of a defendant’s defense. The plain reading of Rule 16(a)(2) in conjunction with Rule 16(a)(1)(C) supported that conclusion, as did case law gloss. Prior to the effective date of the 2002 amendments,²⁰ Rule 16(a)(1)(C) read as follows:

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.

In turn, the previous version of Rule 16(a)(2) read as follows:

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, or 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. [Emphasis supplied.]

Construing these two rules in conjunction, the Supreme Court held that, “under Rule 16(a)(1)(C) [redesignated Rule 16(a)(1)(E) by the 2002 amendments], a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product in connection with his case.” *United States v. Armstrong*, 517 U.S. 456, 463, 116 S.Ct. 1480, 1485, 134 L.Ed.2d 687 (1996).

The Eleventh Circuit also construed the pre-2002 version of Rule 16(a) in *United States v. Jordan, supra*, and concluded that Rule 16(a)(2) precluded the government from being compelled to produce for pre-trial in-

19. See doc. no. 288 (Government’s Response to Defendant’s Motion for Review), at 12–14.

20. Dec. 1, 2003. See *supra* note 15 and 207 F.R.D. at 92 (Apr. 29, 2002 Order of Supreme Court, ¶ 2).

spection by a defendant the raw notes or summaries of witness interviews compiled by government agents, as well as anything prepared from those notes, such as FBI-302s. Cf., e.g., 316 F.3d at 1227 n. 17, 1253.

b. Rule 16(a) after 2002 amendments

The drafters of the Federal Rules amended Rule 16 in 2002, re-designating Rule

16(a)(1)(C) as 16(a)(1)(E), and revising the opening clause of Rule 16(a)(2). The Table set out on the following page compares the pre- and post-2002 amendment versions of the Rules at issue, and indicates through the use of ~~strike-throughs~~ and underlining those words omitted from and added to the pre-2002 versions of the pertinent rules.

COMPARISON OF PRE- AND POST-2002 AMENDMENT VERSIONS OF TWO SUBSECTIONS OF RULE 16(a)

~~Strike-throughs~~ indicate text omitted from the Pre-2002 version of the rule, whereas underlining is used to indicate text added to the 2002 language of the same rule.

Rule 16(a)(1)(C) Pre-2002 Language	Rule 16(a)(1)(E) Post-2002 Language
<p>Upon request of the defendant a defendant's request, the government shall <u>must</u> permit the defendant to inspect and <u>to</u> copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions thereof of any of these items, which are <u>if the item is within the government's possession, custody or control of the government, and; which are</u> (i) the item is material to the preparation of <u>preparing</u> the defendant's defense; or are intended for use by the government as evidence in chief at the trial, <u>(ii) the government intends to use the item in its case-in-chief at trial; or were</u> (iii) the <u>item was obtained from or belong to the</u> defendant</p>	<p>Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:</p> <p>(i) the item is material to preparing the defense;</p> <p>(ii) the government intends to use the item in its case-in-chief at trial; or</p> <p>(iii) the item was obtained from or belongs to the defendant.</p>
Rule 16(a)(2) Pre-2002 Language	Rule 16(a)(2) Post-2002 Language
<p>Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1) <u>Except as Rule 16(a)(1) provides otherwise,</u> this rule does not authorize the discovery or inspection of reports, memoranda, or 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.</p>	<p><i>Except as Rule 16(a)(1) provides otherwise,</i> this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500. [Emphasis supplied.]</p>

[4] The change to the introductory clause of Rule 16(a)(2) is pivotal. As depicted, Rule 16(a)(2) formerly began with these words: "*Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1)*" The

omission of sub-paragraph 16(a)(1)(C) from this clause plainly indicated that a defendant's right to compel pre-trial disclosure of the items described in Rule 16(a)(1)(C) was limited by Rule 16(a)(2).

The 2002 amendments revised the introductory clause of Rule 16(a)(2), however, so that it now states: “*Except as Rule 16(a)(1) provides otherwise . . .*” In other words, Rule 16(a)(2) no longer *explicitly* protects the items described in Rule 16(a)(1)(E) [formerly Rule 16(a)(1)(C)] from compelled disclosure. If read literally, therefore, the post-2002 Amendment version of Rule 16(a)(2) permits a defendant to compel pre-trial disclosure of rough notes of witness interviews compiled by governmental agents, provided the defendant can show that such notes are material to the preparation of his defense.

The rub lies in these non-textual facts: both the May 10, 2001 Report of the Advisory Committee on Federal Rules of Criminal Procedure (“Advisory Committee”), *see* 207 F.R.D. at 355 *et seq.*, as well as the September 10, 2001 Report of the Judicial Conference Committee on Rules of Practice and Procedure, *see* 207 F.R.D. at 336–354, offer persuasive evidence that the drafters did not intend this result.

For example, the Advisory Committee stated in its report to the Judicial Conference that “the Committee attempted to avoid any unforeseen substantive changes and attempted in the Committee Notes to clearly state when the Committee was making a change in practice.” 207 F.R.D. at 357.²¹ Rule 16 was listed among the rules that “were completely reorganized to make them easier to read and apply.” *Id.*

Further, the Advisory Committee’s note to Rule 16 states, in pertinent part, that:

The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more

21. The Report of the Advisory Committee highlighted that the proposed amendments to the Criminal Rules were published in two packages: one for stylistic changes and one for substantive changes.

Publication of Style and Substantive Packages for Public Comment

In June 2000, the Standing Committee authorized publication for public comment of two packages of amendments. The purpose of presenting the proposed amendments in two separate pamphlets was to highlight for the public that in addition to the “style” changes in Rules 1 to 60, a number of significant (perhaps con-

easily understood and to make style and terminology consistent throughout the rules. *These changes are intended to be stylistic only*, except as noted below.

207 F.R.D. at 350 (emphasis supplied).²² *See also Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 2385, 91 L.Ed.2d 18 (1986) (“Although the Advisory Committee’s comments do not foreclose judicial consideration of the Rule’s validity and meaning, the construction given by the Committee is ‘of weight.’”) (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444, 66 S.Ct. 242, 245, 90 L.Ed. 185 (1946)).

This is persuasive evidence that the Advisory Committee, Judicial Conference, Supreme Court, and Congress intended to effect only “stylistic changes” to Rule 16(a)(2). Defendant’s “plain reading” of the language of Rule 16(a)(2) produces much more than stylistic changes. If this court were to adopt defendant’s strict construction of the amended Rule, a future defendant could compel pre-trial disclosure of not only rough notes of government agents, but all those items that fall within the wider net of government “work product” generated in connection with the investigation and prosecution of persons who are accused of committing federal criminal offenses. That would be contrary to the Eleventh Circuit’s holding in *Jordan*, and the Supreme Court’s opinion in *Armstrong*, among many others. Defendant’s interpretation of Rule 16(a)(2), while perhaps literally correct, turns the stated purpose of the Advisory Committee and Congress on its head.

In conclusion, the “genuinely intended” meaning of Rule 16(a)(2) was “inadequately expressed” by an obvious drafting oversight, thus triggering the scrivener’s error doc-

troversial) amendments were also being proposed.

207 F.R.D. at 358. The proposed amendments to Rule 16 were not included among the rules in the “substantive” package.

22. The substantive changes discussed in the remainder of the Advisory Committee’s note concern other sub-paragraphs of Rule 16, and are not pertinent to the present discussion. This notation evinces the Advisory Committee’s ability to clearly state when a substantive change was intended.

trine, and permitting this court to look beyond the plain meaning of the rule's language to non-textual sources. In light of the drafting materials discussed, and the long line of cases interpreting the government's pre-trial disclosure obligations under the pre-2002 language of Rule 16(a)(2), a departure from the rule's previous meaning has occurred—a departure that is contrary to the objective stated in the Advisory Committee Notes to the 2002 amendment. It would not be proper to infer that the Advisory Committee and Congress, in reorganizing Rule 16 for “stylistic” purposes, intended to effect such a dramatic change without a single statement of that intention.

Under established canons of statutory construction, “it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.” *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199, 32 S.Ct. 626, 630, 56 L.Ed. 1047 (1912); see *United States v. Ryder*, 110 U.S. 729, 740, 4 S.Ct. 196, 201, 28 L.Ed. 308 (1884).

Finley v. United States, 490 U.S. 545, 554, 109 S.Ct. 2003, 2009, 104 L.Ed.2d 593 (1989) (emphasis supplied); see also *In re Chateaugay Corporation*, 89 F.3d 942, 953 (2d Cir. 1996) (“When Congress revises and renumbers existing laws, a court should not infer any legislative aim to change the laws’ effect unless such intention is clearly expressed.”) (citing *Finley v. United States*, 490 U.S. 545, 554, 109 S.Ct. 2003, 2009–10, 104 L.Ed.2d 593 (1989)); 207 F.R.D. at 357 (Advisory Committee Report to Judicial Conference on proposed 2002 amendments to the Federal Rules of Criminal Procedure) (“Second, the Committee attempted to avoid any unforeseen substantive change and attempted in the Committee Notes to clearly state when the

Committee was making a change in practice.”).

The court suggests that Rule 16(a)(2) should begin with this clause: “Except as Rule 16(a)(1)(A), (B), (C), (D), (F), and (G) provide otherwise, . . .” In this way, Rule 16(a)(1)(E) will no longer require government disclosure of documents and objects falling under Rule 16(a)(2)’s protection: *i.e.*, “reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.”

In sum, the court will construe Rule 16(a)(2) as it was intended, and hope the Advisory Committee corrects its scrivener’s error in the near future.²³

B. Whether Rough Notes Should Be Submitted for *In Camera* Inspection

[5] Defendant’s arguments are broader than Rule 16(a)(2), however, and implicate *Brady* and *Giglio* concerns. Federal criminal defendants have a due process right to disclosure of evidence that is favorable to the accused on the issues of guilt and punishment, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196–97 10 L.Ed.2d 215 (1963), or evidence that would impeach the government’s witnesses, including inconsistent statements by the witness, or plea and immunity agreements. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). These rights are independent of the Federal Rules of Criminal Procedure and *Jencks Act*, and may result in reversal of a conviction if the defense can demonstrate that there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding.

23. *Lamie*, which the court discussed earlier, does not change the result because it is not a scrivener’s error case. The Court rejected the petitioner’s argument that a scrivener’s error obscured Congress’ real intent, and that the plain language should be ignored. 124 S.Ct. at 1033. The Court, although stating it was unnecessary to look at legislative history in light of the plain language of the statute, explained that legislative history was not conclusive regarding legislative intent because of conflicting reports when the act was

passed. *Id.* at 1033–34. The scrivener’s error doctrine only applies when the meaning and intent are absolutely clear. Defendant provides no authority for the proposition that, after Congress and the Rules Committee amended Criminal Rule 16, and renumbered the paragraphs at issue in this appeal for “stylistic” purposes, this court should nonetheless interpret the plain language to now effect a dramatic change in the disclosure requirements.

[6] As outlined in the magistrate judge's order, the government has produced thousands of FBI-302s²⁴ and other investigative records and memoranda. What defendant now seeks are the investigative agents' rough notes compiled during interviews of thousands of witnesses, and later used to generate the documents that have been produced to him, in order to compare the corresponding FBI-302s for inconsistencies or incompleteness. If the majority of rough notes have been retained, this would require reading hundreds of thousands of pages of handwritten materials, and then comparing those materials to the corresponding FBI-302s generated from the notes.

The court agrees with the magistrate judge that defendant's arguments do not warrant a "wholesale *in camera* review or production to the defense of rough notes of literally tens of thousands of witness interviews."²⁵ Defendant, however, has highlighted in his reply brief fifteen examples, referencing corresponding FBI-302s, in which questionable inconsistencies warrant further review. Defendant has not attempted to make this showing for all FBI-302s disclosed to him. According to defendant, he need not show that *all* of the rough notes are material to require production or *in camera* review. Defendant relies upon the Eleventh Circuit's decision in *United States v. Griggs*, 713 F.2d 672 (11th Cir.1983), where the court ordered *in camera* review of all of the government's evidence:

Although appellants have pointed to no specific exculpatory evidence that may have been suppressed, there is some merit to the contention that, if the arguably exculpatory statements of witnesses discussed *supra* were in the prosecutor's file and not produced, failure to disclose indicates the "tip of an iceberg" of evidence that should have been revealed under *Brady*. It would have been appropriate for the trial court to conduct an *in camera* review of the files to detect any such suppression.

Id. at 674.

The court disagrees that defendant's limited submission in this case warrants review of

all rough notes. The magistrate judge correctly determined that defendant did not make a sufficient showing that production or *in camera* review of *all* rough notes is required based upon the potential *Brady* or *Giglio* violations listed in the fifteen examples. The court finds, nonetheless, that a limited *in camera* review of the rough notes that accompany the FBI-302s highlighted in defendant's reply brief is warranted under these circumstances. Only upon such a review of these fifteen examples can the court determine whether the "tip of an iceberg" has been reached.

It is well within the court's discretion to order an *in camera* inspection to determine whether materials should be disclosed pursuant to *Brady*, *Giglio*, or the *Jencks Act*. See, e.g., *United States v. Medel*, 592 F.2d 1305, 1315-17 (5th Cir.1979); *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir.1978). See also *Jordan*, 316 F.3d at 1252 (noting that, in cases where the assessment of *Brady* material is debatable, "the prosecutor should mark the material as a court exhibit and submit it to the court for *in camera* inspection."). "Requiring materials sought for discovery to be submitted to the court for an [i]n camera inspection is a practice which is both reasonable and protective of the defendant's rights, and, we might add, one which has received a measure of approval by the Supreme Court." *Buckley*, 586 F.2d at 506 (citing *United States v. Agurs*, 427 U.S. 97, 106, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

While an *in camera* inspection is neither the preferred course, nor required for every case in which a criminal defendant asserts a potential violation of either *Brady* or *Giglio*, the court is mindful that this is not just any other case. The stakes are high for everyone involved, and if an *in camera* inspection can allay some of defendant's concerns and avoid unnecessary error at this early stage, the court is willing to undertake the task of reviewing the specific documents referenced by defendant in the current application for

24. FBI-302s are the forms used by FBI agents to summarize, record, and memorialize investigative interviews with potential witnesses.

25. Magistrate Order at 1 (doc. no. 260).

review and his reply brief before the magistrate judge.

The government represents that it has compared the reports identified by defendant in his brief with the rough notes in the government's possession that relate to these reports and has found that the reports substantially and accurately reflect what was originally noted by the interviewing agents at the time of the interview.²⁶ The government maintains that the rough notes it has in its possession do not contain *Brady* or *Giglio* materials. Implicit in defendant's request for an *in camera* inspection is a lack of trust in the government's discernment as to what constitutes *Brady* or *Giglio* material. Defendant cites as an example some excerpts from court conferences to illustrate his point:

McLEAN: "In Atlanta..[t]here were a lot of anonymous calls or calls where they said, you know, 'my boyfriend did it; but don't tell my boyfriend, because he'll kill me.'

And we've got an obligation under the Victim Witness Act not to let that information get out and have that person killed, because we're going to get sued. . . ."

JAFFE: ". . . It's classic *Brady*. Even if it's not credible, who makes that decision?"

McLEAN: "Well, again, you're calling something *Brady* that's not necessarily *Brady*. The defense theory is, everything is *Brady*. *The government's theory is, nothing is Brady*. And the law says what

26. See doc. no. 288, (Government's Response to Defendant's Motion for Review), at 5–6.

27. See doc. no. 257 (Defendant's Reply to Government's Response to Defendant's Motion for Preservation), at 12 n. 7. Defendant's quotation of the court conferences omitted some portions of arguably relevant discussion, failed to include ellipses to indicate when portions were omitted, and made typographic errors. The court has attempted to include all relevant portions of the quotations from the transcripts, and has also corrected defendant's typographical errors. The original transcript of the July 30, 2003 Court Conference appears as document # 39 on the docket sheet. That transcript was corrected due to reporter error, but the corrections did not affect the portions quoted above. See Amended Transcript of Status Conference (doc. no. 62).

28. See doc. no. 257 (Defendant's Reply to Government's Response to Defendant's Motion for

Brady is. We're going to have to figure out what that is at some point."

Court Conference, July 30, 2003, pp. 9–10 (emphasis added).²⁷

CLARKE: "[W]e would think that the negatives [referring to negative scientific test results] would be *Brady*. . . .

McLEAN: "Well, I'm not sure that is *Brady*. Again, your interpretation of *Brady* and ours is somewhat different. Under the circumstances, you know, we err on the side of turning stuff over. That's our position."

Court Conference, March 31, 2004, p. 22.²⁸

Defendant also argued in his reply brief before the magistrate judge that he has discovered "the government is aware, or should be aware, of obviously exculpatory material which has not been turned over to the defense" regarding one of the experts the government has stated an intention to use.²⁹ Defendant reiterates this charge in greater detail in his application for review³⁰—a charge to which the government failed to file a response. Silence can be deafening.³¹

The more prudent course, therefore, is to engage in a limited *in camera* inspection. Upon review, appellate courts are careful in reviewing decisions of a district court that has itself conducted an *in camera* inspection of alleged *Brady* material. See *Medel*, 592 F.2d at 1317. Given the fact that "what constitutes *Brady* material is fairly debatable," *Jordan*, 316 F.3d at 1252, it appears

Preservation), at 12 n. 7. Defendant is citing from doc. no. 173.

29. Doc. no. 257 (Defendant's Reply to Government's Response to Defendant's Motion for Preservation), at 14 and n. 9.

30. Doc. no. 276 (Defendant's Application for Review and Appeal), at 8 and n. 6.

31. While *Brady* does not require the government to produce to defendant information he already has, see *United States v. Yizar*, 956 F.2d 230, 233 (11th Cir.1992), this example cited by defendant does cause one to question why the defendant had to resort to his own devices to obtain the information which clearly would impeach a government lab analyst. As the government chose not to respond, the question looms large.

both the government and the defendant would benefit from a limited *in camera* review.

The court therefore will review the rough notes *in camera*, looking for both exculpatory material and material that is inconsistent with the corresponding FBI-302. See *United States v. Ashley*, 54 F.3d 311, 312–13 (7th Cir.1995). As pointed out in the magistrate judge's order, however, the court is somewhat limited in the review it can offer the parties at this juncture.³² It may be that the significance of potential *Brady* or *Giglio* material may be missed by the court at this stage of the proceedings, because the court is not as knowledgeable of defense strategies as it will be during or after trial. The government operates under a similar, cognitive deficiency at this stage. See *Jordan*, 316 F.3d at 1254. Further, the determination of prejudice at this stage of the proceedings is problematic, to say the least. See *id.* at 1252 n. 79. Even so, because the defendant has provided the court with fifteen examples detailing what may be *Brady* or *Giglio* material, the court's task, as well as the government's, is somewhat manageable. Because this is the first request by defendant for an *in camera* inspection, the court cautiously undertakes this limited review to help both sides fill an obvious chasm regarding the proper interpretation of *Brady* and *Giglio*. The court will reserve ruling on whether the rough notes contain *Brady* or *Giglio* materials until after it completes its limited *in camera* review.

II. CONCLUSION

In light of the foregoing, the order of the magistrate judge on July 9, 2004 will be affirmed in part and reversed in part. The government shall be ordered to produce the rough notes that accompany the FBI-302s identified in defendant's reply brief.³³ An order consistent with this memorandum opinion will be entered contemporaneously herewith.

ORDER

Defendant's "Application for Review and Appeal of Magistrate Judge's Order of July 9, 2004 Denying the Defendant's Motion for Preservation and *In Camera* Inspection and/or Discovery of Rough Interview Notes" (doc. no. 276) is GRANTED IN PART. In accordance with the memorandum opinion entered contemporaneously herewith, the order of the magistrate judge on July 9, 2004 (doc. no. 260) is AFFIRMED IN PART AND REVERSED IN PART.

The government is ordered to produce the rough notes that accompany the FBI-302s that have previously been produced to defendant and identified on pages 15–34 of defendant's reply brief.¹ The *in camera* submission will be accompanied by a log prepared by the government, listing each FBI-302 identified in defendant's reply brief,² the agent/agency preparing the FBI-302, and whether rough notes were retained. An illustration of the log is below:

△'s Illustration of materiality	Bates number of FBI-302	Agent/Agency	Rough Notes Retained?
a	(left blank)	(left blank)	(left blank)
b	BH-302-008155	D. Abrams-FBI	yes
	BH-302-000665	V. Baynes-BPD	yes
	BH-AM-003550	V. Baynes-BPD	yes
	BH-AM-005016	S. Zellers-	yes
	BH-AM-005752	V. Baynes-FBI	yes
	BH-RS-000738	V. Baynes-FBI	yes
	BH-RS-001171	M. Martin-ATF	yes

32. See Magistrate Order, at 5 ("Yet, the court's review of the documents would not assure that everything that might be materially helpful to the defense would be made available to the defense, as the court also might not appreciate or realize the materiality of any particular needle of information in a haystack of documents.")

33. See doc. no. 257 (Defendant's Reply to Government's Response), at 15–34.

1. See Defendant's Reply Brief at 15–34 (doc. no. 257).

2. *Id.*

The *in camera* submission will then be organized according to the listing contained in the log.

The submission will be bound on the left with fifteen tabs marked “a-o” for each illustration of materiality presented by defendant in his reply brief before the magistrate judge. Each tab will consist of a copy of the FBI-302, followed by copies of the corresponding rough notes placed directly behind the FBI-302. For those instances when rough notes were not retained, the government will place a piece of paper that states “Rough Notes Not Retained” behind the corresponding FBI-302.

The government shall produce the rough notes for *in camera* review at this court’s chambers in Huntsville on or before the close of business on Friday, October 15, 2004.³ The government is directed to file a copy of the *in camera* submission under seal with the clerk of court, as well as provide a separate (“work”) copy for the court’s review in chambers.



**In re AFC ENTERPRISES, INC.
DERIVATIVE LITIGATION**

No. CIV.A. 1:03-CV-1584-TWT.

United States District Court,
N.D. Georgia,
Atlanta Division.

Aug. 12, 2004.

Background: Shareholders of corporation brought derivative action against officers and controlling shareholders of corporation, as well as members of corporation’s board of directors. Motions to dismiss were filed.

Holdings: The District Court, Thrash, J., held that:

3. The court is unaware how many rough notes have been retained in light of footnote 2 in the

- (1) demand was excused as futile;
- (2) exclusion for director liability in corporation’s articles of incorporation did not preclude breach of fiduciary duty claims;
- (3) alleged conduct was not protected by the business judgment rule; and
- (4) imposition of constructive trust was warranted on funds received by individual defendants.

Motions granted in part and denied in part.

1. Corporations ⇔206(2, 4)

Under Minnesota law, generally, before bringing a derivative action on behalf of a corporation, a shareholder must make a demand for relief to the board of directors; this demand requirement, however, is excused if demand on the board would be futile.

2. Corporations ⇔190, 320(5)

Under Minnesota law, board of directors’ alleged conduct of conspiring to conduct an initial public offering in order to allow some board members to extinguish loan debts with their stock was sufficiently egregious to excuse demand requirement as futile, for purposes of shareholders’ derivative action against board of directors, officers and controlling shareholders.

3. Corporations ⇔306, 325

Under Minnesota law, exclusion for director liability in corporation’s articles of incorporation did not preclude breach of fiduciary duty claims in derivative action, which alleged, inter alia, that directors caused corporation to issue large loans to board members and then conspired to conduct initial public offering in order to help them extinguish that very indebtedness; such claims did not solely implicate a violation of the duty of care. M.S.A. § 302A.251, subd. 4.

4. Corporations ⇔310(1)

Under Minnesota law, alleged conduct of board of directors in causing corporation to issue large loans to board members, and then

government’s response to defendant’s application for review and appeal (doc. no. 288).

