# PRETRIAL MOTIONS

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## TIME TO FILE PRETRIAL MOTIONS

FED. R. CRIM. P. Rule 12(c) provides that "unless provided by local rule," the trial court has discretion as to the particular time "for the making of pretrial motions," and, where required, a date for hearing of same. FED. R. CRIM. P. Rule 12(b) expressly requires that the following matters "must be raised prior to trial," or they may be waived.

a. defenses and objections based on defects in the institution of the prosecution; or

b. defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge and offense, which objections shall be noticed by the court at any time during the pendency of the proceedings); or

c. motions to suppress evidence; or

d. requests for discovery under Rule 16; or

e. requests for a severance of charges or defendants under Rule 14.

Most jurisdictions have adopted a local rule similar to Local Rule CR12, Local Rules for the United States District Court for the Western District of Texas, requiring that pretrial motions be filed within ten days of arraignment.

Failure to timely file pretrial motions, even those raising constitutional issues may constitute waiver of those issues. *Small v. US*, 391 F.2d 764 (5th Cir. 1968) (noting refusal to consider suppression motion filed day of trial); *US v. Reyes*, 280 F. Supp. 267 (S.D.N.Y. 1968); *US. v. Barker*, 495 F.2d 327 (9th Cir. 1971). However, where the trial court considers same it will be considered timely on appeal. *Glisson v. US*, 406 F.2d 423 (5th Cir. 1969), *overruled on other grounds by U.S. v. Johnson,* 431 F.2d 441 (5th Cir. 1970); *US v. Seary*, 432 F.2d 395 (5th Cir. 1970).

Some matters must be raised within specified time frames expressly set out in the rule.

## NOTICE OF ALIBI

FED. R. CRIM. P. Rule 12.1 requires that upon "written demand" of the attorney for the government "stating the time, date, and place at which the alleged offense was committed" the defendant must list any alibi witnesses he intends to call, the specific place where he claimed to have been, within 10 days or at 10 days prior to the trial, whichever comes first. FED. R. CRIM. P. Rule 12.1(b) . Failure to comply may result in exclusion of testimony of undisclosed witnesses); *US v. Oliver*, 570 F.2d 397 (5th Cir. 1978) (noting good cause shown to excuse non-compliance); *US v. Krohn*, 558 F.2d 1265 (8th Cir. 1977), *cert. denied*, 434 US 970 (allowing government to file its written demand on the record day of trial); *US v. White*, 583 F.2d 899 (6th Cir. 1978) (noting

ignorance of whereabouts of defendant's alibi witness who had been excluded was held not to be "good cause" to excuse compliance).

As to the government's alibi rebuttal witnesses, failure to include their names on the prosecution's list of prospective witnesses is fatal to a conviction where the trial court refused to strike the witness's testimony. *Mauricio v. Duckworth*, 840 F.2d 454 (7th Cir. 1988).

**NOTICE OF INSANITY OR MENTAL DEFECT**

FED. R. CRIM. P. Rule 12.2 requires a defendant who "intends to rely upon the defense of insanity" [FED. R. CRIM. P. Rule 12.2(2)] or who "intends to introduce expert testimony relating to a mental …condition bearing upon … whether he had the mental state required for the offense charged" [FED. R. CRIM. P. Rule 12.2(b)], to notify the attorney for government of same in writing (and file a copy of such notice with the clerk) at the time provided for filing of pretrial motions. Whereupon the government may seek court-ordered psychiatric examination of the accused. FED. R. CRIM. P. Rule 12.2(c). Again, failure to comply with either the notice requirements of subsection (a) and (b) or to submit to the examination under subsection ( c) may result in the exclusion, of expert witnesses offered by the defendant on the issue of defendant's guilt.

**AMENDMENTS TO RULE FED. R. CRIM. P. 12.2**

Rule 12.2 provides that not only are a defendant's statements during the course of such consensual or compelled mental examination inadmissible, but "no testimony by the expert based upon such statement" or "other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony." FED. R. CRIM. P. Rule 12.2( c).

Subsection (e) has been added which provides that when a defendant withdraws his notice of intention to rely on an insanity defense or to introduce expert testimony as to his mental condition, same "is not admissible in any civil or criminal proceeding against the person who gave notice of the intention" to introduce same. FED. R. CRIM. P. Rule 12.2(e).

**Notice of Defense of Governmental Authority:**

FED. R. CRIM. P. Rule 12.3 requires the defendant to notify the government, at the time motions are due, if he intends to raise the defense of "actual or believed exercise of public authority." The notice must also contain the name of the person giving the authority, and the period of time during which the authority was granted. Failure to comply with the rule may result in the Court striking the witnesses supporting the defense.

It is arguable that this Rule, unlike the other notice-of-defense rules, constitutes non-reciprocal discovery in violation of *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L.Ed.2d

82 (1973), because the only "reciprocal duty" initially imposed on the government is that it admit or deny that the authority existed. Such a meager concession probably "does not approach the sort of reciprocity with which due process demands." *Wardius*, 412 U.S. at 480 (holding that a provision requiring the prosecution to provide the defendant with the time and place the offense is alleged to have occurred, in response to the defendant's notice of alibi defense, was insufficiently reciprocal).

However, under the rule, the government may choose to request that the defendant disclose the names of the witnesses supporting the defense. Rule 12.3(a)(2). If it does so, the Government must then disclose its rebuttal witnesses. Should the government choose this path, therefore, the non-reciprocal discovery arguments probably become moot.

**CONTINUANCE**

The Supreme Court has held that a defendant could not complain on Sixth Amendment effective assistance of counsel grounds of a court appointed "young . . . real estate lawyer" who had "never conducted a jury trial" and was given only 25 days to prepare compared to the governments "four and one half year" investigation, covering "thousand of documents," without a demonstration of "an actual breakdown of the adversarial process during the trial of this case" having some "effect . . . on the reliability of the trial process," *US v. Cronic*, 466 US 648 (1984), distinguishing *Powell v. Alabama*, 287 US 45 (1932) where the court held that ineffectiveness could be presumed without inquiry into actual performance at trial, where the trial court had appointed counsel on the very day a capital trial commenced. *See also Tasco v. Butler*, 835 F.2d 1120 (5th Cir. 1988) (noting counsel and defendant did not necessarily know of charges enhancing sentence and must be allowed time to prepare defense to recidivism charges); *US v. Kennedy*, 799 F.2d 556 (C.A. Del. 1986) (denying of brief continuance prior to second trial to allow defendant to obtain counsel violated his right to counsel).

The new standard for Sixth Amendment effective assistance of counsel requires not only that counsel not provide reasonably effective assistance, but also that counsel's errors be so serious as to deprive the accused of a fair trial, causing a reasonable probability that, but for counsel's unprofessional errors, the results would have been different. *Strickland v. Washington*, 80 L.Ed.2d 674 (1984).

On the other hand an accused may have a right to a continuance on Sixth Amendment compulsory process grounds to obtain the testimony of a missing witness. *Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir. 1982).

> "A court may not, however, refuse to grant a reasonable continuance for the purpose of obtaining defense witnesses where it has been shown that the desired testimony would be relevant and material to the defense." *Hicks v. Wainwright*, 633 F.2d 1146 (5th Cir. 1981); *Singleton v. Lefkowitz*, 583 F.2d 618 (2d Cir. 1978).

In *Hicks*, the Fifth Circuit recently enunciated several factors which are to be considered in determining whether an accused was deprived of his right to compulsory process by a denial of a motion for continuance:

> "[T]he diligence of the defense in interviewing witnesses and procuring their presence, the probability of procuring their testimony within a reasonable time, the specificity with which the defense is able to describe their expected knowledge or testimony, the degree to which such testimony is expected to be favorable to the accused, and the unique or cumulative nature of the testimony."

*See also US v. Kahn*, 728 F.2d 676, 678 (1984); *Fendler v. Goldstein*, 782 F.2d 1181, 1191 (1984); *Raulerson v. Wainwright*, 811 F.2d 803, 811 (1984) (stating "no abuse of discretion, let alone such that would offend constitutional principles in this case"); *US v. Wilson*, 721 F.2d 967, 972 (4th Cir. 1983) (denying request for continuance based on unavailability of witnesses not reversible error when testimony would be unessential and cumulative).

**DISCOVERY**

FED. R. CRIM. P. Rule 16
FED. R. CRIM. P. Rule 26.2
*Brady v. Maryland*
18 U.S.C. § 3500 (*Jencks* Act).

Full pre-trial discovery is one of the most critical functions which may be served by defense counsel. Without full and vigorous discovery, the defense is often in no position to make an informed evaluation of the case, engage in plea negotiations, or prepare for trial.

The Federal Government's vast investigatory resources far overshadow that of even the most affluent criminal defendant, and unless the courts adopt a more permissive attitude towards defense discovery this imbalance will threaten the very foundation of the adversary system in the criminal process. *See Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968).

> "[There is a ] growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice… It is also reflected in the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice… In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations." *Dennis v. US*, 384 US 855, 870-871, 873 (1966).

Full discovery by the defendant is critically intertwined with his constitutionally protected rights of equal protection, due process, confrontation and effective assistance of counsel guaranteed by the Fifth and Sixth Amendments. 8 MOORE'S FEDERAL PRACTICE 16.02[1]. The Supreme Court has emphasized the Constitutional ramification of this imbalance between the Government and the accused with respect to investigative resources. In *Wardius v. Oregon*, the Court reiterated that the "due process" clause of the Fifth Amendment " …does speak to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 US 470, 474 (1973). And, that where the prosecution's vast resources provide it with "non-reciprocal benefits" in preparing its case, and "…when the lack of reciprocity interferes with the Defendant's ability to secure a fair trial" such constitutes a violation of the defendant's Constitutionally protected right to due process, *Wardius*, 412 U.S. at 474 n.5.

> "[T]he prosecution's inherent information gathering advantages suggest that if there is to be imbalance in discovery rights, it should work in the Defendant's favor." *Wardius v. Oregon*, 412 US 470, 474, n. 9 (1973).

However, in a case dealing with the authenticity of a government witness participating as a "defendant" in defense strategy sessions with other defendants and their counsel, the Supreme Court noted in dicta that "there is no general Constitutional right to discovery in a criminal case, and Brady did not create one." *Weatherford v. Bursey*, 429 US 545 (1977).

This imbalance is nowhere more readily apparent than in the context of jury selection data. *See Losavio v. Mayber*, 456 P.2d 1032, 1035 (Col. 1972) (noting police records of prospective jurors utilized by prosecution, should be discoverable by the defense). "[T]he requirements of fundamental fairness and justice dictate no less." *Losavio v. Mayber*, 456 P.2d at 1035 (Col. 1972). *See also Commonwealth v. Smith*, 215 NE.2d 897, 901 (Mass. 1966) (noting such information "should be as available to the defendant as the district attorney"); *People v. Aldrich*, 209 NW.2d 796 (Mich. App. 1973)(stating information compiled by prosecutors regarding prospective jurors' adverse contacts with police discoverable under *Brady v. Maryland*); *People v. Murtisban*, 631 P.2d 446 (Cal. 1981)(holding that depriving one unable to afford such investigations of prospective jurors discovery of such jury dossiers compiled by the prosecution violated "due process", noting that such a historic "pattern of inequality reflects on the fairness of the criminal process"). *Contra Wansler v. Stoe*, No. 43655, ___SW.2d ___, (Ga. Jan. 27, 1987).

FED. R. CRIM. P. Rule 16 governs general discovery in federal criminal trials. It provides for broader discovery by both the defense and the prosecution, *see* Advisory Committee Note, Amendments to FED. R. CRIM. P. Rule 16 (1974), and substitutes the seemingly permissive language of the old rule ("the government shall permit"), placing a duty upon the parties to provide the requested materials "without the necessity of a court order unless there is some dispute as to whether the matter is discoverable or a request of a protective order. Advisory Committee Note, Amendments to FED. R. CRIM. P. Rule 16 (1974). This would indicate a change in the method of obtaining discovery, requiring a request of the U.S. Attorney detailing the discovery desired by the Defendant, and resort to the court only upon failure of the Government to comply or where a dispute arises. It is suggested that the request for discovery from the Government be in writing, set out in detail the material desired (to avoid the claim that your request is a "fishing expedition")

and copies filed with the clerk to be made part of the record in order to afford meaningful appellate review. Care should be taken that a request for discovery is made upon the Government at the earliest opportunity possible as the motion to the court, in the event such discovery is not forthcoming, must be filed within the time set by the trial court under Rule 12(e) for pre-trial motions.

Rule 16 is divided into four major sections:

a. Disclosure of evidence by the Government,
b. Disclosure of evidence by the Defendant,
c. Continuing duty to disclose,
d. Regulation of discovery.

## DISCLOSURE BY THE GOVERNMENT

### DEFENDANT'S STATEMENT

FED. R. CRIM. P. Rule 16(a)(1)(A) provides that upon request of the defendant the Government shall permit discovery of:

(1) Any relevant written or recorded statements made by the defendant.

(2) The substance of any oral statement made by the defendant to a person known to him to be a Government agent, whether before or after arrest, which the Government intends to offer in evidence at the trial.

(3) The "portion of any written record" containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to any person then known to be a government agent.

(4) The recorded testimony of the defendant before a grand jury relating to the offense charged, and where the defendant is a corporation, partnership, association, or labor union, the court may grant discovery of relevant recorded grand jury testimony of any officer or employee of such entity who was at the time of the charged acts or of grand jury proceedings able to legally bind the defendant with respect to the activities involved in the charges.

### WRITINGS OR TAPE RECORDINGS OF THE DEFENDANT

Rule 16(a)(1)(A) provides that written or tape recorded statements of the accused need only be relevant to fall within its structures, whether or not the Government intends to offer same at trial.