TAB 6

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 17, Seal of Court on Subpoenas (10-CR-B)

DATE: September 28, 2011

The issue for discussion is whether Rule 17(a) should be amended to eliminate the requirement that subpoenas include the seal of the court. Ms. Jennie Allen at the Administrative Office of the U. S. Courts forwarded the request of the Forms Working Group to “the Criminal Rules Committee that it consider eliminating the requirement, stated in Rule 17(a), that a subpoena include the seal of the court.” Ms. Allen noted that she was not aware of “whether or how courts fulfill this requirement, but the group thought it was unnecessary.” The Working Group minutes provide no additional information on the reason for this request.

This memorandum provides an initial evaluation of the Working Group’s suggestion, according to the following criteria:

- (1) what is the concern or issue;
- (2) how does an existing rule (or lack of a rule) contribute to the concern;
- (3) how would a new (or amended) rule alleviate the concern;
- (4) the advantage and disadvantages of requiring uniformity on the matter;
- (5) any legal concerns with rule action; and
- (6) any practical concerns with rule action.

1. What is the concern?

Is there any need for a court seal on a criminal subpoena in light of the elimination of that requirement for civil subpoenas?

2. How does the existing rule contributes to the concern?

Rule 17(a) provides (emphasis added):

(a) Content. A subpoena must state the court’s name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the

subpoena specifies. The clerk must issue a blank subpoena —signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

As noted, the Forms Working Group has suggested that the Advisory Committee consider deleting the requirement that the subpoena include the court’s seal.

A parallel requirement formerly in Civil Rule 45 was omitted in 1991. Prior to that revision, Civil Rule 45 required that civil subpoenas be issued under the court’s seal, though in practice the clerk of court issued subpoenas bearing the court’s seal in blank upon the request of a party. The 1991 amendment deleted the requirement that the subpoena include the court’s seal and provided that counsel may issue subpoenas as officers of the court. This relieved clerks of the duty of issuing many subpoenas prepared by counsel. Civil Rule 45(a)(1)(A)(i) now provides that a subpoena must “state the court from which it issued,” and Civil Rule 45(a)(3) provides:

(3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

Finally, Rule 45(a)(2) contains additional information concerning the court from which subpoenas must issue under various circumstances.¹

As far as we have been able to determine, the Advisory Committee on Criminal Rules has not previously considered whether it would be desirable to omit the requirement that criminal subpoenas contain the court’s seal and be issued by the clerk, though we note one related change during restyling. Before restyling Rule 17(a) required the clerk to issue subpoenas “under the seal of the court,” but it also provided that “A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate, but it need not be under seal.” The Committee Notes

¹At present, there is a significant difference between civil and criminal subpoenas. Unlike criminal subpoenas, civil subpoenas must generally be issued from the court in which the trial, hearing, deposition, or production of material will occur. *See* Federal Rule of Civil Procedure 45(a)(2)(A)-(C). However, a pending proposal to amend Rule 45 would provide for nationwide service, with some limitations applicable only to trial subpoenas. The proposed limitations on nationwide service reflect concerns related to the abuse of civil trial subpoenas that have no clear counterpart in criminal practice.

If the Advisory Committee decides to undertake an in depth review of the proposal to amend Criminal Rule 17, we have suggested at the conclusion of this memorandum that it would be appropriate to appoint a subcommittee to review any practical concerns; that subcommittee could consider any pertinent issues that have arisen in the civil context.

accompanying the restyling state that the changes were intended to be stylistic not substantive except as noted, and they contain no explanation of the deletion of the provision concerning subpoenas issued by magistrate judges.

3. How would an amended rule alleviate the concern

The Working Group has suggested that the requirement that the subpoenas contain the court's seal is unnecessary. Although they did not make this point explicit, it appears that their suggestion would bring the Criminal Rules in line with Civil Rule 45, and might have the advantage of reducing the clerks' workload.

4. The advantage and disadvantages of requiring uniformity on the matter

The current rule imposes a uniform rule.

5. Any legal concerns with rule action

Amending Rule 17 to delete the requirement that subpoenas be under the court's seal requirement may create a conflict with 28 U.S.C. § 1691, but the adoption of Civil Rule 45 suggests an amendment of this nature would be regarded as a valid supersession under the Rules Enabling Act, 28 U.S.C. § 2072(a).

28 U.S.C. § 1691 states that "All writs and process issuing from a court of the United States shall be under the seal of the court and signed by the clerk thereof." It seems relatively clear that the issuance of either a civil or criminal subpoena is a judicial "process" in the sense contemplated by § 1691, but that provision was not regarded as a barrier to the elimination of the requirement of the court's seal in Civil Rule 45. At least one commentator has concluded that the amendment operated to supersede the statutory requirement for the court's seal. *See* David D. Siegel, *Fed. R. Civ. Proc. 45, Practice Commentaries, C45-5* (stating that a subpoena is court's "process," but requirement of a seal is one of "practice" 28 U.S.C. § 2072(a) and the amendment to Rule 45 superseded the statutory requirement under 28 U.S.C. § 1691).

6. Any practical concerns

If the Advisory Committee is interested in pursuing this issue, we recommend that the issue be referred to a subcommittee, which could consult with clerks of court as well as prosecutors and defense counsel to evaluate practical considerations and then, if warranted, develop a proposed amendment.

From: Jennie Allen/DCA/AO/USCOURTS
To: John Rabiej/DCA/AO/USCOURTS@USCOURTS
Cc: Peter McCabe/DCA/AO/USCOURTS@USCOURTS, Tim
Averill/DCA/AO/USCOURTS@USCOURTS
Date: 05/20/2010 01:59 PM
Subject: Forms Working Group request regarding F.R.Crim.P. 17

John,

At its last meeting, the Forms Working Group asked that we forward a request to the Criminal Rules Committee that it consider eliminating the requirement, stated in Rule 17(a), that a subpoena include the seal of the court. I do not know whether or how courts fulfill this requirement, but the group thought it was unnecessary.

Jennie Allen
Magistrate Judges Division
202/502-2514

TAB 7

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professor Sara Sun Beale, Reporter

RE: Grand Jury Oaths (10-CR-C)

DATE: September 18, 2011

Rule 6(c) provides that the foreperson (or deputy foreperson) “may administer oaths and affirmations and may sign all indictments.”

Mr. Eric Deleon has written to suggest that the rule should either spell out the precise wording of the oaths or provide a cross reference to the text in which the oaths are stated in full. He also requests information concerning the oaths.

Mr. Deleon’s letter provides no information suggesting that there is a problem, and no change in Rule 6 is recommended.

10-CR-C
(typed version of handwritten letter)

Eric Deleon
Southport Corr Fac
236 Bob Masia Dr
PO Box 2000
Pine City, New York 14871

June 3, 2010

The Honorable
Secretary, Committee on Rules
of Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Suggestions and Recommendations/Information Request

Dear Mr. or Madame Secretary,

Fellow Citizen, in the Federal Criminal Code and Rules 2010 Edition page A2 III. The Grand Jury, the Indictment and Information, Rule 6(c) Foreperson and Deputy Foreperson, the foreperson may administer oaths and affirmations and will sign indictments.

Suggestions and Recommendations

(1) Mr. Secretary and/or Madame it should be more information on the “oaths” the foreperson may administer such as word for word the oaths and rules the oath is under and/or the law books the oaths are in will disclose all information on oaths and laws that may authorize oaths.

(2) If I may receive any information on oaths and besides C.P.C. 200.30 who in the courts and/or government that have that information. I look to hear for you on this matter at your earliest possible opportunity.

I thank you in advance for your assistance and cooperation.

Yours, etc.
Eric Deleon (signed)
Eric Deleon
Secured Party, Creditor

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ERIC DELEON
 SOUTHPORT CORR FAC
 236 BOB MASIA DR
 P.O. Box 2000
 PINE CITY, NEW YORK 14871

JUNE 3, 2020

The Honorable
 Secretary, Committee on Rules
 of Practice and Procedure,
 Administrative Office of the
 United States Courts,
 Washington, D.C. 20544

Re: Suggestions and Recommendations / Information Request

Dear Mr. or Madam Secretary:

Fellow Citizen,
 in the Federal Criminal Code
 and Rules 2020 Edition Page 42
 III. The Grand Jury, The Indictment
 and Information Rule 6.(e)
 Foreperson and Deputy Foreperson.
 The Foreperson may administer
 Oaths and Affirmations and

Hon. Secretary
June 3, 2010

Pg #21

Will Sign All Indictments.

SUGGESTIONS AND RECOMMENDATIONS. (1.) MR SECRETARY/AND OR MADAM IT SHOULD BE MORE INFORMATION ON THE "OATHS" THE FOREPERSON MAY ADMINISTER SHOUT SUCH AS WORD FOR WORD THE OATHS AND RULES THE OATHS IS UNDER/AND OR LAW BOOK'S THE OATHS ARE IN THE WILL DISCLOSE ALL INFORMATION ON OATHS AND LAWS) THAT AUTHORIZE OATHS. (2.) IF I MAY RECEIVE ANY INFORMATION ON OATHS AND BESIDES C.P.L. 200.30 WHO IN THE COURTS/AND OR GOVERNMENT THAT HAVE THIS INFORMATION. I LOOK TO HEAR FOR YOU ON THIS MATTER AT YOUR EARLIEST POSSIBLE OPPORTUNITY.

Yours, ETC.,
ERIC DETEK

I THANK YOU IN ADVANCE ERIC DETEK
FOR YOUR ASSISTANCE AND SECURED PARTY,
COOPERATION. Creditor

TAB 8

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 24(b), Peremptory Challenges (11-CR-B)

DATE: September 28, 2011

This memorandum addresses a suggestion by Judge Robert Jones (D. Or.) to help contain costs by eliminating or reducing the number of peremptory challenges afforded by Rule 24(b). This memorandum provides background information intended to assist the Advisory Committee in determining whether to consider an amendment to Rule 24(b)'s provisions on peremptory challenges, and it recommends that the matter not be pursued at this time.

Judge Jones states that permitting 16 peremptory challenges may increase the overall cost of jury trials in federal courts, and he attaches a memo concerning juror utilization. Moreover, Judge Jones argues, the exercise of peremptory challenges is “insulting” and often used to excuse “the most intelligent jurors” for “no cause at all.” We interpret his letter to propose either eliminating peremptory challenges or reducing their number. Either change would require an amendment to Rule 24(b), which now allocates six peremptory challenges to the government and ten to the defense in criminal trials.

The Constitution does not mandate peremptory challenges, and whether to permit them and how many to permit is a highly controversial policy choice. Those calling for elimination or reduction of peremptory challenges have argued that such challenges are costly, undermine respect for the jury process, and perpetuate discrimination in jury selection. Those committed to preserving peremptory challenges have concluded that they are an essential tool for securing a fair trial.

Proposals to reduce the number of peremptory challenges continue to be discussed widely, and over the years several states have adopted or seriously considered cutting back on the number of peremptory challenges allowed parties in criminal cases.¹ The ABA in 2004 addressed the topic

¹ For example, in 1985, [Illinois Supreme Court Rule 434](#) was amended to reduce the number of peremptory challenges in criminal cases to seven in a felony case. In 2005, Georgia changed from 12-6 to 9-9. Two proposals were also recently considered but defeated in New Jersey and the District of Columbia: http://www.judiciary.state.nj.us/notices/reports/peremptory_voirdire.pdf (proposal to reduce number to 8 and 6); http://www.dcbart.org/for_lawyers/sections/criminal_law_and_individual_rights/peremptory.cfm (discussing proposal to reduce to 3 challenges per side in criminal cases). The issue was discussed in the *New York Times* and the *Wall Street Journal* in 2002: <http://www.nytimes.com/2002/03/20/nyregion/3-on-high-court-fault-peremptory->

in promulgating its Principles for Juries and Jury Trials, and after debate agreed on the following: “The number of peremptory challenges should be sufficient, but limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury, and to provide the parties confidence in the fairness of the jury.” ABA Principles for Juries and Jury Trials, Principle 11(D)(2). Commentary explained, “While the number should not be excessively large, it should not be limited to just one or two. Rather, there should be enough challenges ‘to protect the right to “unpick” the few jurors who don't feel right.’” ABA Principles for Juries and Jury Trials, Commentary. The number permitted parties in felony cases in the states is reported to range from four to twenty-five. David B. Rottman & Shauna M. Strickland, U.S. Dep't of Justice, *State Court Organization 2004*, at 233-37 tbl.42 (2006).

In the federal courts, the number of peremptory challenges allocated by Rule 24 to parties in felony cases has remained unchanged for more than sixty-five years. The original Rule 24 replaced 28 U.S.C. § 424, a statute that specified six peremptory challenges for the government and ten for the defendant. *See* Lester B. Orfield, *The Preliminary Draft of the Federal Rules of Criminal Procedure*, 22 *Tex. L. Rev.* 37, 65 (1943) (written by a member of the United States Supreme Court Advisory Committee on Rules of Criminal Procedure). The preliminary draft of the Rule had provided only six challenges for the defense and six for the government, but the Rule that was eventually enacted provided ten for the defense, mirroring the statute. *Id.*

Efforts to reduce the number of peremptory challenges allocated in Rule 24 have in the past been unsuccessful. In 1976 the Supreme Court actually approved an amendment to Rule 24(b) proposed by the Advisory Committee that would have given the defense and the government five challenges each, but Congress rejected the amendment. The House Report explained:

The testimony and statistics presented to it do not justify reducing the number of peremptory challenges, nor do they justify giving the prosecution and defense the same number of peremptory challenges in felony cases. . . . The basic problem seems to be in the voir dire procedures. The testimony before the Subcommittee on Criminal Justice indicates that in most Federal courts the judge conducts voir dire. Only rarely are counsel permitted to question prospective jurors directly. This makes it difficult for counsel to identify biased jurors and develop grounds to challenge for cause. As long as Federal courts rely upon judge-conducted voir dire, the committee believes that it is unwise to reduce the number of peremptory challenges. The rationale that reducing the number of peremptories will eliminate the systematic exclusion of certain groups of people is also unpersuasive. Since the number of defense peremptories was reduced more than the number of prosecution peremptories, that rationale seems to be bottomed upon an assumption that it is defense counsel who are using peremptory challenges systematically to exclude classes of people.

[challenges.html?src=pm](#) ; <http://online.wsj.com/article/SB123621836517136247.html>. *See also* Paula L. Hannaford-Agor & Nicole L. Waters, Nat'l Ctr. for State Courts, *Examining Voir Dire in California* 2-3 (2004) (discussing the efficacy of peremptory challenges and considering a reduction in the number of peremptory strikes). A Kentucky Commission debated the issue in 2009, *see* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges In Capital Jury Selection*, 15 *Mich. J. Race & L.* 57, 105 (2009), and the same year the Massachusetts Bar Association created a task force concerning peremptory challenges. <http://www.massbar.org/member-groups/committees--task-forces/peremptory-challenges-task-force>.

The testimony and statistics presented to the Subcommittee on Criminal Justice indicate that, on the contrary, it is the prosecution that most often uses peremptories in that fashion. More basically, it can be questioned whether it is desirable to introduce a proportionality notion into jury selection procedures. Finally, the committee is unpersuaded by the time rationale. The amount of time that might be saved by the proposed amendment is slight and does not, in itself, warrant making the change in the rule.

H.R.Rep. No. 95-195, 95th Cong., 1st Sess., 1977, pp. 7 to 8 (quoted in Wright, et al., *Federal Practice and Procedure Criminal*, § 379, at note 17).

An earlier proposal to reduce the number of challenges in Rule 24 was circulated in 1962 but was not forwarded to the Supreme Court. The Advisory Committee's proposed amendment would have amended Rule 24 to provide three peremptory challenges for the government and five for defendants in non-capital felonies. It was thought that this would "reduce the time consumed in selecting jurors and the costs of operating the jury system." Wright, et al. *Federal Practice and Procedure Criminal*, § 379, at note 14 (quoting Wright, *Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure*, December 1962, p. 20). The proposal was not repeated in the March 1964 Second Preliminary Draft nor in the recommendations finally made to the Supreme Court. *Id.*

Unless the Committee concludes that there is a serious problem with Rule 24 as it stands, we recommend that the Committee not enter the debate at this time.

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United States Court of Appeals
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, DC 20001-2856

David B. Sentelle
Chief Judge

July 6, 2011

Phone 202-216-7330
Fax 202-273-0174

Honorable Robert E. Jones
United States District Judge
1007 United States Courthouse
1000 S.W. Third Avenue
Portland, OR 97204-2902

Dear Judge Jones:

Thank you for your letter of June 24, 2011, concerning cost containment efforts in the judiciary. I will forward your letter to the appropriate committee and personnel so that they may take your suggestions into consideration.

Very truly yours,



David B. Sentelle

cc: Laura Minor, AO

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Chambers of
ROBERT E. JONES
United States District Judge

United States District Court

DISTRICT OF OREGON
1007 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

June 24, 2011

Hon. David B. Sentelle
Chief Judge
United States Court of Appeals
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W., Room 5108
Washington, D.C. 20001

Hon. Julia S. Gibbons
United States Court of Appeals
Clifford Davis and Odell Horton Federal Building
167 North Main Street, Room 970
Memphis, TN 38103

Re: Cost-Containment Efforts of the Judiciary

Dear Judges Sentelle and Gibbons:

I suggest a simple cost containment measure. Although we are trying only three percent of our criminal cases and not much of a percentage of our civil cases, we still waste a great deal of time in selecting and excusing jurors, particularly using 16 peremptory challenges in criminal cases.

There has been a great deal of academic criticism against any peremptory challenges. After all the jurors have already been screened and excused for hardship and cause, the result is often that the most intelligent jurors are excused for no cause at all. Of course many are called to serve but are not utilized. See attached memo on petit juror utilization.

The calling in of citizens for jury duty is a great inconvenience to them, and then to be disqualified for no discernible reason is insulting, if not incomprehensible. As you know, most courts no longer take challenges in open court in front of the jurors because those excused feel shunned. Instead we use a strike system out of the presence of the jury--often telling them in advance that they are not to feel bad if they are not selected because any challenges are without

June 28, 2011

Page 2

cause. I took this issue up with the Ninth Circuit Jury Committee and received no response. Granted, the savings may be de-minimis, but at least the savings would be justified.

Sincerely,

A handwritten signature in black ink, appearing to read "R. E. Jones", written in a cursive style.

ROBERT E. JONES
U.S. District Judge

Enc.

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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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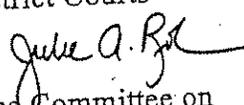
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Washington, DC 20544
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September 15, 2010

MEMORANDUM

To: Judges, United States District Courts

From: Judge Julie A. Robinson 
Chair, Judicial Conference Committee on
Court Administration and Case Management

RE: PETIT JUROR UTILIZATION STATISTICS

The percentage of jurors reporting for jury service but not selected, serving or challenged ("NSSC") has reached 40.1 percent according to 2009 statistics on petit juror utilization. This represents an increase of 2.2 percent from 2008 and is the highest percentage ever recorded. This means that more citizens have been put through the inconvenience of appearing for jury duty without ever truly participating in the process. As a result of these statistics, the Committee on Court Administration and Case Management at its June 2010 meeting took up the issue of petit juror utilization. After discussing the issue, the Committee agreed that, to improve awareness of best practices in juror utilization, the courts might benefit from a historical analysis of their juror utilization rates as part of an ongoing effort aimed at decreasing the number of prospective jurors who are "NSSC."¹

Attached are instructions for activating a chart indicating how your district's juror-usage rates have changed over the preceding ten years, and how those rates have

¹ The Committee undertook a similar effort in 2003, when the NSSC rate had also been steadily increasing. Courts' efforts to improve their juror usage following the Committee's earlier memorandum paid off considerably in 2004, with a decline in the NSSC rate nationwide by more than 3 percentage points. The decline resulted in a savings of over a million dollars and more than 16,000 potential jurors not being brought into the courthouse unnecessarily.

Petit Juror Utilization Statistics

compared with the national trend. In 1984, the Judicial Conference adopted a goal of 30 percent or less for jurors NSSC, but this goal has never been met. Until 1999, the average percentage fluctuated between 33 and 35 percent; since then, it has trended above 35 percent, and in 2009, as stated above, hit over 40 percent. The Committee noted, however, that this number does not indicate a widespread problem in jury management, since half of the districts saw a decline in their percentage of jurors NSSC. Rather, the increase was due to a few large courts, thereby increasing the overall NSSC rate. Nonetheless, the Committee believed that all courts might benefit from an analysis of their statistics.

There are several factors contributing to this increase that are outside a court's control, including an increase in high-profile or notorious trials and a decline in jury trials overall. However, the largest single factor in effective juror utilization is the number of jurors called for selection. Obviously, a court can significantly reduce this number by more accurately predicting the number of jurors needed to meet the court's needs, taking into account predictable excuses, undeliverable summonses, "no shows," and local circumstances.

Accordingly, the Committee encourages all courts, but particularly those with high percentages of jurors NSSC, to look carefully at the number of jurors they call for selection. If the number of jurors reporting greatly exceeds the number needed to serve, courts should consider reducing the number of jurors summoned. The Committee notes that some judges may call large pools for small cases or "over-summon" so as to avoid the risk of not having enough jurors; however, the Judicial Conference's approved utilization goal of 30 percent NSSC already contemplates that three in every ten jurors called will be reported as NSSC. Also, the Committee encourages courts to consider establishing a standard reasonable size range for jury panels in routine civil and criminal cases.

There are a number of practices that courts have used to improve juror utilization. They include consolidating or "bunching" trials so that they are scheduled to start only on specified days of the week, "pooling" or sharing a group of prospective jurors among several judges, and staggering trial starts throughout the jury selection day. Also, limiting the number of individuals called on any given day in notorious trials to those who can be *voir dire*d, either individually or as a group, helps maximize juror utilization. These practices and other techniques are discussed in detail in "Petit Juror Management Practices" (AO, 1985, rev. 1999). In addition, you may want to contact David Williams of the District Court Administration Division at 202-502-1583 or by e-mail at David.S.Williams/DCA/AO/USCOURTS for further information about effective juror utilization techniques.

The Committee has also asked the Federal Judicial Center to consider resuming its juror utilization and management workshops. As with past workshops offered, those courts invited will be able to send a judge and staff team to discuss such jury management and

Petit Juror Utilization Statistics

utilization topics as size of jury pools, jury selection in notorious cases, juror satisfaction, and legal issues. For more information, contact Richard Marshall at 202-502-4120 or by e-mail at rmarshall@fjc.gov.

Controlling the size of jury pools and individual jury panels can improve a court's juror utilization rate, reduce costs to the courts, and ease burdens on jurors and jurors' employers. Accordingly, the Court Administration and Case Management Committee encourages you and the other judges in your court to review your jury selection practices and to identify measures you can take to make better use of jurors.