Unlike unrecorded oral statements, the defendant's written or recorded statements are discoverable without regard to whether they were made before or after the accused's arrest. *US v.*

*Crisona*, 416 F.2d 107, 112-116 (2d Cir. 1969), *cert. den*., 397 US 961 (1970) (noting failure to disclose held harmless). *See also US v. Bufalino*, 576 F.2d 446 (2d Cir. 1978), *cert. den.* (stating where F.B.I. destruction of poor quality back-up tape recordings of defendants was strongly criticized as an infringement on Rule 16, but nevertheless held to be harmless error); *US vs. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980); *US v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. den. sub nom.*, *Erlichman v. US*, 431 US 933 (1977); *US v. Walker*, 538 F.2d 266 (9th Cir. 1876); *US v. Rosenberg*, 299 F. Supp. 1241 (S.D.N.Y. 1969) (Frankel, J.).

Tape recordings of a defendant's conversation, even if unknown to the defendant at the time are as well within the rule. *David v. US*, 413 F.2d 1226, 1230-31 (5th Cir. 1969).

Written statements discoverable under Rule 16 can be in the form of letters, even though not addressed to Government agents, and even though intercepted by unintended third parties. *US v. Caldwell*, 543 F.2d 1333, 1352 (D.C. Cir. 1975), *cert. den.*, 423 US 1087.

When one oral statement by the defendant differs from his written confession, the Government's failure to provide that oral statement may constitute reversible error. *US v. Ible*, 630 F.2d 389 (5th Cir. 1980).

## SPONTANEOUS ADMISSIONS

An unsolicited, spontaneous admission by a defendant within the hearing of an undercover police officer is not discoverable under this portion of the rule (where it is not recorded). *US v. Green*, 548 F.2d 1261 (6th Cir. 1977); *US v. Viserto*, 596 F.2d 531 (2d Cir. 1977), *cert. den.*, 444 US 841, 100 S. Ct. 80.

## DEFENDANT'S ORAL STATEMENTS

Rule 16(a)(1)(A) mandates disclosure of oral statements either before or after arrest only when they are made in response to interrogation by a person then known to the defendant as a government agent. *US v. Viserto*, 596 F.2d 531 (2d Cir. 1979); *US v. Zarattini*, 552 F.2d 753 (7th Cir. 1977); *US v. Carter*, 621 F.2d 240 (1980); *US v. McElroy*, 697 F.2d 459, 465-66 (2d Cir. 1982) (noting substance of oral statements includes Defendant's revocation of Miranda rights, request of lawyer prior to relinquishing those rights and statement to DEA Agent).

## STATEMENTS BY DEFENDANT WHICH GOVERNMENT INTENDS TO USE AT TRIAL

Rule 16(a)(1)(A) also requires the disclosure of "the substance of any other relevant and statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial."

The First Circuit has held that "use at trial" includes not only use in the government's case in chief, but also use in rebuttal, which the government reasonably anticipates. *US v. Ferrer-Cruz*, 899 F.2d 135 (1st Cir. 1990).

However, the Fifth circuit has held that a failure by the government to disclose all of the defendant's statements pretrial is not per se reversible error, even if the undisclosed statements are used against the defendant at trial. In order to obtain a reversal, the defendant must show "prejudice to his substantial rights" resulting from this procedure. *U.S. v. Gonzalez*, 967 F.2d 1032 (5th Cir. 1992).

## ORAL STATEMENTS DIFFER FROM WRITTEN

Where one's oral statement differs from his written confession, the government's failure to provide the oral statement may constitute reversible error. *US v. Ible*, 630 F.2d 389 (5th Cir. 1980).

## SUMMARIES OF INTERVIEWS

Rule 16(a)(1)(A) now requires discovery of any summary of an agent's interview with the defendant, even if included within his investigative report. Same was not true prior to the 1972 Amendment. See *US v. Fioravanti*, 412 F.2d 407, 411-12 n.12 (3d Cir. 1969), *cert. den.*, 396 US 83 (1969); *US v. Johnson*, 525 F.2d 999, 1004 (2d Cir. 1975), *cert. den.*, 424 US 920 (1976).

## AGENT'S ROUGH NOTES

Discovery of an agent's "rough notes" utilized to prepare his agency report has been held proper under Rule 16 by some circuits. *US v. Jefferson*, 445 F.2d 247 (D.C. Cir. 1971); *US v. Fallen*, 498 F.2d 172 (8th Cir. 1974). *But see US v. Roemer*, 703 F.2d 805 (5th Cir. 1983) (stating agent's rough notes are discoverable as *Jencks* Act material). Two circuits have imposed sanctions where the notes have been destroyed, even if destruction of such discoverable material was inadvertent or in good faith. *US v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975); *US v. Harris*, 543 F.2d 1247 (9th Cir. 1976). The Court of Appeals for the Fifth Circuit, however, has refused to impose sanctions for any such destruction of agent's notes. *US v. Cole*, 634 F.2d 866 (5th Cir. 1981).

A prosecutor's notes of his discussions with a witness have been held not to constitute Jencks statements where the witness neither approved, adopted, nor signed those notes. *US v. O'Malley*, 796 F.2d 891 (7th Cir. 1986).

Prior to being discoverable under Rule 16, the defendant must show that an unrecorded oral statement was made to a government agent and that the defendant knew he was an agent at the time the statement was uttered. *US v. Viserto*, 596 F.2d 531 (2d Cir. 1978); *US v. Zarattini*, 552 F.2d 753 (1977).

## "SILENCE" MAY CONSTITUTE A DISCOVERABLE "STATEMENT"

At least one court has held that even silence may constitute a "statement" discoverable under FED. R. CRIM. P. Rule 16(a)(1)(A). *US v. Manetta*, 551 F.2d 1352 (5th Cir. 1977).

> "The statement that I have no statement to make but wish to see my lawyer, itself is a statement within the terms of Rule 16." *US v. Manetta*, 551 F.2d 1352 n.4 (5th Cir. 1977) (stating the Court reserved the issue of whether the admission of that statement, itself, constituted a violation of his Fifth Amendment privilege).

## DEFENDANT'S GRAND JURY TESTIMONY

Any "recorded testimony of the defendant before a grand jury which relates to the offense charged" is discoverable under Rule 16(a)(1)(A).

The policy of grand jury secrecy under FED. R. CRIM. P. Rule 6(e) does not apply to a witness before that grand jury and therefore there is no impediment to disclosure of the defendant's own testimony before the grand jury. *Dennis v. US*, 384 US 855, 86 S. Ct. 1840, 16 L.Ed.2d 953 (1966). See also *In re-Sealed Motion*, Division No. Misc. 2 D.C. Cir. 1989 (stating, "…a grand jury witness has a general right to a transcript of such testimony absent the government demonstrating countervailing interests which outweigh the right to release of a transcript.").

As the rule is couched in mandatory terms, many courts do not even require a showing of need of relevance in interpreting this rule. *See, e.g., US v. United Concrete Pipe Corp.*, 41 F.R.D. 538 (N.D. Tex. 1966).

Recording of all grand jury proceedings including statements made by prosecution is now required by FED. R. CRIM. P. Rule 6(e)(1).

## CORPORATE OFFICERS

Rule 16(a)(1)(A) also adopts a broad interpretation of the discovery of grand jury testimony of corporate officers or employees where the corporation is a defendant. However, it is interesting to note that this is one of the only provisions of the Rule which requires a motion directly to the court, a point not discussed in the Advisory Committee note, although the note does intimate that testimony of such corporate officers, or other officials is now "discoverable as statements of the defendant." Advisory Committee Note, Amendments to FED. R. CRIM. P. Rule 16 (1974). *See US v. 6918 North Tyron Street, Charlotte, NC*, 672 F. Supp. 890 (W.D.N.C. 1987) (noting corporation defendant entitled to disclosure of documents obtained through grand jury investigation of corporation's former owner).

## PRODUCTION OF DEFENDANT'S STATEMENTS AT "DETENTION HEARING"

One court has recently ordered a "detention hearing … be remanded to the Magistrate for rehearing on matters regarding Defendant's pre-trial detention with instructions that the government be directed to promptly produce the tape recording of any statements made by [the] defendant" at a "detention hearing" held pursuant to 18 U.S.C. § 3146 "immediately upon the

person's first appearance before the judicial officer" under FED. R. CRIM. P. Rule 4, but not later than 5 days thereafter. *US v. Musgrave*, _ F.Supp_, No. SA-85-CR-132 (July 5, 1985).

> "FED. R. CRIM. P. Rule 16(a)(1)(A) expressly mandates that *'upon request'* of a defendant the government *shall* permit the defendant to inspect and copy …any relevant written or recorded statement made by the defendant…
>
> Whatever the Government's concerns as to the production of this statement now, rather than later, are outweighed by the strictures of Rule 16(a)(1)(A)'s commands.
>
> Counsel's legitimate request for admittedly discoverable material should have been honored by the government, or at least ordered b the Magistrate below, particularly, where the Magistrate received, reviewed and relied upon that evidence in denying Defendant Musgrave's bail. The government's refusal to provide same "upon demand' deprived Defendant of discovery guaranteed under Rule 16(a)(1)(A) and the Magistrate erred, under the instant facts, in refusing to order the government to comply with the Rule's unambiguous command." (emphasis added) *US v. Musgrave*. _ F. Supp_. No. SA-85-CR-132 (July 5, 1985).

In *US v. Gaitan*, the District Court applied FED. R. CRIM. P. Rule 16 holding:

> "That the government is obligated, at the time of a detention hearing, to produce to a defendant, upon his request, any of his oral or written statements it has in its possession (regardless whether such statements were) relevant to the detention hearing." *US v. Gaitan*, __F.Supp. __, No. SA-88-CR-254 (W.D. Tex. 1988).

## DEFENDANT'S CRIMINAL RECORD

Rule 16(a)(1)(B) provides for the mandatory disclosure of the defendant's prior criminal record, a matter of some dispute under the old rule.

## GOVERNMENT WITNESSES' CRIMINAL RECORDS

Counsel should request the "rap sheets" of prior criminal convictions of all witnesses the Government intends to call at trial, this is critically important for meaningful cross-examination. And while discovery of such information has on occasion been refused, *Hemphill v. US*, 392 F.2d 45 (8th Cir. 1968); *US v. Westmoreland*, 41 F.R.D. 419, 427 (S.D.N.Y. 1967); *US v. Taylor*, 542 F.2d 1023 (8th Cir. 1976), the majority of courts have required production of same recognizing that the defendant, unlike the Federal Government with its vast data storage and investigation facilities, is at a substantial disadvantage in obtaining such information. *US v. Tanner*, 279 F. Supp. 457, 471-472 (N.D. Ill. 1967); *US v. Deardorff*, 343 F. Supp. 1033 (S.D.N.Y. 1971); *US v. Houston*,

339 F. Supp. 762 (N.D. Ga. 1972); *US v. Curry*, 278 F. Supp. 508, 514 (N.D. Ill. 1967); *US v. Jepson*, 53 F.R.D. 289, 291 (E.D. Wis. 1971). *See also* WRIGHT, FEDERAL PRACTICE AND PROCEDURE, Criminal § 254 (noting that defense counsel is at "a substantial disadvantage," without the criminal records of Government witnesses).

Conviction records of government witnesses constitute exculpatory material within the meaning of *Brady v. Maryland*, 373 US 83 (1963) and, therefore, production should be required as a matter of "due process." The fact that such information would serve to impeach any testimony by said witnesses is sufficient to bring the statement under the scope of *Brady v. Maryland*, since the duty imposed upon the government by *Brady* to disclose evidence it has in its possession applies to any information "…favorable to the accused either as direct or impeaching evidence" *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968); *US v. Bagley*, 105 S. Ct. 3375 (1985); *US v. Keogh*, 391 F.2d 138 (2d Cir. 1968); *US v. Agurs*, 427 US 97, 106-107 (1976) (requiring a specific request). See also *Garrison v. Maggio*, 540 F.2d 1277 (5th Cir. 1976).

Furthermore, the defendant will be unable to comply with the requirements of FED. R. EVID. 609(b) requiring advance written notice of intent to use certain prior convictions for impeachment purposes where the defendant is deprived of access to such records.

Although certain prior convictions are admissible for impeachment purposes, *see* FED. R. EVID Rule 609, discovery of same has often been provided only after the witness has testified at trial. *US v. Anzelmo*, 319 F. Supp. 1106 (E.D. La. 1970); US v. Turner, 423 F. Supp. 957 (E.D. Tenn. 1976); *US v. McCord*, 509 F.2d 891 (7th Cir. 1975) (stating then reversible error only if substantial harm from non-disclosure can be shown).

However, in order to prove up such evidence, it is necessary to obtain certified copies of such convictions from the clerk of the court in the jurisdiction where the conviction occurred. Accordingly, pre-trial access to F.B.I. arrest and conviction records is necessary to provide information upon the basis of which these documents may be obtained in sufficient time to be of use at trial. The government will have ready access to any defense witness' rap sheet and will be able to impeach those witnesses with that material. On the other hand, the defense does not have access to those records. This would appear to be the very type of imbalance in investigative resources the Supreme Court was speaking to in *Wardius v. Oregon*, 412 US 470 (1973).

In *US v. Auten*, 632 F.2d 478 (5th Cir. 1980), the Fifth Circuit held that the Government's failure to disclose the criminal record of its witnesses met the requirements of Brady, requiring reversal even though the prosecution failed to seek such records and was therefore unaware of same. But see *US v. Browne*, 829 F.2d 760 (C.A. 9-Dr. 1987) (noting government failed to release police report prior to trial but made it available during trial. Defendant's attorney was able to impeach key prosecution witnesses with the report and thus, no new trial was required).

In the hopes of obtaining early disclosure, counsel should explain to the trial judge that providing defense counsel with a "rap sheet" after the witness testifies on direct examination at trial will cause unnecessary trial delays since such a "rap sheet" is admissible hearsay, is of use and value even for impeachment; it will rarely provide adequate information regarding the "disposition" of the causes therein reflected, and an order to obtain a certified copy of the previous

conviction from the appropriate jurisdiction pursuant to FED. R. EVID. Rule 803(2) during trial will entail significant effort and delay. See also *US v. Phillips*, 664 F.2d 971 (1981); *US v. Martino*, 648 F.2d 367 (1981). But see *US v. Luis-Gonzalez*, 719 F.2d 1539 (1983).

> "Because there is no allegation that the government attorneys in the instant case had any knowledge of Wilson's misdemeanor convictions for violations of state law and because the government had no obligation to seek out information on Wilson's criminal record not otherwise contained in government records, the government did not suppress any evidence favorable to the appellants. Although we will not condone the withholding of a prosecution witness' criminal record, the disclosure of the witness' FBI 'rap sheets' fully compiled with *Brady* and the requirements of due process." *US v. Luis-Gonzalez*, 719 F.2d 1539, 1549 (1983).

## DOCUMENTS AND TANGIBLE OBJECTS

Rule 16(a)(1)(C) provide that "…the Government shall permit the defendant to inspect and copy" the following:

(1) Books,

(2) Papers,

(3) Documents,

(4) Photographs,

(5) Tangible Objects,

(6) Buildings, or

(7) Places.

## REQUISITE SHOWING

Upon request of the defendant new Rule 16(a)(1)(C) places on the government a mandatory duty of disclosure, where:

(1) The defendant shows that disclosure of the items is material to the defense, *US v. Hubbard*, 474 F. Supp. 64 (D.D.C. 1979).

(2) The Government intends to use the item in its presentation of the case in chief, *US v. Pascal*, 606 F.2d 561 (5th Cir. 1979) (stating rebuttal evidence is not discoverable); *US v. Lambert*, 580 F.2d 780 (5th Cir. 1978).

(3) The item was obtained from or belongs to the defendant, or any agent, employee or consultant of the defendant. *US v. Countryside*, 428 F. Supp. 1150 (D.C. Utah, 1977).

A document is any instrument on which is recorded, in writing, any matter which may be evidentially used. *US v. Pascual*, 606 F.2d 561 (5th Cir. 1979).

## TEXTS AND EXAMINATIONS

Rule 16(a)(1)(D) provides for the disclosure of any testing, analysis, or examinations.

Handwriting specimens and the analyst's reports are discoverable, *US v. Buchanan*, 585 F.2d 100 (5th Cir. 1978) under Rule 16(a)(1)(C), as are the medical records of the defendant; *US v. Dannon*, 481 F. Supp. 152 (D. Okla. 1979) (noting not necessarily true with respect to a witness); *US v. Brown*, 479 F. Supp. 1247 (D. Md. 1979) (stating chemicals produced by Government chemists from seized evidence).

Medical records of witnesses are not generally discoverable. *US v. Brown*, 479 F. Supp. 1247 (D. Md. 1979). Those records of the defendant are discoverable, *US v. Dannon*, 481 F. Supp. 152 (D. Okla. 1979).

Chemist's reports are discoverable as documents. *US v. Gordon*, 580 F.2d 827 (5th Cir. 1978).

## EXPERT WITNESS TESTIMONY, OPINION, BASIS, AND QUALIFICATIONS

Under Rule 16(a)(1)(E), at the defendant's request, the government shall disclose to the defendant a written summary of testimony that the Government intends to use.

## GOVERNMENT WITNESSES' NAMES AND ADDRESSES

While the proposed draft of Rule 16(a)(1)(E) provided for mandatory disclosure of Government witnesses names, addresses and any record of felony convictions, Congress deleted same on July 30, 1975. Previously, "witness lists" and "rap sheets" of prospective Government witnesses had been provided by some courts even under the more restrictive provisions of former Rule 16(b). *US v. Leichtfuss*, 331 F.Supp. 723 (N.D. Ill. 1971); *US v. Palmisano*, 273 F. Supp. 750, 752 (E.D. Pa. 1957); *US v. Moceri*, 359 F. Supp. 431 (N.D. Ohio, 1973); *US v. Hardy*, Slip Op. Cr. No. 869-69 (D.C. Cir. 1968); *US v. Baum*, 482 F.2d 1325 (2d Cir. 1973). *See also US v. Richter*, 488 F.2d 170, 175 (9th Cir. 1973). In light of Congress' express disapproval of proposed Rule 16(a)(4), which specifically provided for such disclosure, those decisions are now questionable. *US v. Krohn*, 558 F.2d 390 (8th Cir. 1977), and in dicta the Supreme Court noted with regard to the Constitutional parameters of *Brady v. Maryland*, 373 US 583 (1963), that "[I]t does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably." *Weatherford v. Bussey*, 429 US 545, 559 (1977).

However, in light of the authority given the courts by FED. R. CRIM. P. Rule 16(d)(2) to impose protective orders upon any discovery granted, and thereby protect against any intimidation of Government witnesses, it seems unnecessary to deny to a defendant the names of persons known to the Government who have knowledge of facts relevant to the case. The names of Government witnesses should be discoverable by the defense, and at least one court has granted such discovery on a limited basis, recognizing and discussing the problem. *US v. Holmes*, 18 Cr. L. 2199 (D.C. Cir. 1975).

> "Congress did not require mandatory disclosure of the names and addresses of government witnesses as had been proposed. Neither did it mandate nondisclosure. Thus, there remains a narrow area of authority in the trial court allowing for the exercise of discretion to order pretrial disclosure of government witnesses. Our decision made clear that the use of this authority is to be reserved for the rare criminal case in which the defense can conclusively demonstrate a compelling need for disclosure such as to overcome the government's strong interest in nondisclosure." *US v. Holmes*, 18 Cr.L. at 2199.

Accordingly, several courts have held that while Rule 16 does not require disclosure, the trial court has discretion to order the discovery of witness' names, so long as such information is not shown to endanger those witnesses. *US v. Higgs*, 713 F.2d 39 (3d Cir. 1983); *US v. Richter*, 488 F.2d 170 (9th Cir. 1973); *US v. Price*, 448 F. Supp. 503, 508-18 (D. Colo. 1978). See also *Will v. US*, 389 US 90, 100-01 (1967); *US v. Anderson*, 481 F.2d 685, 693 (4th Cir. 1973), *aff'd*, 417 US 211.

> "The Court has discretion, upon a showing of compelling need, to grant a motion for discovery of the government's witness list. Defendants assert that they have established a compelling need for the witness list, on the ground that there are seventy potential witnesses in this case and thousands of documents to be reviewed, and that adequate preparation is impossible without an advance witness list.
>
> Preparation for trial, effective cross-examination, expediency of trial, possible intimidation of witnesses, and the intrinsic reasonableness of the request are among the factors a court may consider in deciding whether to exercise its discretion to allow discovery of the witness list.
>
> In view of the very large number of witnesses and documents involved in this case, the intrinsic reasonableness of the request, and the extreme lack of likelihood of witness intimidation, the Court concludes that defendants have established a compelling need for

> the government's witness list." *US v. Madeoy*, 652 F. Supp. 371, 375-76 (D.D.C. 1987).

It should be more than obvious that the names of persons with knowledge of the facts relevant to the case is generally the most critical information obtainable for the preparation of an adequate defense.

> "It seems inconceivable that in the middle of the Twentieth Century we should regard as fair a proceeding in which counsel is unaware of the witnesses whom he must cross until the moment they are called." Pyle, *The Defendant's Case For More Liberal Discovery*, 33 F.R.D. 82, 92 (1963).

*See also US v. Brock*, 833 F.2d 519 (5th Cir. 1987) (noting disclosure of names of four out of five government witnesses was adequate where fifth witness' name was not deliberately withheld and where defendant was given opportunity to present evidence on any new issue raised by the expert).

One court has held that the materials relied on by a government expert, who laid the predicate for a "novel scientific test" (DNA blood typing) was discoverable by the defense under Rule 16. *U.S. v. Yee*, 129 F.R.D. 629 (N.D. Ohio 1990). The court ruled that the production of the materials was necessary in order that he defendant could prepare for cross, and let his own experts evaluate the trustworthiness of the materials.

## IDENTITY OF INFORMANTS

The disclosure of the identity and whereabouts of a police informant is as well required upon a showing that he would be "relevant and helpful" to the defense. *Rovario v. US*, 353 US 53, (1957).

> "Where the disclosure of an informer's identity …is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way." *Rovario v. US*, 353 US at 60-61.

In the event the prosecution refuses to disclose the identity of the informer, dismissal is the appropriate remedy, *Rovario v. US*, 353 US 53 (1957); *US v. Ayala*, 643 F.2d 244, 247 (5th Cir. 1981) (stating "the government must disclose to the defense the informer's identity. Otherwise, the action must be dismissed").

> "In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Rovario v. US*, 353 US at 61.

And where the prosecution is unable to locate an informant whose identity is found to be "relevant and helpful" to the defense, such informant's unavailability, even if through no fault of

the prosecution, violates the defendant's constitutional right to "due process" where "…there is a reasonable possibility that, if the [informant] had been available to testify, the defendant would not have been convicted." *US v. Walton*, 411 F.2d 283, 288 (9th Cir. 1969); *US v. Leon*, 487 F.2d 389 (9th Cir. 1973).

However, the Fourth Circuit has held that although the government must make a reasonable effort to secure an informant's presence at trial, it cannot be required to guarantee that he will appear and a reasonable effort by the government may be sufficient and the government will not be held guilty of concealment. *US v. Hargrove*, 647 F.2d 411, 415 (1981). *See also US v. Diaz*, 535 F.2d 130,134 (1976) (suggesting belated request by defendant and diligence by government equals no denial of due process); *US v. Hart*, 546 F.2d 798 (1976).

Where the informant is a factual witness to the crime then his testimony will almost invariably be relevant and material, requiring disclosure. *US v. White*, 379 F.2d 559 (7th Cir. 1966); *US v. Debrow*, 346 US 374, 378 (1953); *Will v. US*, 389 US 80, 99 (1957); *US v. Roberts*, 338 F.2d 646 (2d Cir. 1968); *US v. Barnett*, 418 F.2d 309 (6th Cir. 1969); *Gregory v. US*, 369 F.2d 185, 188 (D.C. Cir. 1966); *US v. Barnes*, 486 F.2d 776, 779 (8th Cir. 1973).

Where the informant is a participant in the alleged criminal offense, disclosure of his identity should be required; *Lopez-Hernandez v. US*, 394 F.2d 820 (8th Cir. 1968) [informant introduced defendant to undercover agent witness]; *US v. Silva*, 580 F.2d 144 (5th Cir. 1978) (noting informant introduced defendant, where identity was key issue).

In *US v. Ayala*, 643 F.2d 244 (5th Cir. 1981), the Fifth Circuit noted that:

> "The informer's level of involvement with the criminal activity is an important consideration. *Suarez v. US*, 582 F.2d 1007 (5th Cir. 1978); *Alvarez v. US*, 525 F.2d 980, 982 (5th Cir.), *cert. denied*, 425 US 995 (1976). The more active the participation, the greater the need for identification" *US v. Gonzalez*, 606 F.2d 70 (5th Cir. 1979)". *US v. Ayala*, 643 F.2d at 246.

And even where the "informer was not an integral member of the criminal activity" his identity may be required where he was more than a "passive observer" or "tipster". *US v. Ayala*, 643 F.2d at 246 (stating where female informer "arranged the initial meeting" . . . " acted as an intermediary relaying messages" and was "also present at each meeting").

Accordingly, the defensive allegation that the informer entrapped defendant generally requires disclosure.

> "…where the defendant asserts he was entrapped by a government informer, *Rovario* is ordinarily inapplicable since the defense rests upon allegations which the informer would be in a unique position to affirm or deny."

*US v. Godkins*, 527 F.2d 1321, 1327 n.4 (5th Cir. 1976) (citing *US v. Gommez-Rojas*, 507 F.2d 1213, 1219 (5th Cir. 1975)). *Cf. US v. Freund*, 525 F.2d 873 (5th Cir. 1976); *US v. Doe*, 525 F.2d 878 (5th Cir. 1976); *Alvarez v. US*, 525 F.2d 980 (5th Cir. 1976) ["Rovario-type cases"].

However, where the informant was a "mere tipster", playing no part in the prohibited transaction and only supplying information for probably cause, no disclosure will be required. *US v. Clark*, 482 F.2d 103 (5th Cir. 1973); *US v. Acosta*, 411 F.2d 627 (5th Cir. 1969) (stating disclosure not required where informant's role consisted solely of introducing the defendant to Government agents and being present during the illegal transaction.]) While there is no general requirement to provide the informant at pre-trial hearings, *McCrary v. Illinios*, 386 US 300, 312 (1967) (upholding constitutionality of Illinois informant's privilege as applied to preliminary hearings to determine probable cause).

Where the informer's credibility is at issue, disclosure may be required even where his testimony is only relevant to the issue of probable cause for an arrest or search; *US v. Anderson*, 509 F.2d 724, 729 (9th Cir. 1975); *US v. Freund*, 525 F.2d 873, 877 (5th Cir. 1976) (stating, "Nevertheless, *McCrary* does not operate as a bar to ordering disclosure in all probable cause cases . . . In a proper case, the trial court may wish to examine the informant to assess his credibility or accuracy"); *US v. Kiser*, 716 F.2d 1268, 1271-72 (9th Cir. 1983).