Attachments

cc: Chief Judges, United States Courts of Appeals
Circuit Executives
District Court Executives
Clerks, United States District Courts

PERCENTAGE OF JURORS NOT SELECTED, SERVING OR CHALLENGED
2000-2009
(Instructions for Activating the Chart)

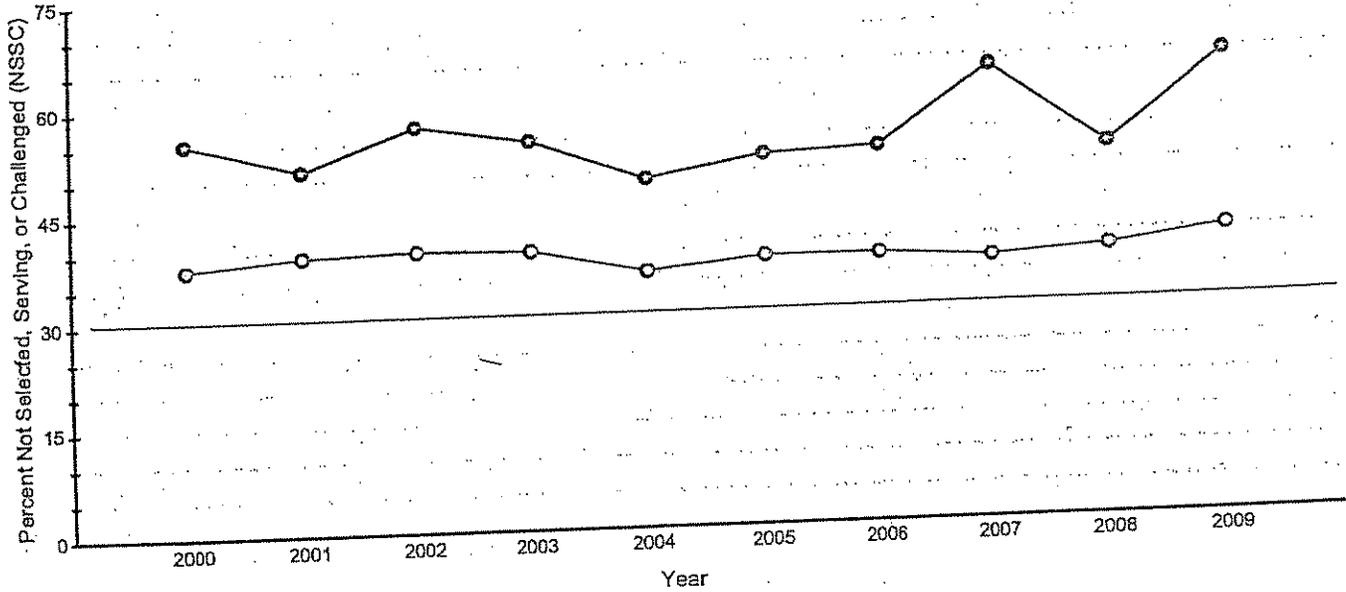
- To activate the chart, choose "trust this document one time only" from the yellow security bar at the top of this Adobe Acrobat file (if you closed the yellow bar when opening this document, you can bring it back up by clicking the red "X" in the left-hand side toolbar of Adobe Acrobat).
- Click anywhere on what appears to be a blank page and you should soon see an interactive presentation.
- You can navigate the presentation by selecting any district or circuit from the drop-down box in the upper left corner of the slide; doing so will update the chart and the table below with data from the chosen circuit or district.
- The graph is interactive – each data point can be moused over for the precise values for the district, the relevant circuit average, and the U.S. average.
- You can use the "print" button at the bottom of the chart (the chart will not print from Adobe Acrobat directly) if you prefer a hard copy.
- If you have any questions about the chart or encounter problems getting it to work, please contact Kevin Scott/DCA/AO/USCOURTS of the Statistics Division for assistance.

Select A Circuit or District

DC Circuit

Percentage of Jurors Not Selected, Serving, or Challenged (NSSC), 2000-2009

DC Circuit



■ DC Circuit ● Circuit Average ○ U.S. Average
 Solid Line Indicates Judicial Conference Standard

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
DC Circuit										
Circuit Average	55.4	51.3	57.2	54.8	49.1	52.1	52.8	63.6	52.3	64.7
U.S. Average	37.7	39.2	39.6	39.3	36.1	37.8	37.7	36.8	37.9	40.1

TAB 9

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Proposed New Rule Summary Judgment (11-CR-A)

DATE: September 18, 2011

This memorandum addresses a suggestion from Assistant Professor Carrie Leonetti of the University of Oregon School of Law for an amendment that would “empower U.S. District Courts to grant summary judgment for the defense, in essence a pretrial judgment of acquittal, whenever there exist no genuine issues of material fact and no rational trier of fact could find the essential elements of the crime(s) charged beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution, or when disposition of the case involves only a question of law.” Leonetti’s article, “When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases,” 84 *S. Cal. L. Rev.* 661 (2011), is provided at the end of this memorandum. In light of the Advisory Committee’s recent decisions not to move forward with amendments to Rule 16 and 29, we conclude that a detailed study of the Leonetti proposal should not be undertaken at this time.

1. Summary of the article

Leonetti argues that the Federal Rules of Criminal Procedure provide insufficient protection to defendants because they contain no provision authorizing *pretrial* judgments of acquittal. The introduction to Leonetti’s article summarizes its contents and contains her statement of the problem, its relationship to an existing rule, and how the amended rule she proposes would address her concerns:

Part II discusses the rationales that underlie the creation of summary judgment in civil cases. Part III surveys the existing mechanisms for summary disposition of criminal charges: pretrial motions to dismiss, preliminary hearings, and grand jury proceedings. This part explains why none of these mechanisms can provide relief to a defendant in a case in which the prosecution has pleaded sufficient facts to constitute a crime but lacks sufficient evidence to prove the charges.

Part IV surveys the existing alternatives to a jury trial in criminal cases--the mid- or posttrial motion for judgment of acquittal and the stipulated bench trial--and argues that the inadequacies of each of these alternatives, in conjunction with the legal standards governing pretrial detention, prosecutorial charging discretion, and a defendant's right to a speedy trial, make it likely that a defendant could spend years in pretrial detention awaiting trial on a charge for which the prosecution cannot secure conviction with no mechanism to secure release.

Part V outlines the proposal that courts should have the authority to grant summary judgment prior to trial for the defense in a criminal case. It argues that if the prosecution is incapable of mustering a legally sufficient case on one or more essential elements, no legitimate purpose is served by waiting until the close of the prosecution's evidence to grant a judgment of acquittal or by sending a legally insufficient case to the jury and risking a guilty verdict stemming from jury confusion or vindictive nullification. This part discusses in detail recent high-profile criminal cases in which the prosecution had probable cause but not proof beyond a reasonable doubt of guilt, and whose outcomes could have been improved had a pretrial summary judgment mechanism existed to dispose of the charges without lengthy pretrial proceedings (and, in one case, wrongful conviction). It argues that the efficiency and judicial economy rationales for summary judgment in civil cases apply equally, if not more forcefully, in the context of criminal cases, and posits additional rationales for employing defensive summary judgment that are unique to the criminal justice system.

Part VI sets forth examples in which trial courts have granted summary judgment to a criminal defendant despite lacking the authority to do so (usually while purporting to do something else, like granting a motion to dismiss) and discusses the ramifications of such inadvertent grants of summary judgment for subsequent proceedings. Part VII discusses the double jeopardy ramifications of the current proposal and asserts that it is likely that a trial court's granting of a defense motion for summary judgment would function as an acquittal in form and substance because the court would be, in effect, acquitting a defendant of the offense charged prior to trial by resolving factual questions pertinent to guilt or innocence.

Part VIII discusses the impact that the present proposal would have on pretrial discovery practices and argues that the creation of a defense motion for summary judgment would necessarily accelerate the timing of the prosecution's disclosures, give additional meaning to the Brady requirements, and thereby improve the quality of justice.

Id. at 669-70.

2. Recommendation

In light of the Advisory Committee's recent decisions not to amend Rules 16 and Rule 29, we recommend that the Committee not undertake a detailed study of the Leonetti proposal at this time.

Addressing the proposal would essentially reopen the Committee's debate on whether to expand pretrial disclosure requirements (albeit in the context of a new rule instead of Rule 16). The proposal appears to be inconsistent with the Jencks Act. In order for the government to respond to a summary judgment motion before trial, it would have to submit sufficient proof on each element to show a factual dispute for trial. Indeed, the author hopes that the proposal would require disclosure of witness statements by the prosecution in advance of each plea: "Because the existence of a motion for summary judgment by the defense would prevent the prosecution from masking its overcharging with a favorable plea offer, the prosecution would have no choice but to disclose favorable information in time for the defense to make a more accurate decision regarding a plea, trial, and sentencing." *Id.* at 710. Professor Leonetti does not mention or cite the Jencks Act.

The proposal also seems to call for a modification of the concept of "acquittal." Professor Leonetti argues, "The purpose underlying the Double Jeopardy Clause would be best served if a grant of summary judgment to a defendant were to function as an acquittal." Under existing law, rulings on the sufficiency of proof *before trial* are not acquittals. Any new evaluation of proof prior to trial under this proposal is likely to be treated for double jeopardy purposes something like a preliminary hearing with a very demanding burden of proof. If a new Rule on summary judgment were to assign to an order of summary judgment the same preclusive effect carried by an acquittal, it would be a significant and controversial modification of existing law.

The proposal would also reopen the question whether the court's power to enter a judgment of acquittal should be restricted, rather than expanded. From 2003 to 2007 the Advisory Committee considered a proposal by the Department of Justice to amend Rule 29 to restrict the court's power to grant acquittals that would not be subject to appellate review because of the Double Jeopardy Clause. In 2007, after reviewing hearing testimony and comments responding to the publication of a proposed amendment to Rule 29, the Advisory Committee decided not to forward the proposed change to the Standing Committee. The lengthy and detailed consideration of this amendment revealed deeply divided views on the Committee over the propriety of granting a judge any unreviewable authority to acquit - even after the government has had an opportunity to present its case at trial. Consideration of this proposal to create a new, additional preclusive ruling prior to trial would require plowing much of the same ground.

Because pursuing the proposal at this time seems inconsistent with the Advisory Committee's recent actions, we have not undertaken a full review of other issues it raises.

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UNIVERSITY OF OREGON
School of Law

13 June 2011

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

Dear Mr. McCabe:

Enclosed please find my most recent article entitled, "When the Emperor Has No Clothes," which argues that the Federal Rules of Criminal Procedure should be amended to empower U.S. District Courts to grant summary judgment for the defense, in essence a pretrial judgment of acquittal, whenever there exist no genuine issues of material fact and no rational trier of fact could find the essential elements of the crime(s) charged beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution, or when disposition of the case involves only a question of law. Thus, the defendant would not need to wait until the case was fully tried, but could seek a final adjudication of the action by pretrial motion.

Best wishes,

A handwritten signature in black ink, appearing to read "CL", written over a white background.

Carrie Leonetti
Assistant Professor of Law

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Southern California Law Review
March, 2011

Article

***661 WHEN THE EMPEROR HAS NO CLOTHES: A PROPOSAL FOR DEFENSIVE SUMMARY JUDGMENT IN CRIMINAL CASES**

[Carrie Leonetti \[FN1\]](#)

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“Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement.” [FN1]

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DEFENSIVE SUMMARY JUDG-
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***662** I. INTRODUCTION

When combined, three doctrinal areas of criminal adjudication create a perfect storm for the long-term, unreviewable pretrial detention of individuals who are not only presumed innocent as a constitutional matter, but who may also, in fact, be innocent (or, at least, whose guilt cannot be proven beyond a reasonable doubt). The first of these doctrinal areas is that governing pretrial detention--more specifically, the preventive detention of an individual who has been charged with a crime pending trial on the charge because of concerns that the individual may pose a danger to the community in the interim. In *United States v. Salerno*, [FN2] the Supreme Court upheld the constitutionality of the Federal Bail Reform Act of 1984 ("BRA") [FN3] in the face of a number of constitutional challenges--most importantly for the purpose of this Article, substantive and procedural due process challenges. The BRA permits the detention of individuals charged with certain enumerated offenses pending trial on the basis of their future dangerousness. [FN4] The finding of future dangerousness is made on a case-by-case basis, but the court's jurisdiction to make such a finding is offense triggered. [FN5] If an individual is charged with certain offenses involving drug trafficking or a minor victim, the statute provides for a rebuttable presumption of the individual's dangerousness (and therefore, detention). [FN6] If an individual is charged with an offense that is a crime of violence; that has a maximum sentence of life imprisonment or death; that involves drug trafficking, a minor victim, or possession of a dangerous weapon; or with any felony if the defendant has a serious prior conviction, the statute provides that he or she may be detained pending trial as a danger to the community on motion of the government, if the government proves the risk of danger by clear and convincing evidence. [FN7]

***663** In *Salerno*, the petitioner challenged the BRA's pretrial detention scheme under the Eighth Amendment's Excessive Bail Clause and the Due Process Clause of the Fifth Amendment. [FN8] The due process challenge was a facial challenge rather than an as-applied one for a very simple reason: the petitioner, Anthony "Fat Tony" Salerno, was precisely the type of defendant to whom the new statute was meant to be applied; he was the boss of the Genovese crime family and an accomplished hit man. [FN9] The Court rejected the Eighth Amendment challenge on the ground that the prohibition against excessive bail did not prohibit the denial of bail. [FN10] The Court rejected the procedural due process challenge on the basis of the statute's many procedural safeguards, particularly its provision of a full adversarial hearing before a neutral decisionmaker:

In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. . . . [N]umerous procedural safeguards . . . attend this adversary hearing. [FN11] The Court rejected the substantive due process challenge on the ground that the statute's pretrial detention regime

was neither punitive nor excessive in relation to Congress's regulatory goal of preventing danger to the community, which the Court held could outweigh an individual's liberty interest. [FN12] In rejecting Salerno's facial challenge, however, the Court left open the possibility of a future as-applied challenge (presumably by a more sympathetic defendant). What the Court did not decide was at what point in any particular case pretrial detention could become excessive and therefore punitive, preferring instead to outline several rather extreme analogous situations, some of which exemplified instances when pretrial detention would be permitted and others when it would be prohibited. [FN13] Under the BRA, there are several factors that courts look at when making *664 their pretrial detention determination: the nature and circumstances of the offense charged, the weight of the evidence, the danger to the community posed by release, and the history and characteristics of the defendant (family ties, employment, community ties, financial resources, history of drug and alcohol abuse, criminal history, and so forth).

As a practical matter, however, courts tend not to look at the strength of the evidence against a particular defendant in making their detention determinations because of the nature of the detention proceedings: they are usually relatively quick, not governed by the rules of evidence, occur at an early stage in the proceedings when the judge and the parties have incomplete information (it is not uncommon for a defendant to be represented by a “duty” defender or to meet his or her permanent attorney for the first time at or immediately before a detention hearing), and judges are hesitant to turn a detention hearing into a miniature trial on the merits.

The second doctrinal area is the Court's speedy trial jurisprudence, particularly the recent case of *Vermont v. Brillon*. [FN14] The dominant standard for assessing the constitutionality of postaccusation delay was established in *Barker v. Wingo*, [FN15] in which the Supreme Court announced a balancing test to determine whether a defendant has been deprived of the right to a speedy trial. The Barker test factors are (1) the length of the delay; (2) the reason for it; (3) what actions the accused took to assert his or her right to a speedy trial; and (4) whether the delay caused prejudice to the accused. [FN16] In *Brillon*, the defendant was arrested for allegedly assaulting his girlfriend. [FN17] The chronology of his court-appointed representation was convoluted. He fired his first lawyer, asserting that the lawyer was not adequately prepared; his second lawyer withdrew due to a conflict of interest, discovered several months into his representation of Michael Brillon. He attempted to fire his third lawyer, again asserting that the lawyer was not adequately prepared, who withdrew after he threatened him; his fourth attorney was assigned to his case for five months, during which time the attorney asked for multiple continuances to “prepare” but actually did little to no work on Brillon's case until his employment contract with the public defender's office expired. Brillon's fifth attorney was assigned two months later and withdrew four and a half months after that, also having done little to no work on Brillon's case, because of a deleterious change in his contract with *665 the public defender's office. [FN18]

At that point, Brillon had been incarcerated “pending trial” for approximately two years. He was then without counsel for another four months, until his sixth and final attorney was assigned to the case. [FN19] Despite the already significant delay up to that point, the parties stipulated to several more continuances before Brillon's trial was actually held. [FN20] After almost three years in pretrial detention, Brillon was convicted of felony domestic violence. [FN21] On appeal, neither party questioned the application of *Barker* to the pretrial delay. Rather, the contested issue was who was to blame for the denial of a speedy trial--Brillon and his many attorneys or the state. [FN22] The Vermont Supreme Court found that the delay was primarily attributable not to Brillon but to Vermont's system of provision of court-appointed counsel, and therefore, to the state for speedy trial purposes. [FN23] The court found that the majority of the delay had been caused by the assigned lawyers' inaction and a breakdown in the public defender system. [FN24] In other words, the delay was really caused by the state's failure to provide adequate representation, which was ultimately the result of systemic underfunding of its public defense system. The Supreme Court reversed, applying an agency theory to attribute any delay caused or requested by defense counsel to the defendant personally, because defense counsel was the defendant's agent and therefore sought continuances on Brillon's behalf. [FN25] The result of *Brillon* is that at least some neutral

reasons for delay count against a defendant in the sense that they do not give rise to a speedy trial violation.

***666** The third doctrinal area is that regulating (or, perhaps more appropriately, not regulating) prosecutorial charging discretion. As a practical matter, prosecutorial charging discretion is virtually unlimited and unreviewable--particularly in the context of decisions about whether, when, and what charge to bring or dismiss--unless a defendant or other petitioner can prove both a discriminatory or retaliatory motive and actual prejudice stemming from a charging decision. [FN26] Of course, there are ethical limitations on prosecutorial charging decisions. For example, the American Bar Association's ("ABA's") Model Rule 3.8(a) prohibits prosecutors from prosecuting charges that they know are not supported by probable cause (a notoriously low standard). [FN27]

The combination of these three strands of doctrine means that (1) it takes only probable cause as a constitutional and ethical matter for a prosecutor to bring and maintain a charge against a defendant and, unless the charge is brought or maintained with a discriminatory motive in violation of the Equal Protection Clause, the charging decision is essentially unreviewable; (2) it takes only a charge for a defendant to be detained pending trial, with little to no consideration of the strength of the supporting evidence; and (3) delays resulting from the administration of a public defense system count against the defendant, at least when they result from staffing and caseload issues, in a speedy trial claim.

One reason courts tend to be relatively unconcerned about lengthy terms of pretrial detention is the high likelihood (in the aggregate) that most incarcerated defendants will ultimately be found guilty and will receive credit toward their ultimate sentences for the time they served in pretrial detention. This logic becomes problematic when the prosecution has a weak case against a defendant who is being detained pending trial, an increasingly prevalent occurrence in an era of overcharging. [FN28]

***667** This occurs primarily in three different types of scenarios. In the first, the prosecution has simply failed to plead a legally sufficient case ("pleading cases"). In the second and third, the prosecution has pleaded correctly, but either its theory of the defendant's guilt is based on a misunderstanding of the governing law ("legal-question cases"), or the evidence to support the charges is legally insufficient for conviction--that is, the prosecution has alleged facts in the charging document for which it has probable cause but cannot prove beyond a reasonable doubt at trial ("sufficiency cases"). This third category of sufficiency cases can itself be broken into two categories: cases in which the prosecution's evidence is legally insufficient under *Jackson v. Virginia* [FN29] ("legal-insufficiency cases"), and cases in which the prosecution's evidence is legally sufficient but not strong enough as a practical matter to actually convince any given jury of twelve citizens.

For example, imagine that the prosecution wishes to charge Jane Defendant with identity theft for using the identity Jane Innocent. "Identity theft" is defined as "knowingly . . . us[ing] . . . a means of identification of another person." [FN30] The another-person element is specific intent--that is, in order to be guilty, not only must Jane Innocent be a real person, but also Defendant must have known that at the time of the offense. In the first scenario (a pleading case), the prosecution charges Defendant with using the means of identification of another person--to wit, Jane Innocent--but does not allege that Defendant knew that Innocent was a real person. In the second scenario (a legal-question case), the prosecution charges Defendant with using the means of another person--to wit, Jane Innocent--when she knew or should have known that Innocent was a real person. The prosecution's incorrect legal theory is that even if Defendant did not know that Innocent was a real person, she should have known; the prosecutor has pleaded actual and, in the alternative, constructive knowledge. In the third scenario (a legal-insufficiency case), the prosecution has charged Defendant with using the means of another person--to wit, Jane Innocent--knowing that Innocent was a real person, but has very little evidence to back up its claim on the knowledge element of the offense.

***668** In all jurisdictions, the first case (the pleading case) can presently be disposed of with a pretrial motion to dismiss, for example, under Rule 12 in federal court. [FN31] In most if not all jurisdictions, the second case likely can as well--at least in practice, even if the rules do not expressly allow such a motion (that is, because the prosecution has charged actual and constructive knowledge, the result of a motion to dismiss should be striking the “should have known” language, but leaving for a jury's determination whether Defendant actually did know that Innocent was a real person--in essence, converting the prosecution's case from a pleading case to a sufficiency case). This Article is concerned with the third scenario, one in which the prosecution has pleaded the charge sufficiently and has probable cause to support it, but simply lacks legally sufficient evidence to sustain it. In the interim between charging and trial, enormous amounts of resources are expended by the court, prosecution, and defense for the sake of pretrial litigation, discovery, investigation, and trial preparation.

As a practical matter, this scenario tends to occur in three broad categories of cases: (1) when the defendant's conduct at issue is outrageous and often high profile, but not necessarily illegal; (2) when the prosecution has probable cause to believe that the defendant has committed the charged offense but cannot quite prove so beyond a reasonable doubt, particularly when the crime for which the defendant is a suspect is a serious one; and (3) after a defendant has won a motion to suppress or exclude certain inculpatory evidence prior to trial or on appeal, depriving the prosecution of some of the evidence necessary to prove guilt beyond a reasonable doubt. [FN32] There is even a colloquial expression among defendants and criminal practitioners for the time spent by the defendant in pretrial detention in these scenarios--“doing D.A. time.” [FN33]

The rules of criminal procedure are meant to ensure simple procedures and the fair administration of justice and to eliminate unjustifiable expense and delay. [FN34] Nonetheless, it is a matter of black letter law that trial courts lack the subject matter jurisdiction to grant summary judgment or ***669** otherwise direct a verdict prior to trial for either party in a criminal case. [FN35] The power that trial courts have to direct verdicts in criminal cases (of acquittal only, for constitutional reasons discussed in greater detail in this Article) arises only after the commencement of trial, at the close of the prosecution's case, [FN36] at the close of the defendant's case, [FN37] or, under more limited circumstances, after the jury has rendered a guilty verdict. [FN38] This Article does not dispute this proposition as a descriptive matter. Rather, it argues that this proposition should no longer be true as a normative matter.

Part II discusses the rationales that underlie the creation of summary judgment in civil cases. Part III surveys the existing mechanisms for summary disposition of criminal charges: pretrial motions to dismiss, preliminary hearings, and grand jury proceedings. This part explains why none of these mechanisms can provide relief to a defendant in a case in which the prosecution has pleaded sufficient facts to constitute a crime but lacks sufficient evidence to prove the charges. Part IV surveys the existing alternatives to a jury trial in criminal cases--the mid- or posttrial motion for judgment of acquittal and the stipulated bench trial--and argues that the inadequacies of each of these alternatives, in conjunction with the legal standards governing pretrial detention, prosecutorial charging discretion, and a defendant's right to a speedy trial, make it likely that a defendant could spend years in pretrial detention awaiting trial on a charge for which the prosecution cannot secure conviction with no mechanism to secure release.

Part V outlines the proposal that courts should have the authority to grant summary judgment prior to trial for the defense in a criminal case. It argues that if the prosecution is incapable of mustering a legally sufficient case on one or more essential elements, no legitimate purpose is served by waiting until the close of the prosecution's evidence to grant a judgment of ***670** acquittal or by sending a legally insufficient case to the jury and risking a guilty verdict stemming from jury confusion or vindictive nullification. This part discusses in detail recent high-profile criminal cases in which the prosecution had probable cause but not proof beyond a reasonable doubt of guilt, and whose outcomes could have been improved had a pretrial summary judgment mechanism existed to dispose of the charges without lengthy pretrial

proceedings (and, in one case, wrongful conviction). It argues that the efficiency and judicial economy rationales for summary judgment in civil cases apply equally, if not more forcefully, in the context of criminal cases, and posits additional rationales for employing defensive summary judgment that are unique to the criminal justice system.