> "The informer in *Rovario* was a percipient witness to the crime and was essential to the development of Rovario's defense. The Government …emphasizes that 'the interests at stake in a suppression hearing are of lesser magnitude than those in the criminal trial itself.' …
>
> *It is clear, however, that these factors do not preclude disclosure when the informant's identity is relevant only to the probable cause determination*. *US v. Anderson*, 509 F.2d 724, 729 (9th Cir.), *cert. denied*, 420 U.S. 910 (1975). In *McCray v. Illinois*, the Court held that the due process clause does not require a fixed rule mandating disclosure at a pretrial hearing. 386 U.S. at 311-13. However, *McCray* did not hold that the informer's privilege was absolute. It implicitly endorsed disclosure where alternate means of assuring the existence of probable cause….
>
> We conclude, therefore, that the limited right of disclosure announced in *Rovario* and *McCray* is consistent with the challenge to the warrant affidavit permitted under *Franks*."

NO PRIVILEGE WHERE IDENTITY KNOWN

Courts have held that there is no informer's privilege where the identity of the informant is already known to the defense. *US v. Godkins*, 527 F.2d 1321 (5th Cir. 1976).

> "The concerns voiced by the Supreme Court in *Rovario*- there the desirability of shielding from disclosure to those who would have cause to resent it, the identity of an informer – are not violated by our holding here. Appellant, the person who would have the greatest cause to resent the actions of the alleged informer, is not seeking disclosure of the informer's identity, but is merely exercising his Sixth Amendment right to call a witness whose identity and participation in the alleged illegal acts are already known to him. *Rovario* does not apply in this situation." *US v. Godkins*, 527 F.2d 1321, 1322 (5th Cir. 1976).

Indeed, *Rovario* contains dicta to this effect, "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." *Rovario v. US*, 353 US at 60.

> "The record contains several intimations that the identity of John Doe was known to petitioner and that John Doe died prior to the trial. In either situation, whatever privilege the Government might have had would have ceased to exist, since the purpose of the privilege is to maintain the Government's channels of communication by shielding the identity of an informer from those who would have cause to resent his conduct." *Rovario v. US*, 353 US at 60 n.8.

*See also* *US v. Melchor Moreno*, 536 F.2d 1042, 1047, n. 7(5th Cir. 1976) (stating "when an accused person wishes to subpoena an individual already known to him, the privilege is irrelevant").

Recently the Fifth Circuit held that a trial court "abused its discretion in refusing to issue [a] subpoena" to an attorney who provided evidence to Government investigators which the accused claimed was obtained by virtue of that individual's representation of the accused.

> *US v. Fortna*, 796 F.2d 724 (5th Cir. 1986) (noting the mere fact that it appeared that the lawyer had consumed controlled substances with his alleged client during those meetings, does not, in and of itself, bring the discussions within the "crime fraud exception" to the attorney-client privilege).

*CONTRA* *US v. Tenario-Angel*, 756 F.2d 1505, 1510 (11th Cir. 1985) (stating "The former Fifth Circuit recognized that merely because the defendant knows the informants name, that does not mean there is no general interest in maintaining the informant's confidentiality");

> *US v. Fischel*, 686 F.2d 1082, 1092 (5th Cir. 1982) (noting although the confidential informant's privilege no longer exists once his or her identity is known "the need for the informant's safety, the

> avoidance of jeopardizing other operations, or the defendant's ability to locate the informant himself …may justify non-disclosure of the informer's address. It should not, however, justify non-production of said informer to testify").

RIGHT TO INTERVIEW KNOWN GOVERNMENT WITNESSES

Where witnesses, particularly eyewitnesses, are known to the defense they should be made available to both sides. *US v. Brown*, 555 F.2d 407, 425 (5th Cir. 1977); *US v. Scott*, 578 F.2d 261, 268 (6th Cir. 1975); *US v. Murray*, 492 F.2d 178, 194 (9th Cir. 1973); *US v. Long*, 449 F.2d 288, 295 (8th Cir. 1977); *US v. Gregory*, 369 F.2d 185 (D.C. Cir. 1966); *US v. Walton*, 602 F.2d 1176, 1179-1180 (4th Cir. 1979).

> "Witnesses, particularly eye-witnesses to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them." *Gregory v. US*, 369 F.2d 185 (D.C. Cir. 1966).

In *US v. Walton*, 602 F.2d 1176, 1180 (4th Cir. 1979), the Fourth Circuit held that even where the government felt "…it necessary to place witnesses in protective custody", it remains "the duty of the trial court to ensure that counsel for defense has access to the secluded witness under controlled arrangements" noting:

> "A witness is not the exclusive property of either the government or a defendant; a defendant is entitled to have access to any prospective witness, although in the end the witness may refuse to be interviewed." *US v. Walton*, 602 F.2d 1176, 1177-78 (4th Cir. 1979).

Where deliberate action by state or government officers causes a witness' absence from the trial, same creates a "*prima facie*" deprivation of due process. *Hernandez v. Estelle*, 674 F.2d 313, 315-316 (5th Cir. 1981) (holding that the initial decision to leave need not be prosecutions, only that officers aided in effecting witness' plan). Whether Defendant actively sought to locate witness is not controlling. *Hernandez v. Estelle*, 674 F.2d at 317.

One Court even required that Government counsel send each Government witness a letter advising:

> "I suggest, therefore, that it is in your best interests and that of the court to cooperate with the lawyers in the case as they strive to determinate the facts and decide whether your testimony will be required." *US v. Rogers*, 642 F.Supp. 934 (D. Colo. 1986).

*See also* State v. Mussehl, 408 N.W. 2d 844, No. CR-86-350 (Minn., July 10, 1987) (noting Minnesota Supreme Court disapproves of letters from prosecutors to potential witnesses discouraging those witnesses from conversing with defense investigators).

## USE OF INFORMANTS AND DUE PROCESS

*See US v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) overruling *Williams v. U.S.*, 311 F.2d 441 (5th Cir. 1962).

*See also: US v. Abrego*, 141 F.3d 142 (5th Cir. 1998).

## CO-CONSPIRATOR STATEMENTS

Where the Government intends to offer statements of co-conspirators made during the course of the conspiracy and in furtherance of the aims and objectives of that conspiracy under FED. R. EVID. Rule 801(d)(2)(E) some courts have held same discoverable since the rationale underlying that rule is that each co-conspirator is the "agent" of the other. *See* Advisory Committee's Notes, Rule 801 (a)(2)(E). And as a defendant's agent, statements made by his co-conspirators, within the scope of that agency and in furtherance of the same, are said to be impliedly authorized by the defendant as their principal and are therefore admissions by the defendant. Given that such co-conspirator's statement are admitted as statements of or adopted by the defendant, under Rule FED. R. EVID. 801(a)(2)(E) then such statements should be discoverable as the defendant's own, pursuant to Rule 16(a)(1)(A) on the same theories.

*See* *US v. Agnello*, 367 F.Supp. 444, 448-49 (E.D.N.Y. 1973);
*US v. Turkish*, 458 F.Supp. 874, 882 (S.D.N.Y. 1978) (requiring disclosure of statements were not made by prospective government witnesses);
*US v. Fine*, 413 F. Supp. 740, 742-43 (W.D. Wis. 1976);
*US v. Mays*, 460 F. Supp. 573, 573-76 (E.D. Tex. 1978);
*US v. Bloom*, 78 F.R.D. 591, 618 (E.D. Pa. 1977);
*US v. Thevis*, 84 F.R.D. 47 (N.D. Ga. 1979);
*US v. Brighton Building and Maintenance Co.*, 435 F. Supp. 222 (N.D. Ill. 1977), *aff'd.*, 598 F.2d 1011 (7th Cir. 1979).

*Cf.* *US v. O'Strer*, 481 F.Supp. 407 (S.D. N.Y. 1979);
*US v. Hall*, 424 F.Supp. 508 (D. Okla. 1975); *aff'd*, 536 F.2d 313, *cert. den.*, 429 US 918 (10th Cir. 1976);
*US v. McMillen*, 489 F.2d 229, 231 (7th Cir. 1972);
*US v. Madeoy*, 652 F. Supp. 371, 375 (D.D.C. 1987).
2 Wright, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 253 at 1.50 (1982).

*But see* *US v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988)(noting statements of co-conspirators are not discoverable under Rule 16(A)(1)(A));
*US v. Bailey*, 689 F. Supp. 1463 (N.D. Ill. 1988)(holding no pretrial disclosure of co-conspirator's statements);

*US v. Roberts*, 793 F.2d 580 (C.A. 4th 1986)(noting co-conspirator's statements under Rule 801 (d)(2)(E) not discoverable as defendant's own under Rule 16(2)(1)(A)).

> "It is clear that defendants are not entitled at this time to the discovery of statements of co-conspirators who will testify at the trial…. On the other hand, it is also relatively well established that statements of co-conspirators whom the government does not intend to call as witnesses at trial are discoverable in advance under FED. R. CRIM. P. 16…. However, the discovery of these statements is limited to those that would be discoverable under Rule 16 if they had been made by the defendant himself: written or recorded statements and oral statements made in response to interrogation." *US v. Madeoy*, 652 F. Supp. 371, 375 (D.D.C. 1987).

Furthermore, the non-testifying co-conspirator will not be granted immunity to preserve his Fifth Amendment privilege in order to get him to testify for the defendant. *US v. Paris*, 812 F.2d 471 (9th Cir. 1987).

More importantly, as the United States Court of Appeals for the Fourth Circuit very stated in *US v. Roberts*, 802 F.2d 682 (4th Cir. 1986);

> "The intent behind Rule 16's original authorization of criminal discovery for defendant's was to minimize the danger of unfair (emphasis added) surprise (surprise with falsehood), to improve the fact-finding process, and to increase the opportunities for informal pleas. The progressive liberalization of the defendant statement provisions of the rule, culminating in the present version of the Rule 16(a)(1)(A), reflects the special concern felt for the danger of unfair surprise in the most devastating form of evidence, inculpating admissions of the defendant. That danger is no less real- indeed is even greater- with respect to imputable co-conspirator statements attributed to the co-conspirator in the trial testimony of others than it is with respect to statements attributed to the defendant himself in the testimony of others." *US v. Roberts*, 802 F.2d 682 (4th Cir. 1986).

## PRESENTENCE REPORTS OF CO-DEFENDANTS

The Fifth Circuit in *US v. Trevino*, 556 F.2d 2165 (5th Cir. 1977) has held these reports are not discoverable under Rule 16, the *Jencks* Act, or *Brady*, unless actually in the possession of the United States Attorney. The Fourth Circuit, however, has held that if a report contains exculpatory material that portion must be disclosed. However, if the report is only material to impeach the

witness, disclosure is only required when there is a reasonable likelihood of the report affecting the trier of fact. *US v. Figurski*, 545 F.2d 389 (4th Cir. 1976).

However, other courts have indicated that "Bureau of Prisons' Records" are discoverable under the Freedom of Information Act even if they related to pre-sentence reports, *Carson v. US Department of Justice*, 631 F.2d 1008, 1009 (D.C. Cir. 1981)(holding that "a presentence report is an agency record within the meaning of the FOIA", even though it was "…prepared not by the Parole Commission" from whom it was sought, but rather, "by the Probation Service of the United States Courts," which are "not agencies within the meaning of the FOIA"). Discovery of "Bureau of Prisons' Records" relating to a co-conspirator/government witness should be allowed under the Freedom of Information Act (5 U.S.C. section 552] without relegating the criminal defendant to exhausting his administrative remedies under the Act and a separate civil suit. See *US v. Brown*, 562 F.2d 1144, 1152 (9th Cir. 1978) where the Ninth Circuit held that the FOIA "is applicable to discovery in a criminal trial," in that "it would impose a needless and time consuming burden on a defendant in a criminal trial to require a separate civil action for disclosure under FOIA"].

However, thereafter in *US v. United States District Court*, 717 F.2d 478, 480-81 (9th Cir. 1983) that court, interpreting its earlier Brown decision, held that Rule 16's requirement of "materiality" [not found under the Freedom of Information Act] is controlling:

> "We hold that in criminal cases the Freedom of Information Act does not extend the scope of discovery permitted under Rule 16. The limitations of Rule 16 are controlling. The trial court erred in its interpretation of *United States v. Brown*, and as a result the issuance of its orders was clear error."

*See also* *Fruehauf Corp. v. Thorton*, 507 F.2d 1253 (6th Cir. 1974);
*US v. Murdock*, 548 F.2d 599, 602 (5th Cir. 1977);
*US v. Buckley*, 586 F.2d 498, 500 (5th Cir. 1978).

*But see* *Berry v. Department of Justice*, 733 F.2d 1343 (9th Cir. 1984) (holding that a defendant's own P.S.I. was subject to F.O.I.A. disclosure for use in a parole proceeding).

## GRAND JURY MINUTES

Pursuant to the mandatory provisions of Rule 16(a)(1)(A), a defendant has an "absolute right" to his own testimony recorded before a grand jury. *US v. Tanner*, 279 F. Supp. 457, 472 (N.D. Ill. 1967); *US v. United Concrete Pipe Corp.*, 41 F.R.D. 538, 539 (N.D. Tex. 1966); *US v. Aeroquip Corp.*, 41 F.R.D. 441, 446 (E.D. Mich. 1966); *US v. Manetti*, 323 F. Supp. 683 (D. Del. 1971); *US v. Shoeneman*, 203 F. Supp. 840, 841-842 (D.D.C. 1962).

Discovery of recorded testimony of witnesses other than the defendant would be best sought under FED. R. CRIM. P. Rule 6(e) which provides, in pertinent part, that a court may order the disclosure of maters before a grand jury "preliminary to or in connection with a judicial

proceeding." Thus it would appear from the language of the rule that the disclosure may be compelled prior to trial.

In *Dennis v. US*, 384 US 855, 868 (1966), the Supreme Court made clear that relevant Grand Jury testimony should be disclosed to the defendant, noting "…the growing realization that disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice."

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact exceptions to this are justifiable only by the clearest and most compelling considerations." *Dennis v. US*, 384 US 855, 873 (1966).