Part VI sets forth examples in which trial courts have granted summary judgment to a criminal defendant despite lacking the authority to do so (usually while purporting to do something else, like granting a motion to dismiss) and discusses the ramifications of such inadvertent grants of summary judgment for subsequent proceedings. Part VII discusses the double jeopardy ramifications of the current proposal and asserts that it is likely that a trial court's granting of a defense motion for summary judgment would function as an acquittal in form and substance because the court would be, in effect, acquitting a defendant of the offense charged prior to trial by resolving factual questions pertinent to guilt or innocence. Part VIII discusses the impact that the present proposal would have on pretrial discovery practices and argues that the creation of a defense motion for summary judgment would necessarily accelerate the timing of the prosecution's disclosures, give additional meaning to the Brady requirements, and thereby improve the quality of justice.

In many ways, this is a modest proposal. Its adoption would alter the present system in only two significant ways: timing and preclusion. It would allow defendants facing properly pleaded but unsubstantiated charges to dispose of such charges sooner (that is, prior to trial rather than at the close of the prosecution's case). And, such dispositions would likely carry double jeopardy effects because a court's ruling that the prosecution's evidence is insufficient is at least a de facto acquittal not created by a pretrial dismissal on procedural grounds (for example, a case dismissed due to prejudicial precharge delay). Nonetheless, its effects on criminal adjudication could be significant: most importantly, it would provide criminal defendants with some leverage to force prosecutors to bring only those charges they can actually prove beyond a reasonable doubt.

*671 II. THE RATIONALES FOR CIVIL SUMMARY JUDGMENT

The rules of civil procedure authorize trial courts to grant summary judgment to either party in a civil proceeding when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. [FN39] A motion for summary judgment may be directed toward all or part of a claim, and it may be made on the basis of the pleadings or other portions of the record in the case, or supported by affidavits and outside materials. [FN40] The parties submit their evidence and legal contentions, and the judge determines summarily whether a bona fide issue of fact exists between the parties. [FN41] The nonmoving party asserting that a fact is genuinely disputed must support this assertion by "citing to particular parts of materials in the record," showing "that the materials cited do not establish the absence . . . of a genuine dispute," or showing that the moving party "cannot produce admissible evidence to support the fact." [FN42] If it cannot do so, the court must grant summary judgment to the moving party. [FN43]

The purpose of the summary judgment procedure is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." [FN44] In other words,

the motion for summary judgment challenges the very existence or legal sufficiency of the claim . . . to which it is addressed. In effect, the moving party takes the position that he [or she] is entitled to prevail as a matter of law because the opponent has no valid claim for relief . . . [FN45]

Civil summary judgment was designed as a mechanism for the speedy disposition of meritless claims or defenses and for simplifying "the ordinary long drawn out suit." [FN46] The procedure outlined in Federal Rule of *672 Civil Procedure 56 was intended to eliminate frivolous claims as well as claims that are unsupported or unable to be supported by any admissible evidence. [FN47] "Growing concern over cost and delay in civil litigation has focused increased attention on Rule 56 as a vehicle to implement . . . the just, speedy, and inexpensive resolution of [civil] litigation." [FN48]

Courts have described the purpose of summary judgment in a variety of ways. They have said that the rule is intended to “prevent vexation and delay,” [FN49] “improve the machinery of justice,” [FN50] expedite litigation and “promote the expeditious disposition of cases,” [FN51] and “avoid unnecessary trials where no genuine issues of fact [have been] raised.” [FN52] The objects of summary judgment in civil cases are, inter alia, to “[e]mpower [the] court summarily to determine whether a bona fide issue exists between the *673 parties” and “[r]equire [the] plaintiff to show that he [or she] has an arguable cause of action.” [FN53] Summary judgment has also come to be recognized as an effective case-management device to identify and narrow issues. [FN54] “Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties. It can offer a fast track to a decision or at least substantially shorten the track.” [FN55] Summary judgment

has operated to prevent the system of extremely simple pleadings from shielding claimants without real claims; in addition to proving an effective means of summary action in clear cases, it serves as an instrument of discovery in its recognized use to call forth quickly the disclosure on the merits . . . on pain of loss of the case for failure to do so. [FN56]

All of these rationales apply with equal if not greater force in the criminal law arena. In the context of civil summary judgment, the Supreme Court has noted the parallel between a court's ruling on a motion for summary judgment in a civil case and its ruling on a motion for judgment of acquittal in a criminal one: “In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt.” [FN57] Criminal cases can also be fraught with delay and are certainly costly--in terms beyond money--for their participants (defendants, victims, witnesses, judges, and juries). Why then should a meritless criminal charge be allowed to stand until the close of the prosecution's case or a legal dispute be resolved only at the time of jury instructions?

*674 III. EXISTING MECHANISMS FOR SUMMARY DISPOSITION OF CRIMINAL CHARGES

There are three existing mechanisms for summary pretrial disposition of criminal charges: the motion to dismiss, the preliminary hearing, and the grand jury, though not all of these are available in all criminal cases.

A. Pretrial Dismissal of Charges

The permissible grounds for dismissal of a charging document in a criminal case are very narrow. While a court can dismiss the charge if the charging document is insufficiently pleaded or fails to state a legally cognizable claim, [FN58] the only pleading requirement is that the indictment set forth a simple and direct statement of the crime charged. [FN59] A court's review of the sufficiency of the indictment is limited to the document's four corners. [FN60] All that is required for an indictment to constitute a legally sufficient pleading is that it sets forth the elements of the charged offense in factual terms, [FN61] with sufficient notice to the defendant of the charge against him or her, [FN62] and in sufficient detail to permit a later determination of what the prohibition against double jeopardy would preclude in a subsequent prosecution arising out of related acts or transactions. [FN63] A pretrial motion to *675 dismiss for failure to state a claim is addressed only to the pleadings (the charging document) and does not address whether there are material triable issues of fact in the case. [FN64] As such, the pretrial motion to dismiss cannot provide relief to a defendant in a case in which the prosecution has pleaded sufficient facts to constitute a crime but lacks sufficient evidence to prove the charges. [FN65] As the Supreme Court has explained in the context of pleading and civil summary judgment,

Before the shift to “notice pleading” accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and

prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of “notice pleading,” the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims . . . that are adequately based in fact to have those claims . . . tried to a jury, but also for the rights of persons opposing such claims . . . to demonstrate in the manner provided by the Rule, prior to trial, that the claims . . . have no factual basis. [FN66]

*676 The same critique about the inadequacy of the notice pleading regime to ferret out legally insufficient claims prior to trial applies in the context of the criminal pretrial motion to dismiss, but unlike civil defendants, criminal defendants presently have no procedure analogous to that of [Federal Rule of Civil Procedure 56](#) of which to avail themselves to replace formerly robust pretrial dismissal mechanisms.

The case of *United States v. Hayes* [FN67] offers a good example of how a motion to dismiss does not adequately address the insufficiency of the prosecution's evidence. Chante Hayes, a health care worker, was charged with conspiracy to commit health care fraud based on her role in signing fraudulent time sheets and bills that were submitted for Medicaid reimbursement. [FN68] Prior to trial, she moved to dismiss all counts of the superceding indictment on the ground that it failed to state an offense because it did not sufficiently allege the existence of provider agreements between the nursing home at which she worked and Missouri Medicaid. [FN69] The district court denied the motion, and the jury convicted her of one of the twelve counts with which she was charged. [FN70]

On appeal, the Eighth Circuit Court of Appeals rejected her argument that the district court erred in denying her motion to dismiss, finding that the indictment sufficiently alleged the offense with which she was charged, even though it ultimately agreed that the evidence adduced against her at trial was legally insufficient to establish that she knew her supervisor was falsifying documents or that she committed an act to further her supervisor's fraud, both necessary elements under the government's aiding and abetting theory. [FN71]

B. Preliminary Hearings and Grand Jury Proceedings

The purpose of a preliminary hearing is for the trial court to determine whether probable cause exists to bind a defendant over for trial. [FN72] Accordingly, the preliminary hearing serves as an independent screening *677 device for prosecutorial charging decisions from outside of the prosecutor's office. The preliminary hearing is conducted before the court (generally a magistrate judge), not before the jury. [FN73] The court acts as the trier of fact, considering the testimony, observing the witnesses during direct and cross-examination, and evaluating the credibility of the witnesses. In cases in which a grand jury indictment is not required, the preliminary hearing is the only determination of the sufficiency of the prosecution's evidence prior to trial. [FN74] The court may base its finding of probable cause entirely on inadmissible evidence, including hearsay or unlawfully obtained evidence. [FN75] If the court finds that probable cause is lacking, the court must dismiss the criminal complaint and discharge the defendant from the court's jurisdiction.

A preliminary hearing is not required if a grand jury indictment is obtained and filed prior to the scheduled hearing time. [FN76] There is a common *678 perception that the grand jury is a passive body that receives from the prosecution just enough evidence (usually in the form of unchallenged hearsay testimony) to satisfy the probable cause threshold, and that the grand jurors reflexively and without critical analysis vote to indict the defendant per the prosecutor's request—hence, the old expression that a grand jury would “indict a ham sandwich.” [FN77] The California Supreme Court has defined the grand jury's role as follows:

The prosecuting attorney is typically in complete control of the total process in the grand jury room: he calls the witnesses, interprets the evidence, states and applies the law, and advises the grand jury on whether a crime has

been committed. The grand jury is independent only in the sense that it is not formally attached to the prosecutor's office; though legally free to vote as they please, grand jurors virtually always assent to the recommendations of the prosecuting attorney Indeed, the fiction of grand jury independence is perhaps best demonstrated by the following fact to which the parties herein have stipulated: between January 1, 1974, and June 30, 1977, 235 cases were presented to the San Francisco Grand Jury and indictments were returned in all 235. [FN78]

There is a great deal of basis to this perception. Grand jury proceedings are secret and ex parte; no other attorneys, either for the defendant or witnesses, are permitted inside the grand jury chamber, and grand jurors are forbidden under penalty of contempt of court from disclosing anything that occurred while the grand jury was in session, even after the grand jury has disbanded. [FN79] The defendant has no right to offer *679 evidence, including his or her own testimony. [FN80] The prosecutor functions as the grand jury's legal advisor. [FN81] There are few constitutional barriers to a grand jury's reception of evidence; it can be based largely or entirely on non-cross-examined hearsay, [FN82] and unlike during a jury trial, constitutional exclusionary rules do not apply during grand jury proceedings. [FN83] The Grand Jury Clause of the Fifth Amendment requires only that the indictment be valid on its face; it does not allow a defendant or a court to question the evidence underlying it. There is no mechanism for a court to review, postindictment, the sufficiency of the evidence that was presented to the grand jury. [FN84] Prosecutors are not constitutionally required to tell juries about evidence of innocence, no matter how strong.

The real weakness of both the grand jury and the preliminary hearing from the perspective of the problem that this Article seeks to solve, however, relates to their respective burdens of proof. They cannot weed out cases with legally insufficient evidence because that is simply not what they were designed to do. Because they assess only the presence or lack of probable cause based on evidence that does not have to be admissible at trial, they cannot substitute for a court's determination of whether the admissible evidence is legally sufficient to go to trial. That determination must wait until the close of the prosecution's evidence. A ruling on a defendant's motion for summary judgment, on the other hand, would ask the question appropriate to resolving legal-insufficiency cases--whether there is sufficient evidence from which a reasonable trier of fact could find the defendant's guilt beyond a reasonable doubt--and this question can be answered only by resorting to evidence that would be admissible at a trial on the merits. [FN85]

*680 IV. TRIAL ALTERNATIVES

A. Judgments of Acquittal

Trial courts are empowered to grant mid- and posttrial judgments of acquittal under rules like [Federal Rule of Criminal Procedure 29](#). A court may grant a motion for judgment of acquittal when the evidence is legally insufficient to sustain a conviction [FN86] or when an acquittal is warranted on the basis of an issue of law for the court to decide. [FN87] Most federal courts of appeal articulate the standard for deciding whether to grant a motion for judgment of acquittal in a formulation similar to the following:

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. [FN88]

The genesis of codified rules like [Rule 29 of the Federal Rules of Criminal Procedure](#) is “somewhat obscure.” [FN89] “The motion for acquittal in the criminal trial and its civil counterpart, the motion for directed verdict, is the product of an evolutionary trend that has increased the supervisory role of the judge over the trial process.” [FN90] “The demurrer to the evidence was the first method by which a judge [by consent of the parties] could withdraw a civil case from the jury and decide it with finality” [FN91] Later, *681 the common law motion for nonsuit empowered the judge to dismiss an action on the motion of the defendant but allowed the plaintiff to reinstitute the suit. [FN92] “In the 19th century judges began to utilize the directed verdict in civil cases, granting final judgment on the motion of the defendant when the proponent’s case failed the test of sufficiency.” [FN93] The power of a court to grant a motion for judgment of acquittal for a criminal defendant was first exercised under common law in the late nineteenth century “and was probably influenced by these earlier developments in the civil trial.” [FN94] These first decisions cited no authority but apparently viewed the power to direct an acquittal as inherent in the judge’s supervisory role over the conduct of the criminal trial. [FN95] “The authority to direct acquittals also appears to have grown out of the courts’ concern with efficiency and judicial economy.” [FN96]

A trial court’s grant of a motion for judgment for acquittal is substantively identical to a grant of defensive summary judgment in a civil trial, except for its timing. [FN97] Under the rules of criminal procedure, a judgment of acquittal may not be entered until all pretrial procedures have been completed, the trial in due form has commenced, and at least the prosecution’s case-in-chief has been presented before the jury. Because a defendant cannot move for a judgment of acquittal until trial, many if not most criminal defendants are detained pending trial, and defendants who maintain not-guilty pleas and go to trial are generally sentenced more severely than defendants who agree to plead guilty prior to trial. The lack of a pretrial mechanism to determine the sufficiency of the prosecution’s case gives rise to a substantial risk that innocent defendants will agree to plead guilty prior to trial (and therein, long before the opportunity to seek a legal ruling on the sufficiency of the prosecution’s case) in order to secure their release from pretrial detention or avoid an enhanced sentence if their midtrial motions for judgment of acquittal are denied. [FN98] Even when a *682 defendant has the fortitude and resources to persevere to trial, by that point enormous amounts of resources have been expended by both parties on a case that is legally insufficient to proceed to a jury’s verdict.

B. Trials on Stipulated Facts

The parties, with the approval of the trial court, can stipulate to a bench trial and file an agreed statement of facts on which the judge can decide the case, in order to streamline trial and focus solely on truly contested issues. [FN99] Sometimes defendants also proceed by way of a stipulated court trial when there are no contested trial issues, allowing them *683 to preserve a pretrial issue for appellate review and expedite the appeal without forgoing sentencing credit under guidelines that reduce sentences for “acceptance of responsibility.” [FN100]

There are several drawbacks to the stipulated trial alternative, however. First, a defendant does not have the right to insist on one. In fact, a defendant cannot demand a court trial at all, at least not in federal court. In *United States v. Drew* (discussed in Part V), for instance, the court denied Lori Drew’s request to waive her right to a trial by jury and be tried before the court. [FN101] Even if a defendant had the right to demand a court trial, he or she is further powerless to exact the factual stipulations necessary from the prosecution. Presumably, prosecutors who bring criminal charges hold out at least some hope of sustaining them since they are ethically required to do so, even if such hopes sometimes turn out to be unrealistic. Sometimes referred to as “trial psychosis” among practitioners, this adversary’s bias (in the best-case scenario, or, in the worst, unethical maintenance of knowingly unsubstantiated charges in the hopes of engendering a favorable plea agreement) can make the parties’ task of reaching a stipulation about the facts difficult.

Second, stipulated court trials do not necessarily occur more quickly than jury trials on contested facts. After all, in most criminal cases, the bulk of the time between charging and trial is spent not on finding a jury and a courtroom but on investigation, discovery, motions litigation, and trial preparation, all of which still has to occur prior to a stipulated court trial.

Third, the stipulated court trial is a risky strategy for a defendant. Stipulating to the facts (presumably framed in the light most favorable to the prosecution, since a prosecutor is likely to consent to this streamlined process only under such a condition) underlying the prosecution's case-in-chief forfeits perhaps the defendant's most valuable trial advantage--the possibility that something unexpected will happen, such as a witness recanting, failing to appear, or coming across as incredible; an unexpected evidentiary ruling; jury nullification; or a trial court error that could be *684 reviewed on appeal. Conceding the best-case scenario for the prosecution is a high-stakes gamble for a defendant betting that the prosecution will not, in the final analysis, have a legally sufficient case. [FN102]

As a result of the inadequacies of each of the existing mechanisms for summary disposition of a criminal case based on charges that the prosecution lacks legally sufficient evidence to sustain, in conjunction with the legal standards governing pretrial detention, prosecutorial charging discretion, and a defendant's right to a speedy trial, it is likely, if not common, that a defendant could spend years in pretrial detention awaiting trial on a charge for which the prosecution cannot secure conviction with no mechanism to secure release.

V. THE PROPOSAL

There is no question that it would be unconstitutional for a court to grant summary judgment for the prosecution in a criminal case (or direct a verdict of guilt). [FN103] The question that this Article poses, however, is why should a court not have the authority to grant summary judgment prior to *685 trial for the defense in a criminal case when there is no constitutional barrier to its doing so?

Prosecutors have virtually unreviewable discretion in their charging decisions (absent discrimination or retaliation), including the decision to charge a defendant in the first instance, what crime to charge, and whether to dismiss or modify some or all of the crimes previously charged. [FN104] Prosecutors, who are generally either elected or appointed through political processes, often have motivations to charge defendants other than the strength of the evidence: the seriousness of the crime, the defendant's prior criminal record, pretrial publicity, the status of the complaining witness in the community, jury appeal, and preexisting prosecutorial priorities (for example, certain types of crimes that the office has committed to prosecute universally). Well-documented psychosocial phenomena, such as political distortion and irrational escalation of commitment, can contribute to erroneous charging decisions. [FN105]

The prosecution in a criminal case bears the burden of proving each essential element of the crime charged beyond a reasonable doubt. [FN106] If the *686 prosecution is incapable of mustering a legally sufficient case on one or more essential elements, what purpose is served by waiting until the close of the prosecution's presentation of evidence to grant a judgment of acquittal? Or by sending a legally insufficient case to the jury and risking a guilty verdict stemming from jury confusion or vindictive nullification? When the cost of going to trial and losing is very high for a defendant and the sentencing "discount" of pleading guilty substantial, even a defendant who is factually innocent of the crime charged may decide to plead guilty in an act of risk aversion. [FN107]

Prosecutors are particularly prone to overcharging in cases in which a potential defendant has engaged in highly unpopular or undesirable conduct that nonetheless falls short of constituting a crime. There are several recent high-profile examples of this. For instance, in the 2009 case of *United States v. Drew*, [FN108] the government charged Lori Drew

with conspiracy and aiding and abetting the unauthorized access of a computer in furtherance of the tort of intentional infliction of emotional distress, in violation of 18 U.S.C. § 1030, the federal computer fraud statute. [FN109] Specifically, the government charged that Drew and others had obtained a MySpace account [FN110] and created an online profile of a fictitious sixteen-year-old boy named Josh Evans to obtain information from a teenage female MySpace user, “M.T.M.,” and torment, harass, humiliate, and embarrass her, all in violation of the MySpace terms of service. [FN111] The government claimed that Drew’s actions had caused the girl to commit suicide. [FN112]

Drew filed a motion to dismiss the indictment for failure to state an *687 offense. [FN113] Specifically, the motion claimed that the government failed to allege that Drew had intentionally accessed a computer without authorization (two elements of the charged offense). [FN114] While Drew’s motion was ostensibly filed under the auspices of Rule 12, [FN115] the motion was in essence a motion for summary judgment based on uncontested facts. The primary defense arguments were that violating the MySpace terms of service did not constitute unauthorized access and that the government had failed to allege sufficient facts to show that any unauthorized access was intentional. [FN116] The defense recognized the government’s allegation that Drew and her coconspirators had agreed with one another intentionally to access a computer in violation of the publicly available MySpace terms of service, but asserted that the allegation was insufficiently supported because the government did not have evidence to establish that the conspirators had actual knowledge of the terms of service. [FN117] Probably because of this defense concession, the court took Drew’s motion to dismiss under advisement pending the trial, functionally converting it into a motion for judgment of acquittal.

Drew’s jury trial resulted in a partial conviction. [FN118] Approximately eight months and three posttrial hearings later, the court tentatively granted Drew’s posttrial motion for judgment of acquittal on the counts of conviction. [FN119] Approximately seven weeks after that, the court issued its written order granting Drew’s motion. [FN120]

Another example occurred in the now-infamous Duke lacrosse rape case. On the night of March 13, 2006, the captains of the Duke lacrosse team hosted a spring break “stripper party” in a rented off-campus house. [FN121] One of the two dancers who was sent to the party was Crystal Mangum. [FN122] Mangum had a history of psychological problems, including anxiety and *688 bipolar disorders, for which she had been prescribed antipsychotic medications. [FN123] By 11:40 p.m. on March 13, the approximate time Mangum arrived (the other dancer, Kim “Nikki” Roberts, had already arrived), there were approximately forty lacrosse players gathered at the house. [FN124] The women started dancing at midnight. [FN125] Mangum was stumbling and incoherent. [FN126] The tone of the party deteriorated. [FN127] Time-stamped photographs showed that the dancers stormed offstage at 12:04 a.m. on March 14. [FN128] Roberts wanted to leave, but Mangum preferred to stay to make more money. [FN129] The women left the house around 12:25 a.m., topless, taking their belongings and the toiletries kit of one of the lacrosse players, Dave Evans, with them. [FN130] At 12:26 a.m., Mangum made a call on her cell phone to an escort service for which she worked. [FN131] A time-stamped photograph appeared to show her smiling and attempting to get back into the house via the back door, but it was locked. [FN132] Another time-stamped photograph showed one of the players carrying an unconscious Mangum to Roberts’s car at 12:41 a.m. and helping her into the passenger seat. [FN133] Roberts drove Mangum to a nearby grocery store to get help, at which point a security guard called 911 at 1:22 a.m. [FN134]

Police responded, finding Mangum “just passed-out drunk.” [FN135] Mangum appeared to be unconscious, but police later concluded that she was faking because she began breathing through her mouth when an ammonia capsule was placed under her nose. [FN136] The police began to process Mangum for involuntary mental health commitment. [FN137] At the commitment facility, she told the intake nurse that she did not want to go to jail. [FN138] When the nurse asked her if she had been raped, in which case the *689 facility would not admit her, she nodded affirmatively. [FN139] Mangum had said nothing about rape to Roberts, the security guard, or the police in the ninety minutes prior to her mental health intake assessment, and her rape complaint saved her from involuntary confinement. [FN140] Mangum was in-

interviewed by several police officers, doctors, and nurses at the hospital where she was taken for sexual-assault assessment and treatment, and gave conflicting accounts of her alleged half-hour ordeal being gang raped by multiple lacrosse players, at one point recanting her rape allegation. [FN141] She insisted that her attackers had not worn condoms and had ejaculated during the assault. [FN142] The hospital took samples of biological evidence from Mangum's clothing, mouth, vagina, rectum, and pubic hair as part of its rape kit but found no physical evidence (bruises, bleeding, or tearing) consistent with Mangum's allegation of a brutal assault by multiple men. [FN143]

Three days later, Mangum returned to work at her regular strip club, bragging that she was “going to get paid by the white boys.” [FN144] When police interviewed Mangum again after her discharge from the hospital, her account contradicted all of her previous ones as to numerous details, including the number of rapists. [FN145] She gave uselessly vague descriptions and was unable to identify any of her alleged attackers out of a series of photo arrays. [FN146] When police finally interviewed Roberts six days after the alleged rape, she told them that Mangum's rape claim was a “crock” and that she had been with Mangum the entire time that she was at the party. [FN147] The state crime laboratory found no semen, blood, or saliva anywhere in or on Mangum and no DNA matching any lacrosse player in any of the samples taken from her. [FN148] A private DNA laboratory, however, found the DNA of four other men with whom Mangum had had earlier encounters, including her boyfriend, in the evidence from Mangum's rape kit. [FN149]

Despite the obvious and serious problems in the case, the Durham County District Attorney's Office sought and obtained a sealed grand jury indictment of two players, Reade Seligman and Collin Finnerty, for rape, *690 sexual assault, and kidnapping. [FN150] Both defendants had partial alibis. Phone company records showed that Seligman made “eight cell [phone] calls between 12:05 and 12:14 a.m., the last being to a taxi service.” [FN151] A taxi driver attested to picking Seligman up one block from the party house at 12:19 a.m. and driving him to an ATM; bank records and security video recorded him withdrawing cash at 12:24 a.m. [FN152] An electronic record showed that Seligman swiped into his dorm at 12:46 a.m. [FN153] Finnerty made and received eight cell phone calls beginning at 12:22 a.m. [FN154] Triangulation calculations made from cell tower records showed that he was walking outside away from the party house at the time that the calls were made. [FN155] A credit card receipt showed that Finnerty purchased food across campus at 12:56 a.m. [FN156] The grand jury never heard any testimony from Mangum, Roberts, or any lacrosse player, doctor, nurse, or other witness with personal knowledge of the events in question. [FN157]

Finnerty's attorney requested an accelerated trial date, but the court denied his request. [FN158] The grand jury subsequently indicted a third defendant, Evans. [FN159] Approximately one month after the first two indictments, the defendants had their first court hearing. [FN160] At that hearing, the court denied Seligman's request for a speedy trial and denied the defendants' request for open-file discovery. [FN161] At the second hearing approximately a month later, the court denied Seligman's request that it impose a discovery deadline on the state to facilitate a speedy trial. [FN162] More than six months after Evans's indictment, the defendants filed a joint motion documenting the substantial evidence of their innocence, particularly the exculpatory DNA results. [FN163] Approximately one month later, the state dismissed the rape charges against the defendants but left in *691 place the sexual assault and kidnapping charges. [FN164] The remaining charges were dismissed on the basis of “insufficient evidence” after an independent investigation by the North Carolina Attorney General's Office approximately one year after the first two defendants were indicted. [FN165] In announcing the dismissals, Attorney General Ray Cooper declared, in pertinent part,

In this case, with the weight of the state behind him, the Durham district attorney pushed forward unchecked. There were many points in the case where caution would have served justice better than bravado. And in the rush to condemn, a community and a state lost the ability to see clearly. . . . This case shows the enormous consequences of overreaching by a prosecutor. [FN166]

Of course, this dismissal by the prosecution was discretionary. Had the Attorney General's Office not stepped in and

acknowledged the writing on the wall, the defendants would have had no mechanism to force an early disposition of their charges, but rather would have had to wait until the close of the prosecution's case-in-chief to move for judgments of acquittal.

There are two primary problems with the current system. First, it lacks an official remedy for courts to employ when the prosecution charges an offense that it has no chance of proving. Many of the efficiency and judicial economy rationales for summary judgment in civil cases apply equally if not more forcefully in the context of criminal cases. Because the trial court can decide summary judgment motions in multiple criminal cases in less time than it would take to try a single one before a jury, the litigation of summary judgment motions should reduce the criminal court's trial calendar considerably. [FN167] This includes defense summary judgment motions that are denied because a denial of summary judgment, after the parties have disclosed their evidence, will induce the parties to agree more readily to settle their action or, at least, knowing each other's real evidence and contentions, to prepare for and conduct the trial more efficiently. [FN168] As such, criminal summary judgment could be a powerful docket-clearing device for overburdened courts. There are also rationales for employing defensive summary judgment that are unique to the criminal justice system. The availability of a pretrial summary judgment mechanism to the defense *692 could serve as a check on what is otherwise essentially unfettered prosecutorial discretion. It could significantly reduce the time spent in pretrial detention as well as the other burdens of being prosecuted for defendants whose guilt cannot be proven beyond a reasonable doubt. [FN169]

Second, when courts unofficially grant summary judgment to the defense under the guise of granting a motion to dismiss (probably compelled by the policy considerations outlined in the previous paragraphs), as discussed further in Part VI, the procedural posture of the case is rendered ambiguous, particularly in the context of a prosecutorial appeal of the dismissal and the prohibition against double jeopardy. [FN170]

Trial courts should be empowered to grant summary judgment for the defense--in essence a pretrial judgment of acquittal--whenever there exist no genuine issues of material fact and no rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution, or when disposition of the case involves only a question of law. [FN171] Thus, the defendant would not need to wait until the case is fully tried but could seek a final adjudication of the action by pretrial motion. [FN172] In this way, dilatory *693 tactics resulting from the charging of unfounded crimes could be defeated, the parties could be afforded expeditious justice, and some of the pressure on criminal court dockets could be alleviated.

Such a motion (and the prosecution's response) could be supported by affidavits, documents, live testimony, or other evidence sufficient for the court to determine whether the defendant is entitled to judgment. The proffered proof should be evaluated under the same standard as a motion for judgment of acquittal made during trial. [FN173] Even when there are no *694 disputes over the sufficiency of the evidence establishing the prosecution's facts that control the application of a rule of law, the court could utilize summary judgment to decide legal issues, such as an issue of statutory construction or constitutional interpretation, prior to trial (that is, prior to the formulation of jury instructions). [FN174] In this way, defensive summary judgment could be utilized in a criminal case to separate form from substance issues, eliminate improper allegations, determine what, if any, issues of fact are present for the jury to decide, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist. [FN175]

When evidentiary facts are in dispute, when the credibility of witnesses is an issue, or when conflicting evidence must be weighed, a trial is necessary. Such disputes should not be resolved on the basis of affidavits. When the question for decision concerns interpreting and evaluating undisputed evidence to drive legal conclusions, however, a jury trial is unnecessary. A court will ultimately rule on a defense motion for judgment of acquittal at the close of the evidence or

notwithstanding a guilty verdict; a defense motion for summary judgment only accelerates the timetable for that same decision.

The case of *Orloff v. Allman* [FN176] provides an example of how this criminal summary judgment mechanism would work. Several members of the Orloff family sued Sheldon Allman and several other individuals and business entities for civil securities fraud arising out of a real estate *695 development pyramid scheme. [FN177] The trial court granted summary judgment for one of the defendants, Edward Allen, a real estate developer who the Orloffs had alleged was liable as an aider and abettor of the other defendants. [FN178] Specifically, the Orloffs claimed that the developer received finders fees for the subject properties that he located, that they had invested in the scheme in part because of representations that the developer would be managing the investment properties, and that they assumed the developer was a knowing participant in the investment scheme. [FN179] The developer claimed that “he was responsible for finding properties, not for raising money, and that he did not know where Allman got the money to finance [the development]” [FN180] The trial court granted summary judgment prior to trial (of course), concluding that the Orloffs failed to make a legally sufficient showing to support their aider-and-abettor theory because they presented no evidence that Allen knew or was willfully blind to the fact of the securities fraud. [FN181]

Contrast *Orloff* with the criminal case of *United States v. Souder*. [FN182] The defendants were the leaders of a Free Mason lodge in North Carolina. They established a life insurance program for the older members of the lodge, through which the lodge owned the whole-life policies on the members, subsidized the premiums, and received a portion of the death benefit. [FN183] They were charged with mail fraud and honest-services fraud and aiding and abetting the same. [FN184] The government's theory was that the defendants had not been forthcoming with the members participating in the program about the financial benefit to the lodge of their participation and had induced those members to participate in the program with material omissions, in breach of their fiduciary duty as plan administrators. [FN185] All three defendants were released from custody pending trial and subjected to the supervision of the pretrial services office for more than a year while *696 awaiting trial. [FN186] One defendant, Marvin Chambers, had his travel restricted to the Western and Middle Districts of North Carolina pending trial. [FN187] William Souder was also ordered not to change his address, place of employment, or telephone number without the prior permission of pretrial services; to surrender his passport; to avoid all contact with the other two defendants; and had his travel restricted to the Northern District of Georgia. [FN188]

The defendants were convicted after a jury trial. [FN189] They moved for a judgment of acquittal notwithstanding the verdict [FN190] and a new trial [FN191] on the ground that the government had failed to meet its burden to prove the existence of a scheme to defraud, [FN192] the intent to defraud, the intent to breach or to aid and abet a breach of a fiduciary duty, or the foreseeability of the economic harm resulting from the breach of fiduciary duty. [FN193] The court granted the motion, agreeing that the jury verdicts were against the weight of the evidence because the government had failed to produce legally sufficient evidence of the defendants' criminal intent, and it conditionally granted the defendants' motion for a new trial on the honest-services and mail-fraud charges. [FN194] Because the judgment of acquittal was granted after and contrary to the jury verdict in the case, neither the Double Jeopardy Clause of the Fifth Amendment nor the doctrines of collateral estoppel or res judicata precluded a new trial on the same charges. [FN195]

*697 The only significant difference between *Orloff* and *Souder* is that *Orloff* was a civil fraud action and *Souder* was a criminal fraud action. The real significance of that difference, however, was that *Orloff* was able to dispose of the legally insufficient civil charges prior to trial on summary judgment, whereas the defendants in *Souder* were granted a judgment of acquittal only after a jury trial, preserving the government's right to retry them on the same charges. It is hard to imagine why the government should be entitled to multiple bites at the prosecutorial apple in a criminal fraud case that would not have proceeded past summary judgment had the case been a civil one.

VI. EXAMPLES OF INADVERTENT DEFENSIVE SUMMARY JUDGMENT

While trial courts are not currently empowered to grant summary judgment in criminal cases, sometimes they have inadvertently done so anyway. One example is *State v. Taylor*. [FN196] In *Taylor*, the Maryland Court of Appeals consolidated several criminal appeals to consider the question of “whether jeopardy attaches in a proceeding where a trial judge grants a pretrial motion to dismiss based on a finding of insufficiency of evidentiary facts beyond those contained within the ‘four corners’ of the charging document, i.e., criminal indictment or criminal information.” [FN197]

In petitioner Larry Bledsoe's case, Bledsoe and his codefendants were charged with conspiracy to commit public indecency. [FN198] Specifically, the state charged that the men conspired to have several women engage in nude dancing in a local theater. [FN199] Bledsoe filed a pretrial “Motion to Dismiss, or in the Alternative for Judgment of Acquittal.” [FN200] In support of his motion, Bledsoe argued that the theater in which the nude dancing had allegedly taken place was not “public” for the purposes of the public indecency ordinance that he allegedly conspired to violate. [FN201] Prior to the court's ruling on the motion, the state and Bledsoe stipulated that the “nude dancing took place in an enclosed building located in an industrial park,” the theater was a for-profit building that charged an admission fee, the *698 theater did not admit anyone under eighteen years of age, and the dancers arrived in costumes and did not undress until their performances. [FN202] The state also filed an opposition to Bledsoe's motion to dismiss, which included as an exhibit an advertising flyer for the theater “describing it as an adult entertainment theater” featuring “exotic all nude female dancers.” [FN203] The trial court granted Bledsoe's motion, applying statutory construction principles to conclude that the theater was not a “public place” under the statute. [FN204] On appeal, the circuit court concluded that the trial court had erred in dismissing the charges and remanded the matter for trial, rejecting Bledsoe's argument that doing so violated his double jeopardy rights. [FN205]

In the second of the consolidated cases, Donald Taylor was charged with soliciting unlawful sexual conduct under the state's child pornography statute, attempted sexual abuse of a minor, and attempted assault. [FN206] Taylor filed a pretrial motion to dismiss. [FN207] At the hearing on the motion, Taylor admitted a memorandum prepared by the Maryland State Police, stipulating that it was “an accurate and complete summary of the facts underlying the charges.” [FN208] According to the memorandum, Taylor had exchanged a series of email messages and online chats with a state trooper posing as a fifteen-year-old girl. [FN209] During these online interactions, Taylor instructed the fictional girl to masturbate and arranged to meet with her to have sex. [FN210] Taylor showed up for the meeting and signaled the undercover officer to come to his car. [FN211] When he was arrested, Taylor admitted that he had traveled to Maryland to have sex with an underage girl and that he had rented a hotel room and brought condoms for that purpose, admissions that were subsequently confirmed when the police executed a search warrant at the hotel room. [FN212]

In support of his motion to dismiss, Taylor argued that his conduct did not amount to a crime under the solicitation statute that he was charged with violating and that the doctrines of impossibility (because there was no *699 real minor involved) and mere preparation (that is, he had not taken a substantial step toward the completion of the sexual assault) precluded his conviction of the attempt charges. [FN213] The trial court granted Taylor's motion and dismissed the charges against him. [FN214] The court found that Taylor's online exchanges did not violate the child pornography statute, that it was legally impossible for Taylor to have committed the charged attempted sexual abuse, and that Taylor's conduct was mere preparation, not a substantial step toward the attempt crimes. [FN215]

In both cases, the state appealed the dismissals pursuant to statutes that permitted it to appeal a final judgment of dismissal in a criminal case. [FN216] The Maryland Court of Appeals held that the trial court in Bledsoe's case had erred by considering facts extrinsic to the charging document and that the trial court in Taylor's case had erred in rendering pretrial decisions on the sufficiency of the evidence; both trial courts had failed to limit themselves to a consideration of the

legal sufficiency of the charging documents on their faces. [FN217] The court of appeals held that, in granting the motions to dismiss, the trial courts had “exceeded the permissible scope of a motion to dismiss.” [FN218] The court concluded, however, that although the trial courts exceeded their authority to dismiss the charges, the dismissals “substantively constituted judgments of acquittal and therefore must be given effect as such for jeopardy purposes,” precluding the state’s appeal in either case. [FN219] In doing so, the court characterized the motions as having been “judgments of acquittal” that were “cloaked in the form of the grant of motions to dismiss.” [FN220]

*700 In sum, a criminal defendant charged with a crime for which the prosecution lacks legally sufficient proof of guilt presently has four options: (1) wait until the close of the prosecution’s case, at which point he or she can make a motion for judgment of acquittal; (2) plead guilty to a charge of which he or she is potentially innocent in order to get out of jail or to guarantee a lenient sentence; (3) agree to a stipulated bench trial, if possible, to speed up disposition of the case; or (4) file a (wink, wink) motion to dismiss, ostensibly on the ground that the prosecution has failed to charge (that is, plead) an offense--although really on the ground that the prosecution lacks legally sufficient evidence to sustain what is likely a sufficiently pleaded charge.

The drawbacks to the first two of these options are, hopefully, obvious. As discussed in Part IV.B, the third option is not always available to a defendant because it requires, among other things, that the parties agree on every material piece of evidence and is a risky strategy. In order to obtain the prosecution’s necessary consent to a court trial, a defendant would presumably have to stipulate to the version of the facts most favorable to the prosecution, thereby forfeiting much of the benefit of the reasonable doubt burden of proof in a criminal trial and waiving the right to appeal the court’s crediting of those stipulated facts. The fourth option is problematic because it does not actually exist. Not all courts will entertain a motion to dismiss on the ground of insufficient evidence, and they probably should not. Courts that do grant such motions create a procedural mess for subsequent proceedings, particularly if the prosecution wants to appeal the dismissal or recharge the defendant after obtaining additional incriminating evidence. [FN221]

VII. DOUBLE JEOPARDY RAMIFICATIONS

Under the Supreme Court’s recent double jeopardy jurisprudence, it is an open question whether the prohibition against double jeopardy bars the prosecution from appealing a trial court’s grant of summary judgment to the defense or from retrying a defendant if additional evidence were later discovered. On the one hand, if a defendant is acquitted after a stipulated bench trial or because a court has granted a mid- or posttrial judgment of acquittal, the Fifth Amendment, [FN222] and more specifically the doctrine of *701 *autrefois acquit*, would bar retrial and, in most circumstances, even an appeal by the prosecution of the acquittal. On the other hand, if a court finds that probable cause is lacking at a preliminary hearing, or a grand jury declines to issue an indictment, or a court grants a pretrial motion to dismiss charges on grounds other than insufficiency of the evidence, double jeopardy would not prevent the prosecution either from appealing the court’s ruling or from reinstating charges if additional evidence were discovered. [FN223]

In *United States v. Martin Linen Supply Co.*, the Supreme Court held that the Double Jeopardy Clause barred appellate review and retrial following a judgment of acquittal entered pursuant to [Federal Rule of Criminal Procedure 29\(c\)](#). [FN224] The Court unequivocally defined an “acquittal” for double jeopardy purposes by looking not to the form of the judge’s action, but rather to whether the judge’s ruling, “whatever its label, actually represent[ed] a resolution, correct or not, of some or all of the factual elements of the offense charged.” [FN225] The Court reasoned,

In the situation where a criminal prosecution is tried to a judge alone, there is no question that the Double Jeopardy Clause accords his determination in favor of a defendant full constitutional effect. See [United States v. Jenkins](#), 420 U.S. 358, 365-367 (1975). Even though, as proposed here by the Government with respect to a [Rule](#)

29 judgment of acquittal, it can be argued that the prosecution has a legitimate interest in correcting the possibility of error by a judge sitting without a jury, the court in *Jenkins* refused to accept theories of double jeopardy that would permit reconsideration of a trial judge's ruling discharging a criminal defendant. [FN226]

One year after *Martin Linen*, the Court revisited the issue of double jeopardy in *United States v. Scott*. [FN227] The district court had dismissed one count of Scott's indictment "based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish the guilt of the defendant." [FN228] The Supreme Court determined that the government's appeal of the dismissal was not *702 barred because the proceedings had been terminated on a basis unrelated to Scott's factual guilt or innocence. [FN229] The *Scott* opinion contrasted Scott's situation--a midtrial dismissal "on grounds unrelated to guilt or innocence"-- with an acquittal resolving guilt or innocence. [FN230] The Court stressed that "the law attaches particular significance to an acquittal . . . , however mistaken the acquittal may have been." [FN231] The Supreme Court's subsequent decision in *Smalis v. Pennsylvania* reinforced the limited application of *Scott* to situations involving dismissals unrelated to the sufficiency of the evidence. [FN232]

The Supreme Court recently revisited the question of the double jeopardy implications of granting a motion for judgment of acquittal in *Smith v. Massachusetts*. [FN233] Melvin Smith was tried before a Massachusetts jury on three related charges stemming from a shooting. [FN234] At the conclusion of the Commonwealth's case, Smith moved for a finding of not guilty on the charge of unlawful possession of a firearm. [FN235] The court granted the motion, finding no evidence to support the statutory requirement that the firearm have a barrel shorter than sixteen inches. [FN236] The Commonwealth rested, and the trial proceeded on the remaining counts. [FN237] Prior to closing arguments, the court reversed its ruling, reasoning that the alleged victim's testimony that Smith had shot him with a "revolver that appeared to be a .32 or a .38" sufficed to establish barrel length. [FN238] The jury convicted Smith on all counts. [FN239] Acknowledging that "[d]ouble-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal," [FN240] the Supreme Court nonetheless reversed Smith's conviction, *703 holding that the court's granting of his motion constituted a judgment of acquittal and that the Double Jeopardy Clause barred the court from reconsidering the acquittal. [FN241] The Court reasoned,

An order entering such a finding [that the evidence was insufficient as a matter of law to sustain a conviction] thus meets the definition of acquittal that our double-jeopardy cases have consistently used: It "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." [FN242]

The Court explained its holding in *Martin Linen* as follows: "[T]he Rule 29 judgment of acquittal is a substantive determination that the prosecution has failed to carry its burden." [FN243] The Court continued,

[W]e have long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict. This is so whether the judge's ruling of acquittal comes in a bench trial or . . . in a trial by jury. [FN244]

The Court concluded, "Our double-jeopardy cases make clear that an acquittal bars the prosecution from seeking 'another opportunity to supply evidence which it failed to muster' before jeopardy terminated." [FN245]

On the one hand, it is clear from *Martin Linen* that a final ruling granting a judgment of acquittal is an acquittal for double jeopardy purposes. The exception to the scope of double jeopardy protection enumerated in *Scott* is a narrow one and does not seem to apply to a pretrial grant of summary judgment for the defense. In contrast to the basis for dismissal in *Scott* (preindictment delay), the basis for a grant of summary judgment would be the trial court's conclusion that the government did not possess or could not present sufficient evidence to sustain the defendant's conviction; thus, a grant of summary judgment would be directly related to guilt or innocence. Furthermore, the Supreme Court made clear in *Smalis* that it would be irrelevant to the issue of double jeopardy if a grant of summary judgment were based on a legal error:

The status of the trial court's judgment as an acquittal is not affected by the Commonwealth's allegation that the court erred in deciding what degree of recklessness was . . . required to be shown under *704 Pennsylvania's definition of [third-degree] murder. [T]he fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles . . . affects the accuracy of that determination but it does not alter its essential character. [FN246]

In other words, double jeopardy would be implicated even if the trial court's legal determination that the uncontested material facts, when taken in the light most favorable to the prosecution, were legally insufficient to prove the crime charged turns out to be erroneous. “[T]he determinative question is whether the [trial] court found the evidence legally insufficient to sustain a conviction.” [FN247] Similarly, a granted motion for summary judgment in a civil case operates to bar the cause of action for the purposes of claim and issue preclusion because summary judgment goes to the merits of the case. [FN248]

On the other hand, it is well established that neither a trial court's grant of a pretrial motion to dismiss [FN249] nor a trial court's finding that the prosecution lacks probable cause to proceed to trial and its consequent dismissal of the charges after a preliminary hearing in a criminal case [FN250] precludes a subsequent prosecution for the dismissed offense. While there *705 may be institutional restraints on doing so, there is no federal constitutional bar to reinstating the charge because the preliminary hearing dismissal occurs prior to the attachment of jeopardy, and state law commonly imposes few, if any, restrictions on reinitiating prosecution after a finding of no probable cause at the preliminary hearing. [FN251] The vast majority of states permit the prosecutor to refile the charge and seek another preliminary hearing on the same evidence. [FN252] Like a court's finding that probable cause is lacking after a preliminary hearing, a grand jury's decision not to issue an indictment also does not trigger the double jeopardy bar. [FN253] While the prosecution may self-regulate its ability to present a case to successive grand juries, the Fifth Amendment does not prevent it from doing so. If a grand jury is readily available, the prosecutor may present the same case to the grand jury for indictment. [FN254]

As the Supreme Court's decisions make clear, the determinative double jeopardy question on a prosecution appeal of a trial court's pretrial *706 grant of a defendant's summary judgment motion would be whether the trial court had found the proffered or uncontested material facts legally insufficient to sustain a conviction. In ruling on a motion for summary judgment, the judge would analyze the proof submitted by both parties to determine whether (1) the prosecutor has presented sufficient evidence to entitle the state to judgment on the cause of action and (2) the defendant has submitted sufficient evidence to demonstrate that his or her denials or defenses are sufficient to defeat the prosecution's claim. [FN255] It seems likely that a trial court's grant of a defense motion for summary judgment would function as an acquittal in form and substance. Because the trial court would be, in effect, acquitting a defendant of the offense charged prior to trial by resolving factual questions pertinent to guilt or innocence, an appellate court's reversal of a grant of defensive summary judgment and remanding for further proceedings (that is, a trial on the merits before a jury) would be construed as exposing such a defendant to jeopardy a second time. [FN256]

In this way, the grant of a defense motion for summary judgment would function in the same manner for double jeopardy purposes as the grant of a motion for judgment of acquittal after the beginning of the trial or verdict of acquittal after a bench trial on stipulated facts. The difference would be one of timing and its attendant effect on use of resources and relative burdens only.