The Supreme Court there ordered the disclosure of grand jury testimony of essential Government witnesses, where the testimony was uncorroborated, dealt with oral statements and each of the witnesses' credibility was open to question (one having reasons for hostility toward the defendant) stating that such a showing "…goes substantially beyond the minimum required by Rule 6(e) and the prior decisions of the Court." *Dennis v. US*, 384 US 855, 871 (1966).

While the Court in Dennis stated that the defendant there had established a "particularized need" to view the grand jury testimony of the witnesses against them.

*See* *US v. Rukin*, 559 F.2d 975 (5th Cir. 1977), *reh. den.*, 564 F.2d 98, 572 F.2d 320, *vacated* 99 S. Ct. 67 (1978), *on remand* 591 F.2d 278 (5th Cir. 1979);
*US v. Haskin*, 585 F.2d 904 (8th Cir. 1978).

The court made clear that such showing was not required and went "…substantially beyond the minimum required by Rule 6(e)." *Dennis v. US*, 384 US 855, 872 (1966). *See also Allen v. US*, 390 F.2d 476, 482 (D.C. Cir. 1968); *National Diary Prod. Corp. v. US*, 384 F.2d 457, 459 (8th Cir. 1967); *Harris v. US*, 433 F.2d 1127 (D.C. Cir. 1970) (en banc); *US v. McGowan*, 423 F.2d 413 (4th Cir. 1970); *US v. Barson*, 434 F.2d 127 (5th Cir. 1970).

Interestingly, the "particularized need" standard was recently applied to a government (I.R.S.) request for grand jury testimony. *In re Grand Jury Proceedings (Miller Brewing Co.)*, 31 Cr.L. 2524. (5th Cir. September 3, 1982).

Accordingly, grand jury testimony should be disclosed any time the Government demonstrates no need for secrecy, *Nolan v. US*, 395 F.2d 283, 286 (5th Cir. 1968), and the defense shows some semblance of need. *Bradley v. US*, 420 F.2d 181 (D.C. Cir. 1969); *Harris v. US*, 433 F.2d 1127 (D.C. Cir. 1970) (requiring a reasonable probability that such testimony could have been effectively utilized by the defense). Thus, a defendant should be entitled to pre-trial disclosure of the testimony of grand jury witnesses the Government intends to call at trial. *US v. Machi*, 324 F. Supp. 153 (E.D. Wis. 1971). The following cases requiring grand jury testimony of witnesses after they have testified;

*See* *Harris v. US*, 433 F.2d 1127 (D.C. Cir. 1970);
*Hanger v. US*, 398 F.2d 91 (8th Cir. 1968), *cert. den.* 393 US 1119;
*US v. Cullen*, 305 F. Supp. 695 (E.D. Wis. 1969);
*US v. McGowan*, 423 F.2d 413 (4th Cir. 1970);
*US v. Youngblood*, 379 F.2d 265 (2d Cir. 1967);
*US v. Burgio*, 279 F. Supp. 843 (S.D.N.Y. 1968);
*US v. Garcia*, 272 F. Supp. 286 (S.D.N.Y. 1967);

See also WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 108 at 183.
Jencks Act, 18 U.S.C. § 3500 (noting since the 1970 amendment, provides for production of a witness' grand jury testimony for purposes of cross-examination.)

The Defendant should be entitled to pre-trial disclosure of grand jury testimony, *Allen v. US*, 390 F.2d 482 (D.C. Cir. 1968); *Gibson v. US*, 403 F.2d 166, 169 (D.C. Cir. 1968); *US v. Tanner*, 279 F. Supp. 457, 472 (N.D. Ill. 1967); *US v. National Dairy Prods. Corp.*, 262 F. Supp. 447, 471 (W.D. Mo. 1967), *rev'd in part on other grounds*, 384 F.2d 457 (8th Cir. 1967).

> "Unless the prosecutor represents that there is substantial doubt whether the officer will testify at trial, we see no good reason why the grand jury testimony should not be available through a pre-trial motion." *Allen v. US*, 390 F.2d 476, 482 n.16 (D.C. Cir. 1968).

This is especially true where there is no demonstrable fear of danger from tampering with a witness. *Allen v. US*, 390 F.2d 476 (D.C. Cir. 1968). And even under such circumstances the Court has authority to issue protective orders to protect against any abuses under former Rule 16(e) and new Rule 16(d)(1); *Harris v. US*, 433 F.2d 1127 (D.C. Cir. 1970)(en banc); *US v. Hughes*, 413 F.2d 1244 (5th Cir. 1969); *vacated as moot sub nom*; *US v. Gifford-Hill America*, 90 S. Ct. 817 (1970).

In light of the length of most grand jury transcripts, anything less than pre-trial disclosure would deprive the defendant of adequate opportunity to make any meaningful use of the materials or cause lengthy delays in the trial proceedings.

Where the Government's case depends upon oral, unrecorded statements of the defendant or co-conspirators, then any grand jury testimony regarding the substance of those statements is necessary to adequately prepare a defense, and disclosure should be required.

> "[W]here the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements." *Dennis v. US*, 884 U.S. 855 (1966), at 872-73.

In determining what testimony is useful for impeachment and like purposes, the Supreme Court in *Dennis*, held that an "*in camera*" inspection by the Court is not sufficient. The defendant

is the only one fully apprized of defensive theories and thereby in a position to effectively evaluate the usefulness of such testimony.

> "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. US*, 384 U.S. 875, 875 (1966).

Rule 6(e)(2) further provides that a court may grant a defense request for disclosure "…upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Such disclosure has been ordered, for example, upon "…an adequate showing that the evidence before the grand jury was invalid." *US v. Laughlin*, 226 F. Supp. 112, 114 (D.D.C. 1964).

## JENCKS ACT WITNESS STATEMENT

The Jencks Act [18 U.S.C. § 3500] provides that "no statement or report …made by a Government witness or prospective witness …shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case. But then after a witness has "testified on direct examination" the Government must "produce any statement … of the witness in the possession of the United States "which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(a).

## PRETRIAL DISCLOSURE NO LONGER PROHIBITED

The language of both Texas Criminal Evidence Rule 614** and Federal Rule of Criminal Procedure 26.2 provide a right to mandatory disclosure "after [the] witness has testified on direct examination." Such disclosure is no longer limited, as was the predecessor statute, the Jencks Act [18 U.S.C. § 3500], "until [after] said witness has testified on direct examination *in the trial of the case*." [emphasis supplied], 18 U.S.C. § 3500(a).

**Merged

Prior decisions interpreting the *Jencks* Act had held that the express § 3500(a)'s express prohibition against disclosing witness' statements "until said witness has testified on direct …*in the trial* of the case," precluded pretrial disclosure of such statements.

*US v. Carter*, 621 F.2d 238, 240 (6th Cir. 1980);
*US v. Jones*, 612 F.2d 453, 455 (9th Cir. 1973);
*US v. Campagnerolo*, 592 F.2d 852, 858 (5th Cir. 1979).

Texas cases, as well held that *Gaskin* and *Zander's* production requirements did not apply to pre-trial hearings.

*Coleman v. State*, 651 SW.2d 846, 850 (Tex. – Tyler, 1983);
*Hoffman v. State*, 514 SW.2d 248 (Tex.Cr.App. 1974) (holding no right to disclosure prior to cross-examination).

Since Rule 26.2 has no such language precluding disclosure of witness statements prior to trial, courts have applied Rule 26.2 to provide for pretrial discovery of witness' statement at pretrial hearings, even where the statement was made by one other than the testifying witness and such production of prosecution witness' statements has even been required at preliminary hearings and bail detention hearings.

*US v. Musgrave*, No. SA-80-CR-70 (W.D. Tex., July 22, 1985);

> "This Court believes that the reports read by Special Agent Allen at the preliminary hearing on June 17, 1985, qualify as 'statements' within the meaning of Rule 26.2. Although the reports were prepared by another case agent, Special Agent Allen relied upon those reports to provide various factual information. His reliance on the reports indicates his belief that the reports were accurate and thus this Court is of the opinion that his reliance on the reports manifests his adoption of the matters set forth therein. Consequently, this Court is of the opinion that Allen adopted the information contained in the reports as his own and thus that the reports constitute 'statements' within the meaning of Rule 26.2 and are discoverable by the Defendant to the extent that the reports are relevant to Special Agent Allen's testimony.
>
> The Government claims that Rule 12(i) of the Federal Rules of Criminal Procedure limits the application of Rule 26.2 to suppression hearings. This Court does not agree. While Rule 12(i) provides that Rule 26.2 shall apply at suppression hearings, it contains no other language that would appear to limit the Rule's application strictly to hearings arising in connection with a motion to suppress . . . .
>
> Rule 26.2 contains no indication that the rule is to apply only at suppression hearings or at trial. *Compare* Rule26.2, Federal Rules of Criminal Procedure with 18 U.S.C. § 3500. Consequently, this Court believes that Rule 26.2 applies to the proceeding at issue and thus believes that the statements read by Special Agent Allen should have been disclosed to the Defendant insofar as they were relevant to his testimony."

Courts have held as well that statements used by a witness to refresh his or her recollection at a pretrial "hearing' may be disclosed under Rule 613 of the Federal Rules as well.

*US v. Salsedo*, 477 F. Supp. 1235 (E.D. Ca. 1979);

*US v. Wallace*, 848 F.2d 1464 (9th Cir. 1988)(notes adopted by witness testifying at grand jury should have been produced by government);
*US v. Musgrave*, No. SA-85-CR-132 (W.D. Tex. 1986).

> "In any event, Agent Massey admittedly used this document to refresh his recollection on the stand at the detention hearing before the Magistrate. And several commentators have noted that, 'after the effective date of Rule 26.2 [December 1, 1980] . . .[S]tatements used for refreshing recollection *at hearings prior to trial* . . . will be subject to production' pursuant to Rule 612 of the Federal Rules of Evidence. 3 Weinstein's_Evidence, § 612[02] at 612-26. This should be especially true where, as here, a presumptively innocent citizen is ordered detained before trial without bail, based upon the *ex parte* receipt of documentary evidence, without affording him the opportunity to review or rebut same." *US v. Musgrave*, No. SA-85-CR-132 (W.D. Tex. 1986).

Commentator's have noted that the language of the Jencks Act was amended by Rule 26.2 "after long and careful consideration by the Advisory Committee, the Supreme Court and the Congress." 3 Weinstein's Evidence ¶612[02] at 612-24.

> "As a general rule, the enactment of revisions and codes manifestly designed to embrace an entire subject of legislation operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect." 73 Am. Jur. 2d § 411; *See also* 3 Weinstein's Evidence, ¶[02] at 612-24.

Here, according to the enabling statute "all laws in conflict with such rules [of criminal procedure] shall be of no further force or effect after such rules have taken effect." 18 U.S.C. § 3737. Accordingly, the Jencks Acts' 1970 prohibition against pretrial disclosure of witnesses statements, being in conflict with the recent enactment of Rule 26.2, has no force or effect.

As one of the leading commentators has noted, while the Jencks Act was not repealed with the enactment of the all-encompassing Rule 26.2, "it should be deemed repealed." 3 Weinstein's Evidence ¶612[02] at 612-25.

## AT VERY LEAST CONTINUANCE MAY BE REQUIRED

Even under the Federal Jencks Act, courts have held that a continuance may be required to study *Jencks* material and adequately prepare cross-examination, even if same is provided *prior* to trial.

*US v. Holmes*, 722 F.2d 37, 40-41 (4th Cir. 1983)

> "Here it is clear that defendant's were not afforded a reasonable opportunity to examine and digest the mass of material furnished them on the Sunday before the Monday that the trial began…. It was therefore an abuse of discretion on the part of the district court to deny a reasonable delay in the progress of the trial to permit counsel to complete their studies and preparation."

*See also* *US v. Wables*, 731 F.2d 440 (7th Cir. 1984)

Other courts have indicated that policy considerations such as judicial economy warrant encouraging early disclosure of Jencks statements. This is obviously a needlessly time consuming process which could be avoided by early disclosure.

*US v. Percevault*, 490 F.2d 126, 132 (2d Cir. 1974);
*US v. Izzi*, 613 F.2d 205, 212 (1st Cir. 1980).

*Contra* *US v. Algil*, 667 F.2d 569 (6th Cir. 1982) (indicating approval of early release of *Jencks* material, but refusing to require same over prosecution's objection);
*US v. Thomas*, 609 F.Supp. 1048 (D.N.C. 1985) (noting courts may not compel disclosure of government witness' *Jencks* statements until after witness testifies on direct at trial);
*US v. Lowenberg*, 853 F.2d 295 (5th Cir. 1988) (noting delivery of *Jencks* material on eve of trial did not constitute reversible error).

*US v. Percevault*, 490 F.2d 126, 132 (2d Cir. 1983)

> "[W]e note that in most criminal cases, pretrial disclosure will resound to the benefit of all parties, counsel and the court. Indeed, sound trial management would seem to dictate that Jencks Act material should e transmitted prior to trial, especially in complex cases, so that those abhorrent lengthy pauses at trial to examine documents can be avoided . . . . We suggest that the district judge may find the pretrial conference, FED. R. CRIM. P. 17.1, a useful forum for establishing a timetable for discovery and for reaching agreements the scope of disclosure. Particularly in multiple defendant cases, the district judge may solicit broad disclosure to assist him in disposing of motions for severance or in detecting inadmissible confessions under *Bruton v. US*, 391 US 123, 88 S.Ct. 1620, 20 F>Ed.2d 476 (1968). Pretrial discovery should be approached with a spirit of cooperation among court and counsel in order to prevent those burdensome trial recesses and also, we should emphasize to protect the government against post-conviction claims of prejudicial surprise, *see US v. Baum*, 482 F.2d 1325, 1331-32 (2d Cir. 1973), or claims of suppression of material and favorable

evidence, *see Brady v. Maryland*, 373 US 83, 83 S.Ct. 1194, 10L.Ed.2d 215, (1963)."

OR AN IN CAMERA HEARING

Where a question arises as to whether a government agent's investigative report constitutes a Jencks Act Statement, the trial court must conduct an *in camera* hearing to determine whether the report relates to the subject matter of the agent's trial testimony. *US v. Welch*, 810 F.2d 485 (5th Cir. 1987); *Bond v. Procunier*, 780 F.2d 461 (4th Cir. 1986).

*See also* *US v. Rivera Pedin*, 861 F.2d 1522 (11th Cir. 1988)(noting reversal required where trial court failed to conduct an *in camera* hearing).

JENCK'S ACT STATEMENT LIMITATION

Statements written by a prosecutor and not adopted by defendant were not seen to be within the act's scope. *US v. Valera*, 845 F.2d 923 (11th Cir. 1988). Another statement was not in verbatim form. *Id.* Also, "statements made by a witness and summarized by a third person can be Jencks material but only if the witness has signed or otherwise adopted and approved them." *US v. Newman*, 849 F.2d 156 (5th Cir. 1988). Additionally, prosecutor's notes of discussions with government witness not found to be "statements" since not signed, written, or adopted by witness. *US v. O'Malley*, 796 F.2d 891 (C.A. Ill. 1986).

**RECIPROCAL DISCLOSURE [THE "TWO-WAY" STREET]**

COUNSEL SHOULD BE MINDFUL THAT DEFENSE WITNESSES' STATEMENTS MAY BE DISCOVERABLE BY PROSECUTION

Calling a defense witness, *other than the defendant*, will now render any relevant prior statements of that witness producible to the prosecution upon request, after the witness testifies on direct. Prior Texas cases had held that *Gaskin v. State*, 353 S.W.2d (Tex Cr.App. 1961) and *Zanders v. State*, 480 SW.2d 708 (Tex.Cr.App. 1972) did not require disclosure of defense witness statements.

*Ballow v. State*, 640 SW.2d 237 (Tex. Cr. App. 1982).

FED. R. CRIM. P. Rule 26.2 makes the Jencks Act [18 U.S.C. § 3500] a two-way street providing for production of defense witness' recorded statements in much the same manner as the Jencks Act provided for production of prosecution witness' statements. The Rule expressly provides that "after a witness other than the defendant had testified on direct examination" upon motion of the opposing party the court shall order the production of "any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified." FED. R. CRIM. P. Rule 26.2.

*See* *US v. Nobles*, 422 US 231, 232 (1975);
*US v. Tarnowski*, 583 F.2d 903, at p. 906 (6th Cir. 1978), cert. denied, 440 US 918 (1979).

This requirement has been held not to become applicable until after the witness has actually testified at trial.

*US v. Felt*, 502 F. Supp. 71 (D. Colo. 1980).

*Cf.* *US v. Abrams*, 539 F. Supp. 378 (S.D.N.Y. 1982)(requiring reciprocal discovery 24 hours prior to testimony where Government was required to reciprocate).

Be mindful that the Government is equally affected by reciprocal discovery. *See Mauricio v. Duckworth*, No. 86-1842 (7th Cir. 1988) (discussing the state's failure to reveal alibi rebuttal witnesses invalidates conviction).

Note also, that the prosecution will be "deemed" to have knowledge of and access to materials held by any federal agency that has taken part in the investigation on wihich the charges the defendant faces are based. *US v. Bryan*, ___ F.2d___, No. 87-3059 (9th Cir. 1989)(noting geographical boundaries notwithstanding).

And while FED. R. CRIM. P. Rule 26.2 omits the Jencks Act's express prohibition against disclosures "until said witness has testified on direct examination in the trial of the case," 18 U.S.C. § 3500(a), at least one court has held that same does not allow pretrial disclosure, *US v. Litman*, 547 F. Supp. 645 (W.D. Penn. 1982), a difficult position to reconcile with FED. R. CRIM. P. Rule 12(i) providing for discovery of witness statements at a pretrial suppression hearing pursuant to Rule 26.2. See *US v. Gerena*, 116 F.R.D. 596 (D. Conn. 1987) (stating that expert witness's reports simultaneously disclosed by defense and prosecution prior to pre-trial suppression hearing).

## CONSTITUTIONALITY OF REQUIRING AN ACCUSED TO MAKE DISCLOSURE

Such mandatory disclosure by the criminal defendant has been approved under certain limited circumstances by the Supreme Court in *Williams v. Florida*, 339 US 943 (1970) (stating Florida statute required defendant to disclose alibi and witnesses); *US v. Nobles*, 422 US 225 (1975) (noting disclosure of defense witness investigator's report).

## AGENT'S ROUGH NOTES

An officer's rough investigative notes may be *Jencks* material. *US v. Paoli*, 603 F.2d 1029 (2d Cir. 1979); *US v. Gaston*, 608 F.2d 607, 611-12 (5th Cir. 1979); *US v. Rippy*, 606 F. 2d 1150, 1153 (D.C. 1979); *US v. Ammar*, 714 F.2d 238 (3d Cir. 1983) (holding that Jencks Act, now FED.

R. CRIM. P. Rule 26.2, includes final reports, rough notes and any drafts used to prepare the final report). *Contra US v. Hinton*, 719 F.2d 711 (4th Cir. 1983) (stating where incorporated into agents reports); *US v. Soto*, 711 F.2d 1558 (11th Cir. 1983) (reversing trial court ruling striking government witness' testimony on grounds rough notes not produced).

Accordingly, while some courts require preservation of such "notes", *US v. Sanchez*, 635 F.2d 47, 65-66 (2d Cir. 1980); *US v. Walden*, 590 F.2d 85, 86 (3d Cir. 1979), *cert. den.*, 444 US 849; *US v. Crowell*, 586 F.2d 1247, 1248 (4th Cir. 1973), others hold that routine and good faith destruction of these notes which have been incorporated into formal reports does not violate the Jencks Act. *US v. Cole*, 634 F.2d 866, 867-8 (5th Cir. 1981); *US v. Kuykendall*, 633 F.2d 118, 199 (8th Cir. 1980); *US v. Fredrick*, 583 F.2d 273, 274 (6th Cir. 1978), *cert. den.*, 444 US 860; *US v. Shovea*, 580 F.2d 1382, 1389-90 (10th Cir. 1978). The Supreme Court has expressed reluctance to impose an absolute duty on the government or its agents to preserve "all material that might be of conceivable evidentiary significance in a particular prosecution." *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988). Typically, for the Defendant to gain any remedy for the destruction of such materials, he must demonstrate bad faith on the part of the police or the prosecution. *Id.*

In the following cases, rough notes written by government agents while interviewing witnesses were held not to be admissible under the Jencks Act.

*Goldberg v. US*, 425 US 94 (1976);
*US v. O'Malley*, 796 F.2d 891 (7th Cir. 1986);
*US v. Hinton*, 719 F.2d 711 (4th Cir. 1983);
*US v. Griffin*, 659 F.2d 932 (9th Cir. 1981);
*US v. Soto*, 711 F.2d 1558 (11th Cir. 1983);
*US v. Lloyd*, 743 F.2d 1555 (11th Cir. 1984).

However, an agent's report or rough notes may be discoverable as the agent's own Jenck's Act statements if the agent testifies. *See US v. Del Toro Soto*, 728 F.2d 44 (1st Cir. 1984); *US v. Kaiser*, 660 F.2d 724 (9th Cir. 1981); *US v. Roemer*, 703 F.2d 805 (5th Cir.), *cert. den.*, 104 S.Ct. 341 (1983); *US v. Barlin*, 686 F.2d 81 (9th Cir. 1981); *US v. Gaston*, 608 F.2d 607 (5th Cir. 1979).

The extent to which government agents should preserve rough notes for subsequent production has been disagreed upon by the circuits. The Second, Fourth, Sixth, Eighth and Tenth Circuits have held that a government agent does not have a duty under the Jencks Act to preserve notes or reports for subsequent production. *US v. Hinton*, 719 F.2d 711 (4th Cir. 1983); *US v. Waterman*, 704 F.2d 1014 (8th Cir. 1983); *US v. Barlin*, 686 F.2d 81 (2d Cir. 1980); *US v. Cole*, 634 F.2d 866 (5th Cir. 1980); *US v. Grammatikos*, 633 F.2d 1013 (2d Cir. 1980); *US v. Kuykendall*, 633 F.2d 118 (8th Cir. 1980); *US v. Frederick*, 583 F.2d 273 (6th Cir. 1978).

Although the Eighth Circuit held in *Kuykendall* that the Jencks Act imposes no duty to preserve original investigative notes, the court has implied that if a defendant can show prejudice, even good faith destruction of an agent's notes after incorporation into a final report could be reversible error. *US v. Hoppe*, 645 F.2d 630 (8th Cir.), *cert. den.*, 454 US 849 (1981).

The Seventh Circuit has suggested in dictum that an agent's handwritten interview notes should be preserved so that the defendant can determine the usefulness of the agent's prior statements for impeachment purposes. *US v. Batchelder*, 581 F.2d 626 (7th Cir. 1978), *rev'd on other grounds*, 442 US 114 (1979).

The Third Circuit has held that destruction of a testifying officers handwritten notes and rough drafts violates the Jencks Act. *US v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. den.*, 104 S. Ct. 344 (1983). *US v. Walden*, 590 F.2d 85 (3d Cir.), *cert. den.*, 444 US 849 (1979).

The D.C. Circuit has held that agents must always preserve their handwritten notes because notes not covered by the Jencks Act may nevertheless be discoverable under Brady or FED. R. CRIM. P. Rule 16; *US v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975).

The Ninth Circuit distinguishes between an agent's rough notes and handwritten rough drafts of reports. The court allows destruction of a rough draft if it is subsequently incorporated into a final formal report that is reviewed, adopted or signed by the testifying agent. *US v. Bagnarial*, 665 F.2d 877 (9th Cir. 1981); *US v. Kaiser*, 660 F.2d 724 (9th Cir. 1981), *cert. den.*, 456 US 962 (1982); *US v. Griffin*, 659 F.2d 932 (9th Cir. 1981).

BUT IF THEY'RE ROUGH ENOUGH…

The Ninth Circuit takes the view that if an agent's rough notes are rough enough, they're not Jencks material. "A government agent's rough notes will not be Jencks Act statements when they are not complete, are truncated in nature, or have become an insiftable mix of witness testimony, investigator's selections, interpretation, and interpolations." *US v. Smitob*, 901 F.2d 799, 809 (9th Cir. 1990). *See also U.S. v. Griffin*, 659 F.2d 932 (9th Cir. 1981), *cert. denied*, 456 U.S. 949, 102 S. Ct. 2019, 72 L. Ed.2d 473 (1982); *U.S. v. Spencer*, 618 F.2d 605 (9th Cir. 1980). The lesson to all you future DEA Agent: Disorganization is the key to a successful career.

## REPORTS OF EXAMINATIONS AND TESTS

Rule 16(a)(1)(D) places a mandatory duty upon the Government to disclose the following, upon request of the defendant:

a. Any result or reports of physical or mental examination, and

b. Any results of reports of scientific tests or experiments made in connection with the particular case.

(1) Scientific Tests and Reports.

The obligation of disclosure applies only to scientific tests or experiments made in connection with a particular case. "Limited mandatory disclosure is justified, because: (1) it is difficult to test expert trial testimony without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense its disclose is mandated under *Brady*," 1975 Advisory Committee Note to Subdivision (a)(1)(D).

(2) Field Tests.

Standard field tests used by DEA to identify controlled substances and internal memoranda relating to such tests, were not discoverable in a cocaine prosecution because not made in connection with that particular case. *US v. Orzechowski*, 547 F.2d 978 (8th Cir. 1976); or where the defendant had the use of such memoranda during trial *US v. Umentum*, 547 F.2d 987 (8th Cir. 1976), *cert. den.*, 430 US 983.

(3) Failure to Produce.

Even if the government fails to produce the results or reports of scientific tests in violation of Rule 16(a)(1)(D), the defendant still must demonstrate prejudice. *US v. Deweese*, 632 F.2d 1267 (5th Cir. 1980). In *Gorham v. Wainwright*, 588 F.2d 178 (5th Cir. 1979), the government did not deliver defendant's counsel, a F.B.I. lab report which was conclusive of guilt until after the trial had begun. The court affirmed the conviction finding no prejudice because defendant's counsel asked for and received a ten minute recess to stuffy the report and did not request a continuance. See also *US v. Eisler*, 567 F.2d 814 (8th Cir. 1977); *US v. Phillips*, 585 F.2d 745 (8th Cir. 1978) (holding Government's failure to disclose handwriting analyst's report did not prejudice defendant); *Norris v. Slayton*, 540 F.2d 1241 (4th Cir. 1976); *US v. Beaver*, 524 F.2d 963 (5th Cir. 1975), *cert. den.*, 425 US 963 (5th Cir. 1975), *cert. den.*, 425 US 905 (1976).

## DISCOVERY OF LAW ENFORCEMENT REPORTS AT PRE-TRIAL SUPPRESSION HEARING

FED. R. CRIM. P. Rule 41(f) specifically provides for the filing of a Motion to Suppress and a pretrial hearing thereon as the appropriate remedy for enforcing a defendant's Fourth Amendment protection against unreasonable search and seizure.

A recent amendment to FED. R. CRIM. P. Rule 12(i) provides for the disclosure of witness statements under FED. R. CRIM. P. Rule 26.2 [reciprocal *Jencks*] at the pre-trial motion to suppress hearing.

"Rule 12. Pleadings and Motions Before Trial; Defenses and Objections
(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING.

Except as herein provided, Rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privilege matter."