The purpose underlying the Double Jeopardy Clause would be best *707 served if a grant of summary judgment to a defendant were to function as an acquittal. The Supreme Court has described the purpose of the double jeopardy prohibition as follows:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when "not followed by any judgment, is a bar to a subsequent prosecution for the same offence." Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. [FN257]

The case of *Finch v. United States*, [FN258] as well as the *Taylor* and *Bledsoe* cases discussed in Part VI, are instructive in this regard. James Finch was charged with knowingly fishing on a portion of a river reserved exclusively for use by the Crow Indians. [FN259] After considering an agreed statement of facts, the district court found that Finch had not made entry onto Crow lands and granted Finch's motion to dismiss the charge on the ground that the charging document failed to state an offense. [FN260] On appeal, the Supreme Court reasoned that "[w]hen the District Court dismissed the information, jeopardy had attached." [FN261] The Court held, "[B]ecause the dismissal was granted . . . 'on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged,' we hold that the Government's appeal was barred by the Double Jeopardy Clause." [FN262] Accordingly, the *708 prosecution would likely be constitutionally prohibited from appealing even an erroneous grant of summary judgment to the defense.

Ultimately, however, whether a grant of summary judgment to a criminal defendant would preclude an appeal or subsequent charges is probably less important than the fact that the existence of summary judgment for defendants would force courts to definitively answer that question, and in the process give clearer guidance to trial courts and parties about the preclusive effects of a court finding that the prosecution has over- or prematurely charged a criminal suspect without legally sufficient evidence to sustain the charges.

VIII. IMPACT ON DISCOVERY

Under *Brady v. Maryland*, [FN263] prosecutors have a duty to divulge to the defense in advance of trial "evidence favorable to an accused." [FN264] Exactly when before trial is not always clear. [FN265] And, *Brady* has often been rather notoriously honored in its breach. [FN266] Presumably, criminal charges have *709 been fully investigated prior to the filing of a formal charge (at least, one would hope so). Nonetheless, commentators have noted the persistence of delayed disclosure of *Brady* material and the detrimental effects that the late timing of *Brady* disclosure has on fairness in criminal trials. [FN267]

The creation of a pretrial defense motion for summary judgment should accelerate the timing of the prosecution's disclosures. Civil courts presently have the discretion to order additional discovery prior to ruling on motions for summary judgment. [FN268] Most criminal courts presently require *710 the prosecution to disclose favorable material information pertaining to a motion to suppress prior to the suppression hearing. [FN269] One would presume that those same courts would also require the prosecution to disclose favorable information bearing on the propriety of summary judgment prior to a hearing on the defense motion, in much the same way that civil courts generally require discovery to be completed prior to ruling on motions for summary judgment. Because the existence of a motion for summary judgment by the defense would prevent the prosecution from masking its overcharging with a favorable plea offer, [FN270] the prosecution would have no choice but to disclose favorable information in time for the defense to make a more accurate decision regarding a plea, trial, and sentencing. [FN271] This accelerated disclosure would give additional meaning to

the Brady requirements and improve the transparency of criminal cases and the accuracy of criminal adjudication outcomes. [FN272] After all, it is hard to *711 imagine a benefit that inures to the system from delaying or suppressing constitutionally required disclosures.

IX. CONCLUSION

The volume of criminal litigation has exploded in this country, giving rise to the need to eliminate or streamline trials in order to manage the judicial docket. Permitting a weak or even frivolous prosecution case to proceed to trial and verdict unnecessarily risks having some juries convict despite the paucity of evidence of guilt. There is presently no mechanism for a defendant in a criminal case to move prior to trial to dismiss a charging document that is adequately pleaded but lacking in substantive evidence to back it up. The defendant's earliest opportunity to challenge the sufficiency of the evidence supporting the charge is during a trial on the merits, at the close of the prosecution's case. In the meantime, the defendant bears significant burdens as a result of the ongoing criminal prosecution: the stigma of arrest and charge; the possibility of pretrial detention with its concordant consequences (being cut off from friends and family, loss of employment, loss of liberty, the degradations of imprisonment, threats from other inmates, violence or even rape); [FN273] and the possibility of wrongful conviction. [FN274] As the Supreme Court has noted, *712 “[A] proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum.” [FN275]

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[FN1]. *Wash. Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

[FN2]. *United States v. Salerno*, 481 U.S. 739 (1987).

[FN3]. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§3141-3156 (2006)).

[FN4]. See 18 U.S.C. §3142(e).

[FN5]. See *id.*

[FN6]. See *id.*

[FN7]. See *id.* §3142(f). Any defendant, regardless of the charge against him or her, may be detained pending trial if he or she poses a risk of nonappearance at future court proceedings. See *id.* §3142(f)(2).

[FN8]. *United States v. Salerno*, 481 U.S. 739, 746 (1987).

[FN9]. See *id.* at 743; James Dao, Anthony (Fat Tony) Salerno, 80, A Top Crime Boss, Dies in Prison, N.Y. Times, July 29, 1992, at D19.

[FN10]. [Salerno](#), 481 U.S. at 754.

[FN11]. [Id.](#) at 755 (emphasis added).

[FN12]. [Id.](#) at 750-51.

[FN13]. [Id.](#) at 748-49.

[FN14]. [Vermont v. Brillon](#), 129 S. Ct. 1283 (2009).

[FN15]. [Barker v. Wingo](#), 407 U.S. 514 (1972).

[FN16]. [Id.](#) at 530.

[FN17]. [Brillon](#), 129 S. Ct. at 1287.

[FN18]. [Id.](#) at 1287-89.

[FN19]. [Id.](#) at 1289.

[FN20]. [Id.](#)

[FN21]. [Id.](#)

[FN22]. [Id.](#) This “blame theory” of speedy trial jurisprudence, which asks to which party pretrial delay should be “charged,” seems to be an outgrowth of the Barker factors relating to the reasons for the delay and the efforts that the accused made in seeking a speedy trial. Of course, nothing in Barker suggests, much less requires, that individual periods of delay be assigned to or blamed on one party or the other. One possibility is that this blame theory has resulted from the grafting by trial courts of the newer Barker standards onto older demand- and waiver-based speedy trial systems (which the Court expressly eschewed in Barker).

[FN23]. [Id.](#)

[FN24]. [Id.](#)

[FN25]. [Id.](#) at 1290-91. Of course, there was a middle ground between these two polarized positions that the Court could have forged. The Court could have answered the more interesting question of how “neutral” delays (that is, delays that are intentionally or negligently caused by neither party) should be analyzed under Barker—for example, the unavailability of courtrooms, jurors, or judges; backlogs at the state crime lab; and public defense and prosecution caseload issues, which are endemic in the criminal justice system—particularly under the reasons-for-delay prong.

[FN26]. See [Wayte v. United States](#), 470 U.S. 598, 607 (1985) (explaining that a prosecutor’s “broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review”); [United States v. Redondo-Lemos](#), 955 F.2d 1296, 1299-1300 (9th Cir. 1992) (rejecting Gilberto Redondo-Lemos’s challenge to the prosecutor’s charging decision and refusing to evaluate whether the decision had been made in an arbitrary and capricious manner, reasoning that prosecutorial charging decisions “involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation”), overruled on other grounds by [United States v. Armstrong](#), 48 F.3d 1508, 1510 (9th Cir. 1995) (en banc).

[FN27]. Model Rules of Prof'l Conduct R. 3.8(a) (2010).

[FN28]. See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (noting that if overcharging occurs it should be done before the plea bargaining rather than after the defendant has accepted a plea); *United States v. Bowman*, 679 F.2d 798, 802 (9th Cir. 1982) (Henderson, J., dissenting) (noting that it is unclear whether overcharging would cease if the principle of mutuality was rejected); *United States v. Andrews*, 612 F.2d 235, 256 n.23 (6th Cir. 1979) (Keith, J., dissenting) (noting that there is a large amount of overcharging). As Justice Blackmun pointed out in *Bordenkircher*, such overcharging is nearly impossible to prove; if the defendant is either acquitted of or pleads guilty to a charge of which he or she is not guilty, an appellate court would not have jurisdiction to review the charging decision. See *Bordenkircher*, 434 U.S. at 368 n.2.

[FN29]. *Jackson v. Virginia*, 443 U.S. 307 (1979).

[FN30]. 18 U.S.C. §1028(a)(7) (2006).

[FN31]. See *Fed. R. Crim. P. 12(b)(3)(B)* (authorizing district courts to dismiss charging documents whenever they fail to state an offense).

[FN32]. See *infra* Parts V-VI (offering examples of several of these cases).

[FN33]. See, e.g., Douglas L. Colbert, *Professional Responsibility in Crisis*, 51 *How. L.J.* 677, 738 n.284 (2008); Phyllis E. Mann, *Hurricanes Katrina and Rita--A Year Later in Louisiana*, *Champion*, Dec. 2006, at 6, 8 (defining "D.A. time" as time spent "sitting in jail while unable to make the bond based on over-charging"); Pamela R. Metzger, *Doing Katrina Time*, 81 *Tul. L. Rev.* 1175, 1183 (2007).

[FN34]. *Fed. R. Crim. P. 2*.

[FN35]. See, e.g., *Russell v. United States*, 369 U.S. 749, 791 (1962) (Harlan, J., dissenting) ("There is no such thing as a motion for summary judgment in a criminal case."); *United States v. Browning*, 436 F.3d 780, 781 (7th Cir. 2006) ("[T]here is no summary judgment or directed verdict in a criminal case...."); *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000) (noting that there is no criminal equivalent to the motion for summary judgment in civil cases); *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) ("There is no summary judgment procedure in criminal cases. Nor do the rules provide for a pre-trial determination of the sufficiency of the evidence.").

[FN36]. See, e.g., *Fed. R. Crim. P. 29(a)* (authorizing a district court to grant a motion for judgment of acquittal before submission to the jury if the evidence is insufficient to sustain a conviction). See also *infra* Part IV.A (discussing mid- and posttrial judgments of acquittal).

[FN37]. See *Fed. R. Crim. P. 29(a)*.

[FN38]. See, e.g., *Fed. R. Crim. P. 29(c)* (authorizing a district court to grant a motion for judgment of acquittal after the jury verdict or discharge).

[FN39]. *Fed. R. Civ. P. 56(a)*; 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §2711 (3d ed. 1998).

[FN40]. Wright, Miller & Kane, *supra* note 39, §2711.

[FN41]. David G. Paston, *Summary Judgment in New York* 25 (1958).

[FN42]. Fed. R. Civ. P. 56(c)(1).

[FN43]. See Paston, *supra* note 41, at 25. See also *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1077 (5th Cir. 1978); *United States v. Gen. Motors Corp.*, 518 F.2d 420, 441-42 (D.C. Cir. 1975); *Commercial Iron & Metal Co. v. Bache & Co.*, 478 F.2d 39, 41 (10th Cir. 1973); *Applegate v. Top Assocs., Inc.*, 425 F.2d 92, 96 (2d Cir. 1970); *Kern v. Tri-State Ins. Co.*, 386 F.2d 754, 756 (8th Cir. 1967); *Gilmore v. Ivey*, 348 S.E.2d 180, 183 (S.C. Ct. App. 1986); *Larose v. Agway, Inc.*, 508 A.2d 1364, 1365 (Vt. 1986); Wright, Miller & Kane, *supra* note 39, §2712.

[FN44]. Fed. R. Civ. P. 56(e) advisory committee's note (1963).

[FN45]. See Wright, Miller & Kane, *supra* note 39, §2711.

[FN46]. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 *Yale L.J.* 423, 423 (1929) (advocating the use of summary judgment as a remedy for excessive delay and congestion in the courts). See also Harold M. Kennedy, *The Federal Summary Judgment Rule*, 13 *Brook. L. Rev.* 5, 6 (1947).

[FN47]. See Kennedy, *supra* note 46, at 6.

[FN48]. See William W. Schwarzer, Alan Hirsch & David J. Barrans, Fed. Judicial Ctr., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure* vii (1991).

[FN49]. *Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 388 F.2d 272, 278 (2d Cir. 1967) (quoting 3 William V. Barron & Alexander Holtzoff, *Federal Practice and Procedure* §1231 (Charles Alan Wright ed., 1958)). See also, e.g., *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1189 (11th Cir. 2005); *Apton v. Wilson*, 506 F.2d 83, 94 (D.C. Cir. 1974); *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972); *Chambers v. United States*, 357 F.2d 224, 229 (8th Cir. 1966); *Krieger v. Ownership Corp.*, 270 F.2d 265, 270 (3d Cir. 1959); *S.M.S. Mfg. Co. v. U.S.-Mengel Plywoods, Inc.*, 219 F.2d 606, 607 (10th Cir. 1955).

[FN50]. *Am. Mfrs.*, 388 F.2d at 278 (quoting Barron & Holtzoff, *supra* note 49, §1231). See also, e.g., *Bros., Inc. v. W.E. Grace Mfg. Co.*, 261 F.2d 428, 432 (5th Cir. 1958).

[FN51]. *Am. Mfrs.*, 388 F.2d at 278 (quoting Barron & Holtzoff, *supra* note 49, §1231). See also, e.g., *Staren v. Am. Nat'l Bank & Trust Co.*, 529 F.2d 1257, 1261-62 (7th Cir. 1976); *Bland v. Norfolk & S. R.R. Co.*, 406 F.2d 863, 866 (4th Cir. 1969); *Kern v. Tri-State Ins. Co.*, 386 F.2d 754, 756 (8th Cir. 1967); *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.*, 378 F.2d 377, 386 (5th Cir. 1967); *Empire Elecs. Co. v. United States*, 311 F.2d 175, 179 (2d Cir. 1962); *Krieger*, 270 F.2d at 270; *Atlas Sewing Ctrs., Inc. v. Nat'l Ass'n of Indep. Sewing Mach. Dealers*, 260 F.2d 803, 806-07 (10th Cir. 1958); *1901 Wyo. Ave. Co-op. Ass'n v. Lee*, 345 A.2d 456, 460-61 (D.C. 1975); *Guthrie v. Nw. Mut. Life Ins. Co.*, 208 S.E.2d 60, 65 (W. Va. 1974).

[FN52]. *Am. Mfrs.*, 388 F.2d at 278 (quoting Barron & Holtzoff, *supra* note 49, §1231). See also, e.g., *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976); *Broadway v. City of Montgomery*, 530 F.2d 657, 661 (5th Cir. 1976); *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135-36 (9th Cir. 1975) (explaining that summary judgment serves the goal of limiting the waste of time and resources of both the litigants and the courts in cases in which a trial would be a useless formality); *Bloomgarden v. Coyer*, 479 F.2d 201, 206 (D.C. Cir. 1973); *Wahl v. Vibranetics, Inc.*, 474 F.2d 971, 976 (6th Cir. 1973); *Mintz*, 463 F.2d at 498; *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); *Bland*, 406 F.2d at 866; *New Home Appliance Ctr., Inc. v.*

Thompson, 250 F.2d 881, 883 (10th Cir. 1957) (“[S]ummary judgment is available to avoid expensive trials of frivolous claims.”); *Donald v. City Nat'l Bank of Dothan*, 329 So. 2d 92, 94 (Ala. 1976); Paston, *supra* note 41, at 25; Wright, Miller & Kane, *supra* note 39, §2712.

[FN53]. Paston, *supra* note 41, at 29.

[FN54]. See *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 320 (1902) (explaining that summary judgment “prescribes the means of making an issue”); Schwarzer, Hirsch & Barrans, *supra* note 48, at 8. Even when summary judgment is denied, the court must determine “if practicable...what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.” 41 C.F.R. §60-30.23(f) (2009). See generally *Fed. R. Civ. P. 56(g)* (noting that a court “may enter an order stating any material fact...that is not genuinely in dispute and treat[] the fact as established in the case” even if summary judgment is not granted).

[FN55]. See Schwarzer, Hirsch & Barrans, *supra* note 48, at 8.

[FN56]. Charles E. Clark, *Handbook of the Law of Code Pleading* 566 (2d ed. 1947) (footnote omitted).

[FN57]. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (citing *Jackson v. Virginia*, 433 U.S. 307, 318-19 (1979)).

[FN58]. See, e.g., *Fed. R. Crim. P. 12(b)(3)(B)*.

[FN59]. See, e.g., *Fed. R. Crim. P. 7(c)* (“The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged....”); *United States v. Debrow*, 346 U.S. 374, 377 (1953) (upholding the sufficiency of a perjury indictment that failed to allege either the name or authority of the person who administered the oath because the charge in the indictment “followed substantially the wording of the statute, which embodies all the elements of the crime”). Cf. *United States v. Russell*, 369 U.S. 749, 752-53 (1962) (holding that the indictment's failure to identify the subject of the inquiry in Russell's prosecution for failure to answer a congressional subcommittee's questions was a fatal defect in the charging document, because the failure to answer immaterial questions posed by Congress was not a crime).

[FN60]. See *United States v. DiFonzo*, 603 F.2d 1260, 1263 (7th Cir. 1979) (“The scope of such a challenge to the sufficiency of the indictment, however, is not unrestricted. The defendant is not permitted to transcend the four-corners of the indictment in order to demonstrate its insufficiency.”).

[FN61]. See *Fed. R. Crim. P. 7(c)*; *United States v. Cruikshank*, 92 U.S. 542, 557-58 (1875); *United States v. Murphy*, 762 F.2d 1151, 1154 (1st Cir. 1985) (holding, in light of *Russell*, that a witness-tampering indictment was insufficient when it failed to identify the official proceeding in which the witness was to testify); *State v. Levasseur*, 538 A.2d 764, 766 (Me. 1988) (holding that because the information charging Levasseur with sexual misconduct failed to identify what method of compulsion he used, an essential element of the offense, the pleading failed to charge him with an offense). Cf. *United States v. Cotton*, 535 U.S. 625, 629-30 (2002) (holding that the failure of an indictment to include an essential element of an offense was not an unwaivable “jurisdictional” defect).

[FN62]. See *Russell*, 369 U.S. at 763.

[FN63]. See *id.* at 764; *Hamling v. United States*, 418 U.S. 87, 117 (1974). Cf. *Valentine v. Konteh*, 395 F.3d 626, 635-36 (6th Cir. 2005) (holding, on habeas review, that the state court had applied Supreme Court precedent in an objectively unreasonable manner when it failed to recognize that the due process standards of *Russell* invalidated the indict-

ment pursuant to which Valentine had been convicted of twenty “carbon-copy” counts of child rape and felonious sexual penetration, respectively, which were alleged to have occurred over a period of ten months with nothing to distinguish them, rendering the indictment too lacking in detail to meet the notice and double jeopardy functions of Russell).

[FN64]. See [United States v. King](#), 581 F.2d 800, 802 (10th Cir. 1978) (holding that a motion to dismiss was improperly granted when the trial court considered disputed evidence beyond the charging document to determine whether King's conduct constituted a violation of the statutes pleaded).

[FN65]. See [United States v. DeLaurentis](#), 230 F.3d 659, 661 (3d Cir. 2000) (holding that, while the Federal Rules of Criminal Procedure permit dismissal of the charges if the allegations in a charging document do not charge an offense, such dismissal may not be based on the insufficiency of the evidence to prove the allegations); [United States v. Ayarza-Garcia](#), 819 F.2d 1043, 1048 (11th Cir. 1987) (“[A] pretrial motion to dismiss the indictment cannot be based on a sufficiency of the evidence argument because such an argument raises factual questions embraced in the general issue.”); [King](#), 581 F.2d at 802 (noting that a charging document “may be dismissed if it is insufficient to charge an offense” but “may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence”). See generally [Fed. R. Crim. P. 12\(b\)](#) (providing that “any defense, objection, or request that the court can determine without a trial of the general issue” may be raised before trial by motion (emphasis added)).

[FN66]. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 327 (1986). See also [id.](#) at 325 (holding that, when a party moving for summary judgment does not bear the burden of proof at trial, the party need not negate the nonmoving party's case, but rather can discharge its burden by demonstrating the absence of an essential element of the nonmoving party's case); [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 254 (1986) (holding that the trial court, in ruling on a motion for summary judgment, should assess the sufficiency of the evidence according to the evidentiary burden imposed by the controlling substantive law). In [Celotex](#), the issue on summary judgment was whether Catrett had adduced proof of exposure to Celotex's products, an essential element of the claim. [Celotex](#), 477 U.S. at 319-20.

[FN67]. [United States v. Hayes](#), 574 F.3d 460 (8th Cir. 2009).

[FN68]. See [id.](#) at 465, 468.

[FN69]. See [id.](#) at 465.

[FN70]. See [id.](#) at 465, 471.

[FN71]. See [id.](#) at 473, 477-78. For a discussion of the inadequacy of a motion for judgment of acquittal under [Federal Rule of Criminal Procedure 29](#) to address such legal-insufficiency cases, see [infra](#) Part IV.A.

[FN72]. See, e.g., [Fed. R. Crim. P. 5.1\(e\)](#) (governing preliminary hearings in federal criminal proceedings).

[FN73]. See, e.g., [Fed. R. Crim. P. 5.1\(a\)](#).

[FN74]. See, e.g., [id.](#) (“If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless...the defendant is indicted....”).

[FN75]. See, e.g., [Fed. R. Crim. P. 5.1\(e\)](#) (“At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired.”); [Fed. R. Evid. 1101\(d\)\(3\)](#) (“The rules [of evidence]...do not apply in...preliminary examinations in criminal cases....”).

[FN76]. The Fifth Amendment right to a grand jury indictment does not apply to the states by way of the Due Process Clause of the Fourteenth Amendment. See [Hurtado v. California](#), 110 U.S. 516, 538 (1884) (sustaining Hurtado's first-degree murder conviction arising from a prosecution that was initiated by information rather than indictment). As a result, the states are permitted to charge even very serious crimes without obtaining a grand jury indictment. In fact, fewer than half of all states regularly use grand juries in charging. See 1 Sara Sun Beale et al., *Grand Jury Law and Practice* §1.1 (2d ed. 2008) (“Today only eighteen states require a grand jury indictment to initiate serious criminal charges; four additional states require an indictment to initiate charges that could result in a capital sentence or life imprisonment.” (footnote omitted)); 4 Wayne R. LaFave et al., *Criminal Procedure* §14.2(c) (3d ed. 2007) (“Eighteen states, as in the federal system, require prosecution by indictment (unless waived) for all felonies.”). Most states permit prosecution either by indictment or information at the discretion of the prosecutor. Beale et al., *supra*, §1.5; LaFave et al., *supra*, §14.2(d) (“Almost two-thirds of the states permit felony prosecutions to be brought by either information or indictment (although several in this group require indictments for capital or life-sentence felonies).”). See also, e.g., [Ariz. Const. art. 2, §30](#); [Ark. Const. amend. XXI, §1](#); [Cal. Const. art. I, §14](#); [Haw. Const. art. I, §10](#); [Idaho Const. art. I, §8](#); [Mo. Const. art. I, §17](#); [Mont. Const. art. II, §20\(1\)](#); [Nev. Const. art. I, §8\(1\)](#); [N.M. Const. art. II, §14](#); [Okla. Const. art. II, §17](#); [Or. Const. art. VII, §5\(3\)-\(5\)](#); [Pa. Const. art. I, §10](#) (providing that “[e]ach of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information,” a condition that has now been met in all counties--see [204 Pa. Code §201.3\(a\)](#) (2010)); [S.D. Const. art. VI, §10](#); [Utah Const. art. I, §13](#); [Colo. Rev. Stat. §16-5-205](#) (2002); [Conn. Gen. Stat. §54-46](#) (2009); [Haw. Rev. Stat. §806-6](#) (2009) (duplicating the authorization contained in the Hawaii constitutional provision cited *supra*); [725 Ill. Comp. Stat. 5/111-2\(a\)](#) (2008); [Ind. Code §35-34-1-1\(a\)](#) (2010); [Iowa Code §813.2](#) (1997); [Kan. Stat. Ann. §22-3201](#) (2007); [Md. Code Ann., Crim. Proc. §4-102](#) (LexisNexis 2010); [Mich. Comp. Laws §767.1](#) (1979); [Neb. Rev. Stat. §29-1601](#) (2008); [Wash. Rev. Code §10.37.015](#) (2010); [Wis. Stat. §967.05](#) (2007); [Wyo. Stat. Ann. §7-1-106\(a\)](#) (2009); [N.D. R. Crim. P. 7\(a\)](#); [Vt. R. Crim. P. 7\(a\)](#).