And "law enforcement" officers are "deemed" to have been called by the government even if subpoenaed and put on the stand by the defendant.

The Advisory Committee notes to new Rule 12(i) expressly provide that when "a federal, state or local officer has testified at a suppression hearing, the defendant will be entitled to any statement of the officer in the possession of the government and relating to the subject matter concerning which the witness has testified, without regard to whether the officer was in afct called by the government or the defendant."

Accordingly, standard field tests used by D.E.A. to identify controlled substances and internal memoranda relating to such tests were not discoverable in a cocaine prosecution because they were not made in connection with that particular case. *US v. Orzechowski*, 547 F.2d 978 (8th Cir. 1976); or where the defendant had the use of such memoranda during trial, *US v. Umentum*, 547 F.2d 987 (8th Cir. 1976), *cert. den.*, 430 US 983.

However, pursuant to the mandatory disclosure provisions of the Freedom of Information Act [5 U.S.C. § 552(a)(2)(C)- requiring agencies to make public "administrative staff manuals"] DEA has been required to disclose portions of their agents' manuals dealing with informants and search warrants. And the so-called "law enforcement exception" [5 U.S.C. 552(b)(7)] is inapplicable since that provision relates only to records compiled in the course of an investigation directed at specific persons, and then only if disclosure would reveal investigative techniques and procedures. Those portions dealing with planning prior to entry, however, were exempted from disclosure as same constituted an "internal personnel" matter in which the general public could not reasonably be expected to have an interest [§ 552(b)(2)]. *Sladek v. Bensinger*, 605 F.2d 899 (5th Cir. 1979). *See also Jordan v. U.S. Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978), *overruled on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051, 1053 (D.C. Cir. 1981); *Contra v. Bureau of Alcohol, Tobacco and Firearms*, 587 F.2d 544 (2d Cir. 1978).

Even in cases where the government fails to produce the results or reports of scientific tests in violation of Rule 16(a)(1)(D), many courts have still required that the accused demonstrate prejudice. *US v. Deweese*, 632 F.2d 1267 (5th Cir. 1980). In *Gorham v. Wainwright*, 588 F.2d 178 (5th Cir. 1979), the government did not deliver defendant's counsel a F.B.I. lab report which was conclusive of guilt until after the trial had begun. The court affirmed the conviction finding no prejudice because defendant's counsel asked for and received a ten-minute recess to study the report and did not request a continuance. *See also US v. Eisler*, 567 F.2d 814 (8th Cir. 1977); *US v. Phillips*, 585 F.2d 745 (5th Cir. 1978) (noting Government's failure to disclose handwriting analyst's report did not prejudice defendant); *Norris v. Slayton*, 540 F.2d 1241 (4th Cir. 1976); *US v. Beaver*, 524 F.2d 963 (5th Cir. 1975), *cert. den.*, 425 US 905 (1976).

**DISCOVERY FROM GOVERNMENTAL AGENCY MANUALS**

Pursuant to the mandatory disclosure provisions of the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(C) (requiring agencies to make public "administrative staff manuals"); DEA has been required to disclose portions of their agents' manuals dealing with informants nad search warrants. And the so-called "law enforcement exception" [§ 552(b)(7)] is inapplicable since that provision relates only to records compiled in the course of an investigation directed at specific persons, and then only if disclosure would reveal investigative techniques and procedures. Those portions dealing with planning prior to entry, however, were exempted from disclosure as same constituted an "internal presonell" matter in which the general public could not reasonably be expected to have an interest [§ 552(b)(2)]. *Sladek v. Bensinger*, 605 F.2d 899 (5th Cir. 1979).

See also Jordan v. U.S. Department of Justice, 591 F.2d 753 (D.C. Cir. 1978);
Contra v. Bureau of Alcohol, Tobacco and Firearms, 587 F.2d 544 (2d Cir. 1978).

Even in cases where the government fails to produce the results or reports of scientific tests in violation of Rule 16(a)(1)(D), many courts have still required that the accused demonstrate prejudice. US v. Deweese, 632 F.2d 1267 (5th Cir. 1980). In Gorham v. Wainwright, 588 F.2d 178 (5th Cir. 1979), the government did not deliver defendant's counsel a F.B.I. lab report which was conclusive of guilt until after the trial had begun. The court affirmed the conviction finding no prejudice because defendant's counsel asked for and received a ten-minute recess to study the report and did not request a continuance. See also US v. Eisler, 567 F.2d 814 (8th Cir. 1977); *US v. Phillips*, 585 F.2d 745 (5th Cir. 1978) (noting Government's failure to disclose handwriting analyst's report did not prejudice defendant); *Norris v. Slayton*, 540 F.2d 1241 (4th Cir. 1976); *US v. Beaver*, 524 F.2d 963 (5th Cir. 1975), *cert. den.*, 425 US 905 (1976).

## DISCLOSURE BY THE DEFENDANT (RECIPROCAL DISCOVERY)

Upon the request of the government, Rules 16(b)(1)(A) and (B) place a reciprocal duty upon the defendant to disclose those items which correspond to the section under which the defendant has sought discovery from the Government, but only if the defendant seeks discovery under some provision other than Rule 16 (a)(1) (A) or (B), and then only for items which correspond to the section under which the defendant made a request [i.e., if the defendant requests discovery of a "document" under Rule 16(a)(1)(C) and Government is entitled to like discovery under Rule 16(b)(1)(C), but not to discovery of "Reports of Examinations" under Rule 16(b)(1)(D)].

Disclosure from the defendant is subject to only those items "which the defendant intends to introduce as evidence in the trial."

While mandatory disclosure by the criminal defendant has been approved under limited circumstances by the Supreme Court, *Williams v. Florida*, 339 US 943 (1970) (noting Florida statute requiring defendant to disclose alibi and witnesses); *US v. Nobles*, 422 US 225 (1975) (noting disclosure of defense witness-investigator's report); the constitutionality of the disclosure requirements placed on the defendant by Rule 16(b)(1) has been criticized on the grounds it conflicts with the defendant's Fifth Amendment privilege against self-incrimination. See 39 F.R.D. 276, 277 (Douglas, J., dissenting) (dissenting with regard of the adopton of old Rule16(c)); *see also US v. Sermon*, 218 F.Supp. 871, 872 (W.D. Mo. 1963) (noting pre-rule case discussing

discovery from a criminal defendant). *But see Williams v. Florida*, 399 US 78 (1970); US v. Nobles, 422 US 225 (1975).

## TRIGGERING RECIPROCAL DISCOVERY

In other words a defendant will not invite reciprocal discovery by seeking statements under Rule 16(a)(1)(A), or the defendant's criminal record under Rule 16(a)(1)(B), but will be required to provide corresponding materials to those he requests from the Government under Rule 16(a)(1)(C) and (D) respectively.

## MATERIALITY OF GOVERNMENT REQUEST

There is no requirement that the Government's request be material or reasonable. It has been said that the Rule is purely mechanical. See 8 MOORE'S FEDERAL PRACTICE § 16.08(s) at 121-22.

## INFORMATION NOT SUBJECT TO DISCLOSURE

Rule 16(a)(2) provides as follows: "[e]xcept as provide in paragraphs )(A), (B), and (D) of subdivision (a)(1) this Rule does not authorize the discovery or inspection of reports, memoranda, or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. Sec. 3500."

a. Work Product.

The first exemption in this subjection of Rule 16 is the work product exemption which is articulated in *Hickman v. Taylor*, 329 US 495 (1947), and reaffirmed in *US v. Nobles*, 422 US 225 (1975): "[a]t its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." The *Nobles* case then applied the privilege to a defense attorney's investigator and "other agents that participate in the compilation of materials preparation for trial."

(1) Agent's Reports.

Criminal reference report of the Department of Justice was held to be work product in *US v. Bloom*, 78 F.R.D. 591, 619-20 (E.D. Penn. 1977). I.R.S. special agent's final report of his investigation was not discoverable in *US v. Kessler*, 61 F.R.D. 11 (D. Minn. 1973).

(2) Reports Adopted by Witness.

"A writing prepared by a government lawyer relating to the subject matter of the testimony of a government witness that has been signed or otherwise adopted or approved by a government witness that has been signed or otherwise adopted or approved by a government witness is producible under the Jencks Act, and is not rendered non-producible under the Jencks Act, and is not rendered non-producible because a government lawyer interviews the witness and writes the 'statement'." Goldberg v. US, 425 US 94 (1976). See also US v. Strahl, 590 F.2d 10 (1st Cir. 1978), cert. den., 99 S. Ct. 1237 (1979).

b. Witness Statements.

The second exemption of Rule 16(a)(2) applies to "statements made by government witnesses or prospective government witnesses" except where the requirements of 18 U.S.C. Sec. 3500 are met.

## GRAND JURY TRANSCRIPTS

Rule 16(A)(3) provides as follows: "Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

### DEFENDANT'S TESTIMONY

Rule 16(a)(1)(A) provides for mandatory disclosure of a defendant's own grand jury testimony which relates to the offense charged.

### CORPORATE DEFENDANT

Corporate defendants are entitled to inspect any testimony given by its officers, directors, agents, and employees before the grand jury. *US v. Tobin Packaging Co., Inc.*, 362 F. Supp. 1127 (N.DN.Y. 1973); *US v. Bally Mfg. Corp.*, 345 F. Supp. 410 (E.D. La. 1972). The test used to determine whether the grand jury witness was a representative of the corporation is the same test as set out in Rule 16(a)(1)(A). *US v. White Ready-Mix Concrete Co.*, 449 F. Supp. 808 (N.D. Ohio, 1978).

### GRAND JURY WITNESSS TESTIMONY

*Brady v. Maryland* may require disclosure of exculpatory grand jury testimony of a government witness, but *Brady* imposes no time limits on such disclosure that are inconsistent

with the Jencks Act. *US v. Campagnuola*, 592 F.2d 852 (5th Cir. 1979); *US v. Eisenberg*, 469 F.2d 156 (8th Cir. 1972).

## RULE 6(e) DISCOVERY

FED. R. CRIM. P. Rule 6(e) provides generally for secrecy of grand jury proceedings. One exception for defense discovery appears in Rule 6(e)(3)( C). "Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made …(i.e.) when permitted by a court at the request of a defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the Grand Jury."

## PARTICULARIZED NEED

A "strong showing of a particularized need" is required to justify pre-trial disclosure of grand jury testimony. *Pittsburgh Plate Glass Co. v. US*; *US v. Rubin*, 559 F.2d 975, *reh. den.*, 564 F.2d 98, 572 F.2d 320 (5th Cir. 1977), *vac'd*, 99 S.Ct. 67 (1978), *on remand*, 591 F.2d 278 (1979); *US v. Harbin*, 585 F.2d 904 (8th Cir. 1978) (alleging that the transcript might reveal a ground on which to dismiss the indictment and could be used in cross-examination was insufficient).

(a) Examples of Need:

(i) To establish a double jeopardy defense when a Los Angeles grand jury transcript was requested by a Texas defendant, *US v. Hughes*, 413 F.2d 1233 (5th Cir. 1969).

(ii) To enable counsel to investigate well-documented suspicions of jury-tampering. *US v. Moton*, 582 F.2d 654 (2d Cir. 1978), *on remand*, 463 F. Supp. 49 (S.D.N.Y. 1979).

## CONTINUING DUTY TO DISCLOSE

Rule 16(c ) provides as follows: "[I]f, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material."

a. Application of Duty.

This rule applied in a situation where the government acquired new discoverable evidence before trial but after defense counsel had inspected evidence at U.S.

Attorney's office; duty on government to re-notify defense counsel. *US v. Bowers*, 593 F.2d 376 (10th Cir. 1979), *cert. den.*, 100 S. Ct. 106.

b. Failure to Disclose.

In order to preserve error under this rule, upon being confronted with the withheld evidence at trial, defense counsel must request continuance and recess of trial, and demonstrate prejudice. *US v. Scruggs*, 583 F.2d 238, 241-42 (5th Cir. 1978); *US v. James*, 495 F.2d 434 (5th Cir. 1974), *cert. den.*, 419 US 899.

*But see* *US v. Pulido*, 879 F.2d 1255, No. 2974 (5th Cir. 1989)(stating failure to disclose transcript to defendant was reversible error despite accused's failure to demonstrate "particularized need").

## GOVERNMENT MAY DEPOSE DEFENSE COUNSEL IN PURSUIT OF CLIENT'S FORFEITED ASSETS

Neither the Fifth Amendment or Attorney Client privilege stands in the way of the Government to depose defense attorneys in their efforts to locate a client's forfeited assets. *See U.S. v. Saccoccia*, 823 F. Supp. 994 (D.C. 1995).

## SANCTIONS

Rule 16(d)(2) provides that as a sanction for failure to comply with Rule 16 the Court "may order such party to permit the discovery or inspection, grand a continuance, or prohibit the party from introducing evidence not disclosed."

The appropriate standard in a particular case is left to the "discretion of the trial court," see Advisory Committee Notes, Rule 16(d), and "in an unusual case the court might be justified in taking the extreme measure of ordering the prosecution dismissed." 8 MOORE'S FEDERAL PRACTICE § 16.05 at 16-64.

The Sixth Amendment Compulsory Process Clause may be violated by the imposition of a discovery sanction that entirely excludes the testimony at a material defense witness. The clause confers on the accused the fundamental right to present witnesses in his own defense. However, the clause does not create an absolute bar to the preclusion of the testimony of a defense witness as a sanction for violating a discovery rule. Although a trial court may not ignore the fundamental character of the defendant's right to offer testimony of witnesses in his favor, the mere invocation of that right cannot automatically outweigh public interests. *Taylor v. Illinois*, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). If discovery violations are willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the witness's testimony regardless whether other less drastic sanctions are available. Taylor, supra.