The Supreme Court has defined an “infamous” offense as one punishable by imprisonment (that is, a felony). [Green v. United States](#), 356 U.S. 165, 183 (1958); [Mackin v. United States](#), 117 U.S. 348, 354 (1886) (“‘Infamous crimes’ are thus in the most explicit words defined to be those ‘punishable by imprisonment in the penitentiary.’”). See also [18 U.S.C. §4083](#) (2006) (“Persons convicted of offenses against the United States or by courts-martial punishable by imprisonment for more than one year may be confined in any United States penitentiary.”). Even in federal court, misdemeanor prosecutions may be initiated directly by the government by way of information. See [Fed. R. Crim. P. 58\(b\)\(1\)](#) (“The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.”). The roles played by the prosecutor, court, and grand jury are not identical in all jurisdictions.

[FN77]. See, e.g., Stuart Taylor, Jr. & K.C. Johnson, *Until Proven Innocent* 177 (2007) (“[G]rand juries are rubber stamps. The notion that they protect defendants --any defendants--against prosecutorial abuse is a fraud.”).

[FN78]. [Hawkins v. Superior Court](#), 586 P.2d 916, 919 (Cal. 1978) (citations omitted).

[FN79]. See, e.g., [Fed. R. Crim. P. 6\(e\)\(2\)\(B\)](#) (forbidding grand jurors, prosecutors, and court personnel from disclosing matters occurring during grand jury proceedings). The grand jury secrecy requirements also shield the identity of grand jury witnesses. In federal court, grand jury testimony is sealed unless and until it is ordered released by the court.

[FN80]. See [United States v. Williams](#), 504 U.S. 36, 52 (1992). Cf. [United States v. Calandra](#), 414 U.S. 338, 343-44 (1974).

[FN81]. See [United States v. Sears, Roebuck & Co.](#), 719 F.2d 1386, 1393-94 (9th Cir. 1983); [United States v. Ciam-](#)

brone, 601 F.2d 616, 622 (2d Cir. 1979); ABA Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and Defense Function §3.5, at 87 (1971).

[FN82]. See *Costello v. United States*, 350 U.S. 359, 363 (1956) (holding that a grand jury may constitutionally rely solely on hearsay evidence in reaching its decision to issue an indictment).

[FN83]. See *Calandra*, 414 U.S. at 345 (opining that the rationale of *Costello* barred a challenge to an indictment issued on the basis of unconstitutionally obtained evidence).

[FN84]. See *United States v. Alexander*, 789 F.2d 1046, 1048 (4th Cir. 1986) (“[A] facially valid indictment suffices to permit the trial of the party indicted.”). But see *United States v. Mills*, 995 F.2d 480, 489 (4th Cir. 1993) (explaining that, when a trial court “is presented with a facially valid indictment founded entirely upon mistaken evidence” and “no rational grand jury could have found probable cause to indict,” it should dismiss the indictment).

[FN85]. In civil cases, summary judgment must be based on admissible evidence. See *Fed. R. Civ. P. 56(c)(2)*; *Feliciano v. Rhode Island*, 160 F.3d 780, 787 (1st Cir. 1998); *In re Harris*, 209 B.R. 990, 994 (B.A.P. 10th Cir. 1997); *Tomlinson v. City of Cincinnati*, 446 N.E.2d 454, 455 (Ohio 1983).

[FN86]. See, e.g., *United States v. Freter*, 31 F.3d 783, 785 (9th Cir. 1994).

[FN87]. See, e.g., *United States v. Pardue*, 983 F.2d 843, 847 (8th Cir. 1993) (holding that the question of whether Jack Pardue was entitled to a judgment of acquittal on the basis of outrageous government conduct was “one of law for the court”).

[FN88]. *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947) (footnote omitted). See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253-54 (1986) (citing *Curley*, 160 F.2d at 232-33).

[FN89]. Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(A) and the Unreviewability of Directed Judgments of Acquittal*, 44 *Am. U. L. Rev.* 433, 439 (1994).

[FN90]. Theodore W. Phillips, Note, *The Motion for Acquittal: A Neglected Safeguard*, 70 *Yale L.J.* 1151, 1151 (1961).

[FN91]. *Id.*

[FN92]. *Id.* at 1151-52.

[FN93]. *Id.* at 1152.

[FN94]. *Id.* See also Sauber & Waldman, *supra* note 89, at 439.

[FN95]. Sauber & Waldman, *supra* note 89, at 439.

[FN96]. *Id.* at 441.

[FN97]. Cf. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (explaining that the standard for summary judgment under *Federal Rule of Civil Procedure 56* mirrors the standard for a directed verdict under *Federal Rule of Civil Procedure 50(a)*).

[FN98]. See, e.g., *Fed. R. Crim. P. 29(a)*; Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren*

and Burger Courts' Competing Ideologies, 72 *Geo. L.J.* 185, 217 (1983) (“One obvious response to [the claim that plea bargaining results in accurate and fair results] is to dispute its assumption that the parties' evaluation of the defendant's degree of culpability plays a significant role in shaping the ultimate bargain. Negotiated compromises concerning the charging decision or sentencing ‘recommendation’ often reflect and promote institutional, financial, and tactical considerations that have little bearing on what the defendant did, or his culpability in doing it.” (footnotes omitted)); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2465-69 (2004) (rejecting as “far too simplistic” the theory that plea bargaining reflects merely a risk calculus of the likelihood of conviction at trial and its attendant sentencing enhancement, and discussing “the structural influences that skew [plea] bargains, such as lawyer quality, agency costs, bail and detention rules, sentencing guidelines and statutes, and information deficits”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *Stan. L. Rev.* 29, 31-32 (2002) (advocating better and earlier prosecutorial screening of charges as a mechanism to reduce questionable plea bargaining practices); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *U. Pa. L. Rev.* 79, 130-31 (2005) (noting the substantial size of the “plea discount” due to prosecutor-controlled sentencing in concessions that defendants in federal court gain by pleading guilty).

[FN99]. See, e.g., *United States v. Moody*, 30 *F. App'x* 58, 59 (4th Cir. 2002) (“At the stipulated bench trial, the district court dismissed three counts against Moody, but found Moody guilty of the remaining two counts....”); *United States v. Collazo*, 815 *F.2d* 1138, 1141 (7th Cir. 1987) (“Collazo and the prosecutor with the approval of the court stipulated to a bench trial and filed an agreed set of facts upon which the judge decided the case. The presiding judge found Collazo guilty of Counts one (conspiracy to receive and possess stolen checks), forty-eight and sixty-five (aiding and abetting the unlawful possession of stolen checks.)”); *United States ex rel. Potts v. Chrans*, 700 *F. Supp.* 1505, 1513 (N.D. Ill. 1988) (convicting Chrans of manslaughter instead of murder at a quasi-stipulated bench trial); *State v. Williams*, No. 0805027568, 2010 Del. Super. LEXIS 246, at *1-2 (Del. Super. Ct. May 28, 2010) (“A stipulated bench trial was held on October 23, 2008, and the Court found Defendant guilty as to Possession of a Controlled Substance Within 300 Feet of a Park, Recreation Area or Place of Worship and not guilty as to Loitering.” (footnote omitted)); *Davis v. State*, 690 *S.E.2d* 464, 466 (Ga. Ct. App. 2010) (“A stipulated bench trial resulted in Davis's acquittal on the DUI (less safe) charge and in his conviction on the remaining charges, giving rise to this appeal.”); *Commonwealth v. Monteiro*, 913 *N.E.2d* 900, 902 (Mass. App. Ct. 2009) (“After a jury-waived trial on stipulated evidence, a District Court judge found the defendant guilty of unlicensed possession of a firearm...and possession of a firearm without a firearm identification card... and not guilty of receipt of stolen property with a value over \$250....”); *Commonwealth v. Wilkins*, 8 *Pa. D. & C.5th* 404, 406-07 (2009) (“[A]ppellant proceeded to a stipulated bench trial wherein he stipulated to certain facts including the arresting officer's testimony from the preliminary hearing. This court found appellant guilty of one count of driving under the influence, general impairment, and not guilty of the remaining two counts.” (citation omitted)).

[FN100]. See, e.g., *Illinois v. Wardlow*, 528 *U.S.* 119, 122 (2000) (“Following a stipulated bench trial, Wardlow was convicted of unlawful use of a weapon by a felon. The Illinois Appellate Court reversed Wardlow's conviction, concluding that the gun should have been suppressed because Officer Nolan did not have reasonable suspicion sufficient to justify an investigative stop.... The Illinois Supreme Court agreed.”); *United States v. Abbott*, No. H-05-0309-01, 2009 *U.S. Dist. LEXIS* 44919, at *2 (S.D. Tex. May 28, 2009) (“After this Court denied Abbott's motion to suppress evidence, Abbott agreed to a stipulated bench trial. This Court found Abbott guilty as charged....The conviction was affirmed on direct appeal.”).

[FN101]. See *United States v. Drew*, 259 *F.R.D.* 449 (C.D. Cal. 2009).

[FN102]. See, e.g., *United States v. Vasquez-Padilla*, 330 *F. App'x* 883, 886 (11th Cir. 2009) (per curiam) (“Vasquez-Padilla waived his right to a jury trial and, following a stipulated bench trial, was found guilty by the district

court on all three counts of the indictment.”); [United States v. Anderson](#), 131 F. App'x 212, 214 (11th Cir. 2005) (“Following a stipulated bench trial, the district court found Anderson guilty of violating 18 U.S.C. §922(g)(1).”); [United States v. Washington](#), 340 F.3d 222, 224 (5th Cir. 2003) (“Tony Washington was convicted at a bench trial on stipulated facts of being a felon in possession of a firearm. Washington claims the district court erred [in part by]...concluding that the evidence sufficiently proved that the weapons traveled in or affected interstate commerce as necessary for a conviction.”); [United States v. Kowal](#), 486 F. Supp. 2d 923, 935-39 (N.D. Iowa 2007) (finding Kowal guilty in a bench trial and articulating the court's findings on each of the disputed elements of the offense); [Johnson v. State](#), 676 S.E.2d 884, 885 (Ga. Ct. App. 2009) (“Following a stipulated bench trial, Randy Johnson was convicted of possession of cocaine with intent to distribute...and a headlight violation...and acquitted of driving with a suspended license...”); [Davis v. State](#), 653 S.E.2d 107, 108 (Ga. Ct. App. 2007) (“[F]ollowing a stipulated bench trial at which the state presented evidence of Davis's prior felony conviction, the trial court found Davis guilty of possession of a firearm by a convicted felon...”).

[FN103]. See U.S. Const. art. III, §2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”); [Duncan v. Louisiana](#), 391 U.S. 145, 149 (1968) (holding that the Sixth Amendment right to trial by an impartial jury was part of the due process guaranteed to state defendants by the Fourteenth Amendment); [Singer v. United States](#), 380 U.S. 24, 34 (1965) (“Thus, there is no federally recognized right to a criminal trial before a sitting judge alone...”); [Adams v. United States ex rel. McCann](#), 317 U.S. 269, 275 (1942) (noting that a defendant may waive a trial by jury only if it is “in the exercise of a free and intelligent choice, and with the considered approval of the court”).

[FN104]. See [United States v. Armstrong](#), 517 U.S. 456, 464-65 (1996) (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’” (citing [Bordenkircher v. Hayes](#), 434 U.S. 357, 364 (1978))). Of course, a prosecutor's discretion is “subject to constitutional constraints.” [United States v. Batchelder](#), 442 U.S. 114, 125 (1979). One of these constraints, imposed by the Equal Protection Clause of the Fourteenth Amendment, is that the decision to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” [Oyler v. Boles](#), 368 U.S. 448, 456 (1962). See also [Bolling v. Sharpe](#), 347 U.S. 497, 500 (1954) (holding that under federal law, “racial segregation in the public schools...is a denial of the due process of law”).

[FN105]. Studies have shown that early prosecutorial commitments to prosecute play a role in wrongful convictions because they create a psychological barrier to the prosecutor withdrawing the charges on the basis of subsequent information. See Alafair S. Burke, [Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science](#), 47 *Wm. & Mary L. Rev.* 1587, 1604-05 (2006) (“Recent attention to the risks of wrongful convictions has brought to light the influence of ‘tunnel vision,’ whereby the belief that a particular suspect has committed the crime might obfuscate an objective evaluation of alternative suspects or theories. In Illinois, a special commission on capital punishment identified tunnel vision as a contributing factor in many of the capital convictions of thirteen men who were subsequently exonerated and released from death row. Similarly, in Canada, a report issued under the authority of federal, provincial, and territorial justice ministers concluded that tunnel vision was one of the eight most common factors leading to convictions of the innocent. In cognitive terms, the tunnel vision phenomenon is simply one application of the widespread cognitive phenomenon of confirmation bias. Law enforcement fails to investigate alternative theories of the crime because people generally fail to look for evidence that disconfirms working hypotheses.” (footnotes omitted)).

[FN106]. See [In re Winship](#), 397 U.S. 358, 361 (1970) (“[Beyond a reasonable doubt] is now accepted in common law

jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all essential elements of guilt.” (internal quotation marks omitted)).

[FN107]. A defendant's decision to plead guilty pursuant to a plea agreement with the prosecution is deemed to be voluntary even if the defendant's subjective feeling is that he or she has no choice because of the risks of exercising his or her trial rights. See *Brady v. United States*, 397 U.S. 742, 755 (1970) (“[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).” (alteration in original) (internal quotation marks omitted)).

[FN108]. *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

[FN109]. Indictment at 5, *Drew*, 259 F.R.D. 449 (No. CR 08-0582-GW).

[FN110]. *Www.myspace.com* is a Web site that offers social network services by providing a forum in which individuals who have registered as members can post online personal profiles, post personal information and other content, and communicate with other MySpace users and view their personal content, including instant- and private-messaging services. *Id.* at 3-4.

[FN111]. *Id.* at 6-7.

[FN112]. *Id.* at 8.

[FN113]. See Motion to Dismiss, *Drew*, 259 F.R.D. 449 (No. CR 08-0582-GW).

[FN114]. See *id.* at 3.

[FN115]. Fed. R. Crim. P. 12(b)(3)(B).

[FN116]. Motion to Dismiss, *supra* note 113, at 4.

[FN117]. See *id.* at 5-8.

[FN118]. The jury acquitted *Drew* of the felony computer fraud charges regarding the unauthorized access of a computer to obtain information in furtherance of the tort of intentional infliction of emotional distress, but it convicted her of the misdemeanor charges of simple unauthorized access to a computer based solely on her creation of the Evans profile in violation of MySpace's terms of service. See *Drew*, 259 F.R.D. at 453, 461.

[FN119]. Criminal Docket, *Drew*, 259 F.R.D. 449 (No. CR 08-0582-GW).

[FN120]. *Id.*

[FN121]. Taylor & Johnson, *supra* note 77, at 16.

[FN122]. *Id.* at 17.

[FN123]. *Id.* at 19-20.

[FN124]. Id. at 23.

[FN125]. Id. at 24.

[FN126]. Id.

[FN127]. See id. at 24-25.

[FN128]. See id. at 25.

[FN129]. Id. at 27.

[FN130]. Id.

[FN131]. Id. at 28.

[FN132]. Id.

[FN133]. Id.

[FN134]. Id. at 30.

[FN135]. Id. (internal quotation marks omitted).

[FN136]. Id. at 30-31.

[FN137]. Id. at 31.

[FN138]. Id.

[FN139]. Id.

[FN140]. Id.

[FN141]. Id. at 31-32.

[FN142]. Id. at 96.

[FN143]. Id. at 32.

[FN144]. Id. at 35 (internal quotation marks omitted).

[FN145]. Id. at 37-39.

[FN146]. Id. at 38-39.

[FN147]. Id. at 46.

[FN148]. See id. at 34, 96, 162.

[FN149]. See id. at 163, 223, 303.

[FN150]. See *id.* at 174, 179. Under North Carolina law (which is typical), the issuance of the grand jury indictment preempted what otherwise would have been Seligman's and Finnerty's rights to a probable cause hearing. *Id.* at 173-74.

[FN151]. *Id.* at 181.

[FN152]. *Id.*

[FN153]. *Id.*

[FN154]. *Id.* at 183.

[FN155]. See *id.*

[FN156]. See *id.*

[FN157]. *Id.* at 178.

[FN158]. *Id.* at 200.

[FN159]. *Id.* at 225.

[FN160]. See *id.* at 229.

[FN161]. *Id.*

[FN162]. See *id.* at 249.

[FN163]. See *id.* at 303.

[FN164]. See *id.* at 316.

[FN165]. See *id.* at 351-52.

[FN166]. *Id.* at 352.

[FN167]. Cf. Paston, *supra* note 41, at 30.

[FN168]. Cf. *id.*

[FN169]. The common colloquial expression used to describe the time that defendants spend in pretrial detention (including the time spent in detention by defendants whose convictions have been overturned on appeal and who are awaiting a prosecutorial decision (not) to proceed with a second trial) is “doing D.A. time.” See *supra* note 33 and accompanying text.

[FN170]. See *infra* Part VII for further discussion of the double jeopardy ramifications of defensive summary judgment.

[FN171]. This is essentially the same standard that a court applies in ruling on a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Freter*, 31 F.3d 783, 785 (9th Cir. 1994); *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986). The Supreme Court has articulated the development of the civil summary judgment standard in parallel terms:

Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

[Improvement Co. v. Munson](#), 81 U.S. (14 Wall.) 442, 448 (1871) (footnote omitted). See also [Pa. R.R. Co. v. Chamberlain](#), 288 U.S. 333, 343 (1933); [Coughran v. Bigelow](#), 164 U.S. 301, 307 (1896); [Pleasants v. Fant](#), 89 U.S. (22 Wall.) 116, 120-21 (1874) (citing [Munson](#), 81 U.S. (14 Wall.) at 448). This rationale is even more applicable in the context of a criminal case, in which the prosecution is constitutionally required to prove guilt beyond a reasonable doubt--a far higher standard than the civil standards of proof: a preponderance of the evidence and clear and convincing evidence.

[FN172]. This is similar to situations in which defensive summary judgment is employed in civil cases. A prominent example is [Matsushita Electric Industrial Co. v. Zenith Radio Corp.](#), 475 U.S. 574 (1986), in which the Supreme Court embraced a more active use of summary judgment in civil cases. See *id.* at 598 (affirming summary judgment for the defendants in an antitrust case involving an alleged conspiracy to fix unreasonably low prices). In [Matsushita Electric](#), American manufacturers of consumer electronic products (Zenith) had filed suit against a group of their Japanese competitors (Matsushita), alleging that they had violated American antitrust laws by conspiring to drive domestic firms from the American market by selling their products at a loss in the United States. *Id.* at 577-78. The district court granted the defendants' motion for summary judgment, finding that there was no significant probative evidence that the Japanese companies had entered into an agreement or acted in concert with respect to their exports in any way that could have resulted in a cognizable injury to the American firms. See *id.* at 578-79. The court of appeals reversed the district court, holding that a reasonable trier of fact could find the existence of a conspiracy to depress prices in America in order to drive out domestic competitors based on evidence of concerted action in the form of (1) an agreement among the Japanese companies and the Japanese government to set minimum export prices; (2) the companies' common practice of undercutting the minimum prices through rebate schemes that they concealed from the governments of both countries; and (3) an agreement among the companies to limit the number of their American distributors. *Id.* at 581. The Supreme Court reversed the court of appeals, finding that the plaintiffs had failed to adduce sufficient evidence in support of their predatory pricing theory because the purported evidence of concerted action had no relevance to the alleged predatory pricing conspiracy and the Japanese companies lacked any plausible motive to engage in such a conspiracy, which would have involved substantial profit losses and had little likelihood of success. *Id.* at 595. See also [Celotex Corp. v. Catrett](#), 477 U.S. 317, 320, 322 (1986) (upholding the district court's grant of summary judgment to Celotex because Catrett was unable to produce evidence in support of her allegation in her wrongful death complaint that the decedent, her husband, had been exposed to Celotex's asbestos products, and holding that the plain language of [Federal Rule of Civil Procedure 56\(c\)](#) "mandat[ed] the entry of summary judgment, after adequate time for discovery and upon motion, against a party who failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); [Monsanto Co. v. Spray-Rite Serv. Corp.](#), 465 U.S. 752, 768 (1984) (holding that conduct as consistent with permissible competition as with illegal conspiracy did not, standing alone, constitute sufficient evidence of an antitrust conspiracy). The Court held that, as a matter of substantive antitrust law, a case could not be submitted to a jury if the plaintiffs had produced no direct evidence of a conspiracy and an inference of lawful conduct from the circumstantial evidence was at least as plausible as an inference of a conspiracy. [Matsushita Elec.](#), 475 U.S. at 595.

[FN173]. The Supreme Court has delineated a parallel standard for civil summary judgment--namely, that it "should be

granted where the evidence is such that ‘it would require a directed verdict for the moving party.’” [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 251 (1986) (quoting [Sartor v. Ark. Natural Gas Corp.](#), 321 U.S. 620, 624 (1944) (holding that the test for determining whether a genuine issue of material fact exists is the same as the test for granting a directed verdict—namely, whether the evidence is sufficient to sustain a verdict for the nonmoving party)). “The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.” [Bill Johnson's Rests., Inc. v. NLRB](#), 461 U.S. 731, 745 n.11 (1983).

[FN174]. Cf. [Edwards v. Aguillard](#), 482 U.S. 578, 594 (1987) (holding that summary judgment is the appropriate means of deciding an issue that turns on statutory interpretation when there is no dispute over the sufficiency of the evidence establishing the facts that control the application of a rule of law). In the context of a criminal case, this is analogous to the court deciding a pretrial motion to suppress illegally obtained evidence. Cf. [Gramenos v. Jewel Cos.](#), 797 F.2d 432, 438-39 (7th Cir. 1986) (holding that the issue of whether a police arrest was reasonable under the circumstances presented a legal question with policy considerations transcending the particular case and was, therefore, best decided by the court rather than a jury).

[FN175]. In a criminal case, the jury determines disputed issues of fact, but the court determines disputed issues of law. See [Bollenbach v. United States](#), 326 U.S. 607, 612 (1946) (“In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.” (citation omitted)); [Georgia v. Brailsford](#), 3 U.S. (3 Dall.) 1, 4 (1794) (“It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide.”); James B. Thayer, “Law and Fact” in [Jury Trials](#), 4 *Harv. L. Rev.* 147, 147 (1890) (“[M]atters of law are for the court, and matters of fact for the jury....”). Summary judgment in a criminal case should not be a substitute for the trial of disputed factual issues by the jury.

[FN176]. [Orloff v. Allman](#), 819 F.2d 904 (9th Cir. 1987).

[FN177]. *Id.* at 905.

[FN178]. See *id.* at 905, 907.

[FN179]. *Id.* at 906.

[FN180]. See *id.* at 907.

[FN181]. See *id.* at 905, 907-08. The United States Court of Appeals for the Ninth Circuit affirmed, finding that, in order to demonstrate that Allen was an aider and abettor, the Orloffs would have had to prove that he had actual knowledge of the fraudulent investment scheme and that he substantially assisted that fraud. See *id.* at 907. The court of appeals concluded that they had fallen short of making the requisite showing of Allen's culpability. *Id.* at 908.

[FN182]. [United States v. Souder](#), 666 F. Supp. 2d 534 (M.D.N.C. 2009).

[FN183]. *Id.* at 538-39.

[FN184]. *Id.* at 541.

[FN185]. *Id.* at 543, 549.

[FN186]. See *id.* at 541; Order Setting Conditions of Release at 1, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-1); Order Setting Conditions of Release at 1, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-2); Order Setting Conditions of Release at 1, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-3).

[FN187]. See Order Setting Conditions of Release at 2, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-2).

[FN188]. See Order Setting Conditions of Release at 2, Souder, 666 F. Supp. 2d 534 (No. 1:08-CR-136-1).

[FN189]. Souder, 666 F. Supp. 2d at 541.

[FN190]. *Id.* See Fed. R. Crim. P. 29 (governing motions for a judgment of acquittal).

[FN191]. Souder, 666 F. Supp. 2d at 541. See also Fed. R. Crim. P. 33 (governing a defendant's motion for a new trial).

[FN192]. The mail fraud statute provides, in pertinent part,

Whoever, having devised or intending to devise any scheme or artifice to defraud...for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [shall be guilty of an offense against the United States.]

18 U.S.C. §1341 (2006).

[FN193]. See Souder, 666 F. Supp. 2d at 541, 551, 554.

[FN194]. *Id.* at 549-50, 555, 558.

[FN195]. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977) (“We thus conclude that judgments under Rule 29 are to be treated uniformly and, accordingly, the Double Jeopardy Clause bars appeal from an acquittal entered under Rule 29(c) after a jury mistrial....”). Rule 29(c) provides that a defendant may move for a judgment of acquittal “after a guilty verdict or after the court discharges the jury.” Fed. R. Crim. P. 29(c)(1).

[FN196]. *State v. Taylor*, 810 A.2d 964 (Md. 2002).

[FN197]. *Id.* at 966.

[FN198]. *Id.*

[FN199]. *Id.*

[FN200]. *Id.*

[FN201]. *Id.*

[FN202]. *Id.* at 967.

[FN203]. *Id.* at 967 n.4 (internal quotation marks omitted).

[FN204]. *Id.* at 967-68.

[FN205]. *Id.* at 968, 974.

[FN206]. See *id.* at 968-69.

[FN207]. *Id.* at 969-70.

[FN208]. *Id.*

[FN209]. *Id.*

[FN210]. *Id.*

[FN211]. *Id.* at 970.

[FN212]. *Id.*

[FN213]. *Id.*

[FN214]. *Id.*

[FN215]. *Id.*

[FN216]. *Id.* at 967 n.5, 970 n.10. See also [Md. Code Ann., Cts. & Jud. Proc. §12-302\(c\)\(1\)](#) (LexisNexis 2006 & Supp. 2010); [Md. Code Ann., Cts. & Jud. Proc. §12-401\(b\)\(1\)\(ii\)](#) (LexisNexis 1974).

[FN217]. [Taylor](#), 810 A.2d at 979.

[FN218]. *Id.* Maryland's rules of criminal procedure echo the federal rules in that they provide mechanisms for pretrial dismissal of a charging document that fails to charge an offense. Compare Md. R. Crim. P. 4-252(a)(2), with [Fed. R. Crim. P. 12\(b\)\(3\)\(B\)](#). Maryland's rules also include a mid- or posttrial judgment of acquittal. Compare Md. Rule Crim. P. 4-324(a), with [Fed. R. Crim. P. 29](#). The state lacks a mechanism for a pretrial ruling on the sufficiency of the evidence (what this Article terms “defensive summary judgment”), however. See [Taylor](#), 810 A.2d at 980 (explaining that there is no criminal analogue to the civil motion for summary judgment); [State v. Bailey](#), 422 A.2d 1021, 1025 (Md. 1980) (“[T]he motion to dismiss attacks the sufficiency of the indictment, not the sufficiency of the evidence.”).

[FN219]. [Taylor](#), 810 A.2d at 979-80.

[FN220]. *Id.* at 982.

[FN221]. See *infra* Part VII.

[FN222]. See U.S. Const. amend. V (guaranteeing that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb”).

[FN223]. See [United States v. Martin Linen Supply Co.](#), 430 U.S. 564, 569 (1977) (“The protections afforded by the [Double Jeopardy] Clause are implicated only when the accused has actually been placed in jeopardy. This state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence.” (citations omitted)).

[FN224]. *Id.* at 576.

[FN225]. *Id.* at 571.

[FN226]. *Id.* at 573 n.12.

[FN227]. See *United States v. Scott*, 437 U.S. 82 (1978).

[FN228]. *Id.* at 95.

[FN229]. See *id.* at 98-99; *Wilkett v. United States*, 655 F.2d 1007, 1012 (10th Cir. 1981) (holding that the trial court's termination of Wilkett's trial based on the government's failure to prove venue was not an acquittal under *Scott* because venue was a "procedural" rather than "substantive" element of the offense charged).

[FN230]. *Scott*, 437 U.S. at 95-96.

[FN231]. *Id.* at 91.

[FN232]. *Smalis v. Pennsylvania*, 476 U.S. 140, 144 (1986) (holding that a ruling on a demurrer under Pennsylvania's rules of criminal procedure that the state's evidence was insufficient as a matter of law to establish Smalis's factual guilt constituted an acquittal for double jeopardy purposes).

[FN233]. *Smith v. Massachusetts*, 543 U.S. 462 (2005).

[FN234]. *Id.* at 464.

[FN235]. *Id.* at 465.

[FN236]. *Id.* at 464-65.

[FN237]. *Id.* at 465.

[FN238]. *Id.* (internal quotation marks omitted).

[FN239]. *Id.* at 466.

[FN240]. *Id.* at 474.

[FN241]. *Id.* at 473.

[FN242]. *Id.* at 467-68 (citations omitted).

[FN243]. *Id.* at 468.

[FN244]. *Id.* at 467 (citations omitted).

[FN245]. *Id.* at 437 n.7.

[FN246]. *Smalis v. Pennsylvania*, 476 U.S. 140, 144 n.7 (1986) (alterations in original) (citations omitted) (internal quotation marks omitted).

[FN247]. *United States v. Ogles*, 440 F.3d 1095, 1103 (9th Cir. 2006) (en banc).

[FN248]. *Wright, Miller & Kane*, supra note 39, §2712. See also *Flores v. Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d

773, 775-76 (5th Cir. 1984); *Prakash v. Am. Univ.*, 727 F.2d 1174, 1182 (D.C. Cir. 1984); *Jackson v. Hayakawa*, 605 F.2d 1121, 1125 (9th Cir. 1979); *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 715-16 (2d Cir. 1977) (holding that summary judgment granted to Lafayette Towers on the ground that a New Jersey statute barred Weston Funding's claim seeking a real estate commission precluded Weston Funding's subsequent action to recover the commission under the quantum meruit theory); *Hoke v. Retail Credit Corp.*, 521 F.2d 1079, 1081 n.3 (4th Cir. 1975) (finding that a district court had subject matter jurisdiction and therefore its summary judgment ruling precluded the issue); *Air-Lite Prods., Inc. v. Gilbane Bldg. Co.*, 347 A.2d 623, 630 (R.I. 1975); *Coronado Oil Co. v. Grieves*, 603 P.2d 406, 415 (Wyo. 1979). But see *Bricklayers & Allied Craftsmen Local 14 v. Russell Plastering Co.*, 755 F. Supp. 173 (E.D. Mich. 1991) (holding that an order granting summary judgment against the local union in a prior case did not bar arbitration of the union's breach-of-contract claims, because the summary judgment order was "based solely on the failure of [the local union] to submit to arbitration" of a clearly arbitrable dispute and was not based on the merits of the underlying dispute or on the union's timeliness in filing its grievance).

[FN249]. See, e.g., *Serfass v. United States*, 420 U.S. 377, 389 (1975).

[FN250]. See, e.g., *Fed. R. Crim. P. 5.1(f)* ("If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense."); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977) ("The protections afforded by the Clause are implicated only when....[a] jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence." (citation omitted)).

[FN251]. See *Crist v. Bretz*, 437 U.S. 28, 29 (1978) ("The federal rule is that jeopardy attaches when the jury is empaneled and sworn...."); *Stewart v. Abraham*, 275 F.3d 220, 229 (3d Cir. 2001) ("There is no precedent...for the proposition that the federal Constitution prohibits the reinitiation of a criminal proceeding in such a manner where double jeopardy has not attached and no pattern of prosecutorial harassment has been alleged."); *Spencer v. State*, 640 S.E.2d 267, 268 (Ga. 2007) ("[I]n either the context of a constitutional claim or that under the extended state statutory protections, jeopardy does not attach in a jury trial until the jury is both impaneled and sworn.").

[FN252]. Ned Tompsett, Comment, *Necessary for Justice: Rearrests in Pennsylvania and the Fourth Amendment*, 76 *Temp. L. Rev.* 921, 924 (2003) ("A majority of states allow district attorneys to refile the same charges using the same evidence even after dismissal on probable cause."). Cf. *Jones v. State*, 481 P.2d 169, 171 (Okla. Crim. App. 1971) (permitting the prosecution to refile and seek a new preliminary hearing when it has new evidence that was not "known to the State at the time of the first preliminary [hearing] or which could have been easily acquired").

[FN253]. Generally, a grand jury's decision not to indict a prospective defendant is not dispositive. Assuming that there are no barriers posed by statutes of limitations, the prosecution may simply present the same case to another grand jury (or grand juries), although some jurisdictions require good cause, court approval, or both to do so. See Beale et al., *supra* note 76, §8.6 ("Approximately one-fourth of the states have statutes or court rules that restrict resubmission of criminal charges once a grand jury has returned a no bill or dismissed the charges. In absence of such a statutory restriction, most jurisdictions recognize that the prosecutor may resubmit charges to either the same grand jury or to a successor." (footnote omitted)); LaFave et al., *supra* note 76, §15.2(h) ("Jeopardy not having attached, a grand jury's refusal to indict does not inherently preclude returning to a new grand jury (or even the same grand jury) to seek an indictment. Jurisdictions vary in their treatment of the prosecutor's authority to resubmit a proposed indictment to a grand jury. The division here, as in the case of resubmission following a preliminary hearing dismissal, clearly favors unrestricted resubmission, but a significant minority group of jurisdictions do impose limitations." (footnotes omitted)). A grand jury's decision to

indict a defendant is also not reviewable on the merits. See [Costello v. United States](#), 350 U.S. 359, 363 (1956).

[FN254]. See [United States v. Navarro-Vargas](#), 408 F.3d 1184, 1201 (9th Cir. 2005) (“It is true that the district court may convene another grand jury and the prosecutor may seek another indictment....”).

[FN255]. Paston, *supra* note 41, at 26.

[FN256]. Compare [United States v. Ogles](#), 440 F.3d 1095, 1103 (9th Cir. 2006) (en banc) (holding that the district court's grant of John Ogles's motion for judgment of acquittal on the charge of selling firearms without a license, pursuant to [Federal Rule of Criminal Procedure 29](#), on the ground that the statute in question applied only to an unlicensed firearm dealer and Ogles was a licensed firearm dealer, functioned as a genuine acquittal because “the district court found the evidence legally insufficient to sustain a conviction”), and [Daff v. State](#), 566 A.2d 120, 126 (Md. 1989) (holding that a judge's dismissal of the charges constituted an acquittal when, on the date that Troy Daff's trial was set to begin, the state had not served any of its witnesses with subpoenas), with [Palazzolo v. Gorcyca](#), 244 F.3d 512, 514, 517 (6th Cir. 2001) (holding that, after a state trial court quashed the information charging Gerard Palazzolo with criminal sexual conduct because there was insufficient proof of penetration, the state's appeal was not barred by double jeopardy principles because Palazzolo, “like the defendant in Scott, voluntarily chose to terminate the prosecution...on a basis unrelated to factual guilt or innocence”), and [State v. Kruelski](#), 737 A.2d 377, 380-81 (Conn. 1999) (holding that the prohibition against double jeopardy did not bar Edward Kruelski's retrial after the trial court dismissed the charges at the close of the trial evidence on statute of limitations grounds). In [Ogles](#), the United States Court of Appeals for the Ninth Circuit specifically noted, “The Court's double jeopardy decisions do not...condition an acquittal under [Rule 29\(a\)](#) on the district court's examination of contested facts.” [Ogles](#), 440 F.3d at 1104.

[FN257]. [Green v. United States](#), 355 U.S. 184, 187-88 (1957) (citation omitted).

[FN258]. [Finch v. United States](#), 433 U.S. 676 (1977) (per curiam).

[FN259]. [United States v. Finch](#), 395 F. Supp. 205, 207 (D. Mont. 1975), rev'd, 548 F.2d 822 (9th Cir. 1976), vacated, 433 U.S. 676 (1977).

[FN260]. [Finch](#), 395 F. Supp. at 207, 213.

[FN261]. [Finch](#), 433 U.S. at 677.

[FN262]. *Id.* (citation omitted). The Supreme Court reached a seemingly contradictory result, however, two years prior to its decision in [Finch](#) in [Serfass v. United States](#), 420 U.S. 377 (1975). [Serfass](#) was charged by indictment with willful draft evasion. *Id.* at 379. He filed a pretrial motion to dismiss the indictment, arguing that his local draft board had improperly refused to reopen his case. *Id.* In support of his motion, [Serfass](#) provided an affidavit alleging that he had applied for conscientious objector status and a copy of his selective service case file. *Id.* at 379-80. The district court dismissed the indictment on the basis of the affidavit, the case file, and oral stipulations made by counsel at the hearing. *Id.* at 380. The government appealed the dismissal to the United States Court of Appeals for the Third Circuit. *Id.* at 381. The Supreme Court held that the government's appeal was not barred by the Double Jeopardy Clause because jeopardy had not attached at the time of the dismissal and [Serfass](#) had not been “put to trial before the trier of facts.” *Id.* at 389 (citation omitted) (internal quotation marks omitted). Nonetheless, [Finch](#) would seem to be the more applicable precedent, since [Serfass](#) appears not to have contemplated an argument based on the *autrefois acquit*, as opposed to the prior-attachment, variety of double jeopardy.

[FN263]. [Brady v. Maryland](#), 373 U.S. 83 (1963).

[FN264]. *Id.* at 87.

[FN265]. Case law requires that the disclosure be made a sufficient period ahead of time to permit the defendant to make effective use of the disclosed material at trial. See, e.g., [United States v. Farley](#), 2 F.3d 645, 654 (6th Cir. 1993). Courts are often lenient in their interpretation of “sufficient,” however. See, e.g., [United States v. Kaplan](#), 554 F.2d 577, 578 (3d Cir. 1977) (holding that the government's belated provision of Brady material to Kaplan during trial did not warrant reversal). In [United States v. Coppa](#), 267 F.3d 132, 135 (2d Cir. 2001), the United States Court of Appeals for the Second Circuit addressed the question of whether due process required that the government disclose Brady and Giglio material immediately upon demand by a defendant. In reversing the district court's order that the government do so, the court of appeals noted that “as long as a defendant possesses Brady evidence in time for its effective use, the government has not deprived the defendant of due process of law.” *Id.* at 144.

[FN266]. See, e.g., [Boyette v. Lefevre](#), 246 F.3d 76, 92-93 (2d Cir. 2001) (granting Calvin Boyette a writ of habeas corpus because the state failed to produce evidence that impeached the victim's identification of Boyette and evidence pointing to alternate suspects); [Spicer v. Roxbury Corr. Inst.](#), 194 F.3d 547, 555-56, 562 (4th Cir. 1999) (affirming the district court's grant of Brady Spicer's writ of habeas corpus because the state failed to disclose conflicting statements made by the main prosecution witness); [United States v. Scheer](#), 168 F.3d 445, 457-58 (11th Cir. 1999) (reversing Dana Scheer's conviction for misuse of bank funds because the government failed to disclose threats to its witnesses); [Carriger v. Stewart](#), 132 F.3d 463, 479, 482 (9th Cir. 1997) (granting Paris Carriger's writ of habeas corpus because the prosecution failed to disclose a witness's prior criminal history); [United States v. Pelullo](#), 105 F.3d 117, 122-23, 127 (3d Cir. 1997) (reversing Leonard Pelullo's fraud convictions because the government withheld evidence of prior inconsistent statements, redactions in FBI incident reports, and internal contradictions relating to a key witness's credibility); [United States v. Brumel-Alvarez](#), 991 F.2d 1452, 1461, 1465 (9th Cir. 1992) (reversing Hector Brumel's drug trafficking convictions because the government failed to disclose a police report raising serious doubts about the truthfulness of one of its key witnesses); [United States v. Perdomo](#), 929 F.2d 967, 968, 969-70, 974 (3d Cir. 1991) (reversing Juan Perdomo's cocaine possession conviction because the government failed to disclose the prior criminal history of one of its witnesses); [Lindsey v. King](#), 769 F.2d 1034, 1042-43 (5th Cir. 1985) (granting Tyrone Lindsey's writ of habeas corpus and reversing his murder conviction because the prosecution failed to disclose a police report indicating that a key witness could not positively identify Lindsey as the shooter); [United States v. Sutton](#), 542 F.2d 1239, 1242-43 (4th Cir. 1976) (reversing Paul Sutton's conviction because the government failed to disclose that it induced its key witness's testimony with threats); [United States v. Pope](#), 529 F.2d 112, 114 (9th Cir. 1976) (per curiam) (reversing Thomas Pope's conviction because the government failed to disclose the plea bargain it made with a key witness). In one high-profile example in 2009, newly appointed Attorney General Eric Holder took the nearly unprecedented step of moving to set aside the conviction of and dismiss with prejudice the charges against former Senator Theodore Stevens of Alaska because of prosecutorial misconduct, including several serious Brady violations, which came to light only after an FBI agent filed a misconduct complaint and a new prosecution team was assigned to the case. Neil A. Lewis, Justice Dept. Moves to Void Stevens Case, N.Y. Times, Apr. 2, 2009, at A1.

[FN267]. See John G. Douglass, [Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining](#), 50 Emory L.J. 437, 443 (2001) (“Courts and scholars who so readily attach Brady to plea bargaining have failed to account for Brady's fundamental weakness: the Brady doctrine suffers from a severe case of ‘bad timing.’ Brady governs disclosure before a trial or plea; but courts almost always enforce Brady after-the-fact, when a defendant tries to overturn a conviction obtained without full disclosure by the prosecutor. In other words, Brady is a prospective rule, enforced only retrospectively.”); Laurie L. Levenson, [Unnerving the Judges: Judicial Responsibility for the Rampart Scandal](#), 34 Loy. L.A. L.

[Rev. 787, 792-93 \(2001\)](#) (“[J]udges often allow prosecutors to skirt their responsibility to turn over timely discovery so that there can be a full investigation that will provide evidence to challenge the police officer's allegations. The Brady standard set forth by the Supreme Court, which allows the disclosure of exculpatory and impeachment materials at any time before the conclusion of trial, has been too low of a bar to set for prosecutors' discovery compliance. By allowing prosecutors to delay discovery, judges have hampered defense counsel in their duties to investigate prosecution witnesses and evidence.”); Mary Prosser, [Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities](#), 2006 [Wis. L. Rev. 541, 566 \(2006\)](#) (“[T]he Court has failed to articulate when disclosure of favorable evidence must be made during the course of a prosecution, which implicitly encourages delay in disclosure by a reluctant prosecutor and increases the likelihood that convictions will rest on less than a full consideration of relevant facts.”).

[FN268]. See, e.g., [Crawford-El v. Britton](#), 523 U.S. 574, 599 n.20 (1998); [Plott v. Gen. Motors Corp., Packard Elec. Div.](#), 71 F.3d 1190, 1195 (6th Cir. 1995) (“Before ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case.”).

[FN269]. See [United States v. Gamez-Orduño](#), 235 F.3d 453, 461 (9th Cir. 2000) (“The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.”); [United States v. Barton](#), 995 F.2d 931, 935 (9th Cir. 1993) (“To protect the right of privacy, we hold that the due process principles announced in Brady and its progeny must be applied to a suppression hearing involving a challenge to the truthfulness of allegations in an affidavit for a search warrant.”); [United States v. Lanford](#), 838 F.2d 1351, 1354-55 (5th Cir. 1988) (applying Brady to a suppression hearing). Even courts that have declined to apply Brady to suppression hearings have done so on the ground that suppression hearings do not involve determinations of guilt or innocence--an argument that would not be compelling in the context of summary judgment on the basis of legally insufficient evidence of guilt. See, e.g., [United States v. Bowie](#), 198 F.3d 905, 912 (D.C. Cir. 1999) (“[I]t is hardly clear that the Brady line of Supreme Court cases applies to suppression hearings. Suppression hearings do not determine a defendant's guilt or punishment, yet Brady rests on the idea that due process is violated when the withheld evidence is ‘material either to guilt or to punishment.’”).

[FN270]. See [United States v. Ruiz](#), 536 U.S. 622, 628-29 (2002) (noting that a plea agreement could require a defendant to waive his or her right to impeachment material under [Giglio v. United States](#), 405 U.S. 150 (1972)).

[FN271]. See Levenson, *supra* note 267, at 820 n.95 (“A common complaint by defense counsel is that they are often surprised before trial by the last-minute disclosures by prosecutors and law enforcement. There is no way of knowing how many defendants, concerned about the impact of last-minute evidence, chose to plead guilty because their lawyers may not be fully prepared at trial.” (citation omitted)).

[FN272]. See Model Rules of Prof'l Conduct R. 3.8(d) (2010) (“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....”); Standards for Criminal Justice: Prosecution Function & Def. 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....”). Several courts have noted that

the belated disclosure of Brady material “tend[s] to throw existing strategies and [trial] preparation into disarray.” It becomes “difficult[to] assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available.” ...It is not hard to imagine the many circumstances in which the belated revelation of Brady material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on.

[United States v. Burke](#), 571 F.3d 1048, 1054 (10th Cir. 2009) (alterations in original) (quoting [Leka v. Portuondo](#), 257 F.3d 89, 201 (2d Cir. 2001)).

[FN273]. Nationwide, approximately 40 percent of defendants charged with felony offenses are ordered detained pending trial. See LaFave et al., *supra* note 76, §12.1(b) (“Approximately 62% of felony defendants were released prior to the final disposition of their case.”); Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in the Federal Court*, Fed. Probation, Sept. 2009, at 3, 5 (“While approximately 60 percent of defendants prosecuted during the study period were ordered detained pending trial, of those released, conditions that included at least one alternative to detention were required for nearly three-quarters.”).

[FN274]. Numerous studies have shown a correlation between the amount of time a defendant spends in pretrial detention and the likelihood of conviction and length of the sentence ultimately imposed. See, e.g., Stevens H. Clarke & Susan T. Kurtz, *Criminology: The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. Crim. L. & Criminology 476, 502-05 (1983) (finding a strong correlation between the length of pretrial detention and the likelihood of conviction and long sentences in a study of North Carolina counties); Charles E. Frazier & Donna M. Bishop, *The Pretrial Detention of Juveniles and Its Impact on Case Dispositions*, 76 J. Crim. L. & Criminology 1132, 1145-46 (1985) (finding that, holding all other variables constant, detained juveniles were more likely to be convicted); John S. Goldkamp, *The Effects of Detention on Judicial Decisions: A Closer Look*, 5 Just. Sys. J. 234, 245-46 (1980) (finding a strong correlation between the length of pretrial detention and the likelihood of conviction and long sentences in a study of Philadelphia's criminal justice system); Jeffrey Manns, [Liberty Takings: A Framework for Compensating Pretrial Detainees](#), 26 *Cardozo L. Rev.* 1947, 1972 (2005) (“Numerous empirical studies have suggested that the longer a person spends time in pretrial detention, the more likely she will be convicted and the more likely that the sentence will be severe.”). Cf., e.g., William M. Landes, *Legality and Reality: Some Evidence on Criminal Procedure*, 3 J. Legal Stud. 287, 333-35 (1974) (finding a strong correlation between the length of pretrial detention and sentence length in New York City, but attributing this fact to judges calculating bonds in ways that incorporate the probability of acquittal).

[FN275]. [Russell v. United States](#), 369 U.S. 749, 760 (1962).

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