*See* *Escalera v. Coombs*, ___F.Supp. ___ (E.D.N.Y. 1987);
*Chappee v. Rose*, ___F.2d ___ (1st Cir. 1988).

Rule 26.2, in even stronger language than Rule 16(d)(2), provides that a sanction for failure to comply is that the Court "shall order that the testimony of the witness be stricken from the record and that the trial proceed." R. 26.2(e), F.R.Cr.P..

It is interesting to note that under Rule 16, the appropriate standard in a particular case is left to the "discretion of the trial court," *see* Advisory Committee Notes, Rule 16(d), and "[I]n an unusual case the court might be justified in taking the extreme measure of ordering the prosecution dismissed." 8 MOORE'S FEDERAL PRACTICE § 16.05 at 16-64, where the prosecution fails to comply. *See also US v. Wallace*, 848 F.2d 1464 (9th Cir. 1988) (noting the sanction of dismissal appropriate where notes of government's principal witness were not disclosed and subsequently lost); *US v. Carrigan*, (1986) (stating defense counsel permitted to depose government witness as sanction for government's interference with defense counsel's access to the witnesses).

**BRADY MOTION (EVIDENCE FAVORABLE TO THE DEFENDANT)**

Apart from any discovery under FED. R. CRIM. P. Rule 16, the criminal defendant has a Constitutional right to the disclosure of all favorable evidence in the possession of the Government, pursuant to the "due process" clause of the Fifth and Fourteenth Amendments. *Brady v. Maryland*, 373 US 83 (1963).

This right of the defendant to disclosure of "favorable" evidence exists whether such evidence is material to the defendant's guilt or to mitigation of his punishment, *Brady v. Maryland*, 373 US 83, 87 (1963), and "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 US 83, 87 (1963).

The Government has a duty to disclose any favorable evidence which could be used at trial ". . . or in obtaining further evidence." *Giles v. Maryland*, 386 US 66, 74 (1963). Such favorable evidence need not be competent evidence, admissible at trial. *US v. Gleason*, 265 F. Supp. 850, 886 (S.D.N.Y. 1967).

TEST

FAVORABLE EVIDENCE

The test for determining whether particular evidence is favorable has been held to be whether the undisclosed material "…might have led the jury to entertain a reasonable doubt" regarding the defendant's guilt or might have altered his punishment.

*See* *Levin v. Katzenback*, 363 F.2d 287, 292 (D.C. Cir. 1966);
*Cannon v. Alabama*, 558 F.2d 1211, 1216 (5th Cir. 1977)
(stating "[w]e must assess the evidence's impact on a reasonable fact finder.");
*US v. Agurs,* 427 US 97, 111 (1976);

*Silk-Nauni v. Fields,* 676 F. Supp. 1076 (W.D. Okla. 1987) (noting police officer's statement showing inconsistencies in the sequence of events leading up to the shooting charged must be revealed).

*But see* *US v. Biaggi*, 674 F. Supp. 1034 (S.D.N.Y. 1987) (stating defendant was not entitled to production of evidence implicating attorney general in the bribery of a congressman where the same did not necessarily exonerate the defendant).

## IMPEACHMENT EVIDENCE

The Supreme Court has recently reiterated that the prosecution's failure to disclose favorable evidence requires reversal only if the undisclosed evidence was "material". That is, disclosure would have, within "reasonable probability," effected the result of the proceeding. *US v. Bagley*, 105 S.Ct. 3375 (1985); *Delaware v. Van Arsdale*, 106 S.Ct. 1431 (1986) (stating harmless error analysis applies to denial of cross-examination of informant for bias); *US v. Peltier*, 800 F.2d 722 (8th Cir. 1986) (noting a "possibility" is not enough).

## SPECIFIC REQUEST REQUIRED

The Government's duty to disclose favorable evidence to the accused should not be dependaent upon any request by the defense, at least not where the defendant is not aware of the existencde of such evidence. *US ex rel. Meers v. Wilkins*, 326 F.2d 155 (2d Cir. 1964); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); *Thompson v. Uye*, 221 F.2d 763 (3rd Cir. 1955); *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963). *See also US v. Agurs*, 427 US 97, 106-07 (1976) (holding by the Supreme Court that unless a "specific and relevant" request is made upon the government the exculpatory evidence must be "obviously exculpatory," to bring *Brady* into play).

> "In *Brady*, the request was specific. It gave the prosecutor notice of exactly what the defense desired . . . When the prosecutor receives a specific request, the failure to make any response is seldom, if ever, excusable.
>
> In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the

> desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all." *US v. Agurs*, 427 US 97, 106-07 (1976).

However, there should be no requirement that an accused's request be any more specific than his knowledge of the existence of such evidence would allow, absent express knowledge of the precise nature of the exculpatory evidence. *Sitters v. Estelle*, 651 F.2d 1074, 1077 (5th Cir. 1981) (stating "[I]n the case before us, we find that the defense specifically requested the prosecution to produce 'the offense reports and any other written statements' dealing with this case. The petitioner could not have been more specific absent express knowledge of (the) reports").

Your *Brady* Motion should be as specific as possible with respect to the items sought (e.g. names, addresses, and statements of witnesses to the offense unable to identify the defendant). However, the very nature of the Brady rule makes a particularized request in many instances a practical impossibility.

> "If the defense does now know of the existence of the evidence, it may not be able to request its production. A murder trial- indeed any criminal proceeding- is not a sporting event." (Fortas, J., concurring). *Giles v. Maryland*, 386 US 66 (1967). *Cf. US v. Agurs*, 427 US 97 (1976).

## "IMPEACHMENT" VS. "EXCULPATORY" EVIDENCE

The Supreme Court has also held that "favorable" evidence requiring disclosure under Brady includes "impeaching" as well as purely exculpatory evidence.

*US v. Bagley*, 105 S.Ct. 3375 (1985);
*Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968) (noting evidence "favorable to the accused either direct or impeaching");
*Giglio v. US*, 405 US 150 (1972);
*Giles v. Maryland*, 386 US 66, 76 (1967);
*US v. Poole*, 379 F.2d 828 (7th Cir. 1967);
*US v. Miller*, 411 F.2d 825 (2d Cir. 1969);
*US ex rel Smith v. Fairman*, 769 F.2d 386 (10th Cir. 1976);
*Johnson v. Folino,* 705 F.3d 117 (3d Cir. 2013);
*US v. Ben M. Hogan Co., Inc.*, No. 84-1757 (8th Cir. 1985);
*Carter v. Rafferty*, 826 F.2d 1299 (3rd Cir. 1987) (stating that state failed to disclose evidence that would destroy State's main witness).

While some courts have indicated that the test for determining whether withholding favorable evidence may differ depending upon whether such evidence is directly exculpatory or merely impeaching, *Garrison v. Maggio*, 540 F.2d 1271, under the questionable rationale that:

> "Requiring a prosecutor to disclose substantive evidence always enhances the search for truth and maintains or increases the amount of evidence available to the trier of fact. But requiring a the prosecutor to disclose impeachment matter . . . entails the risk that government witnesses will be less open with the prosecutor or may even refuse to testify voluntarily. Thus forcing disclosure of impeachment matter may actually inhibit a full presentation to the trier of fact."

The Supreme Court has recently held that there is no such distinction for Brady purposes between exculpatory and impeaching testimony.

*US v. Bagley*, 105 S.Ct. 3375 (1985);
*US v. Ben M. Hogan Co., Inc.*, No. 84-1757 (8th Cir. 1985);
*US v. McKenzie*, 768 F.2d 602 (5th Cir. 1985);
*US v. Hickey*, 767 F.2d 705 (10th Cir. 1985).

PRETRIAL DISCLOSURE

Furthermore, the right to disclosure under *Brady* should include pre-trial discovery by the defendant, *US v. Gleason*, 265 F.Supp. 880, 884-85 (S.D.N.Y. 1967) (requiring in-camera inspection prior to trial); *US v. Morrison*, 43 F.R.D. 516, 520 (N.D. Ill. 1967); *US v. Ladd*, 48 F.R.D. 166 (D. Alaska, 1969); *US v. Ahmad*, 53 F.R.D. 186, 193-94 (M.D. Pa. 1971); *US v. Partin*, 320 F. Supp. 275, 284-85 (E.D. La. 1970); *US v. Leta*, 60 F.R.D. 127 (D.C. Pa. 1973); *US ex rel Drew v. Myers*, 327 F.2d 174 (3d Cir. 1964); ABA Standards, Discovery and Procedure Before Trial, Approved 1970, 2.1.. *Contra US v. Leighton*, 265 F. Supp, 27, 35 (S.D.N.Y. 1967); *Ashley v. Texas*, 399 F.2d 610, 615 (5th Cir. 1963); *US ex rel Butler v. Maroney*, 319 F.2d 622 (3d Cir. 1963); *US v. American Oil Co.*, 286 F. Supp. 742, 754 (D. N.S. 1963); US v. More, 439 F.2d 1107, 1108 (6th Cir. 1971).

Certainly pre-trial discovery of Brady materials should be allowed with respect to material which is "obviously exculpatory" or of "such a nature that delay in disclosure would prevent the defendant from effectively using it at trial." *US v. Cobb*, 271 F. Supp. 159, 164 (S.D.N.Y. 1967). After all, Brady itself involved a pre-trial request for a co-defendant's statement.

> "[I]t is recognized that there are some categories of exculpatory evidence which would be of little use unless discovered before trial." US v. Ladd, 48 F.R.D. 266, 267(D. Alaska).

Where exculpatory evidence is contained in a statement of a Government witness, discoverable under the Jencks Act only after the witness has testified, then the Jencks Act's "…statutory restrictions must be accommodated to the demands of due Process," and the relevant

portions disclosed prior to *US v. Gleason*, 265 F. Supp. 880, 887 (S.D. N. Y. 1967). *Contra US v. Eisenberg*, 469 F.2d 156 (8th Cir. 1972).

The obligation to disclose favorable evidence to the accused is that of the Government and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of such favorable evidence. *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964); *Rhinebart v. Rhay*, 440 F.2d 725 (9th Cir.), *cert. den.*, 404 US 825; *US v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971); *US v. Auten*, 632 F.2d 478 (5th Cir. 1980) (stating prosecutor cannot "compartmentalize" his information by not inquiring of the "prosecutorial team").

Certainly upon defense request a prosecutor has an obligation to exercise due diligence to determine if Government agencies have any information favorable to the defendant. MOORE'S FEDERAL PRACTICE: CRIMINAL § 16.06 [1]; *US v. Roberts*, 338 F.2d 640, 648 (2d Cir. 1968).

However, it has been held the prosecutor need not go out and seek information favorable to an accused from non-governmental third parties. *US v. Burns*, 668 F.2d 855 (5th Cir. 1982).

## NON-GOVERMENTAL AGENCIES

Thus, failure of government counsel to produce evidence held by a state agency, *US v. Gatto*, 763 F.2d 1040, 1047-48 (9th Cir. 1985), or a hospital, *US v. Alderdyce*, 787 F.2d 1365 (9th Cir. 1986) have been held not to constitute *Brady* errors.

Materials and evidence which have been held to constitutionally require disclosure under *Brady v. Maryland* include:

## CO-DEFENDANT'S EXCULPATORY STATEMENT

Extrajudicial statements of a co-defendant favorable to the accused (indicating that defendant was guilty of murder but not capital murder as he had not pulled the trigger), may be discoverable, *Brady v. Maryland*, 373 US 83 (1963).

## EVIDENCE IMPEACHING GOVERNMENT WITNESS' TESTIMONY

Evidence impeaching government witnesses is discoverable ("…favorable to the accused either direct or impeaching") *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968); *US v. Bagley*, 105 S.Ct. 3375 (1985). *See also Giglio v. US*, 405 US 150 (1972); *Giles v. Maryland*, 386 US 66, 76 (1967) (noting prior inconsistent statement of rape victim); *US v. Chestang*, 849 F.2d 528 (11th Cir. 1988) (holding prosecutor had duty to reveal the existence of a letter stating that the government witness would not be prosecuted for the very conspiracy for which the defendant was charged); but it was not an abuse of discretion to deny the motion to discovery because defendant heard of "deal" and effectively cross-examined witness regarding the same). *Cf. US v. Kehm*, 799

F.2d 354 (7th Cir. 1986) (noting fact that government witness had faulty recollection of facts later testified to at trial); *Levin v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967); *US v. Poole*, 379 F.2d 828 (7th Cir. 1967); *US v. Miller*, 411 F.2d 825 (2d Cir. 1969).

## CRIMINAL RECORD OF GOVERNMENT WITNESS

*US v. Auten*, 632 F.2d 478 (5th Cir. 1980);
*US v. Alvarez-Lopez*, 559 F.2d 1155 (5th Cir. 1977).

## COMPLAINING GOVERNMENT WITNESS' BACKGROUND

Prior sexual relations by a prosecutrix in a rape case, *Giles v. Maryland*, 386 US 66 (1967) (noted remanded for further proceedings). Psychiatric reports indicating the defendant's insanity. *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963) (suggesting may be discoverable as *Brady* material); *Coppolinio v. Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967) (stating evidence of a witness' unstable mental condition); *Alcorta v. Texas*, 355 US 28 (1957) (noting information that prosecution's key witness was the paramour of the defendant's murdered wife). Evidence of government witness' prior narcotic habit, *US v. Fowler*, 465 F.2d 664 (D.C. Cir. 1972).

## GOVERNMENT WITNESS' PERSONNEL FILE

Government witness' personnel file may be discoverable, *US v. Gross*, 603 F.2d 757, 759 (9th Cir. 1979) (stating government agent disciplined regarding issue present in Defendant's case); *US v. Garrett*, 542 F.2d 23, 27 (6th Cir. 1976) (stating accused entitled to personnel file of police officer who sold defendant drugs, where he was later suspended for suspected drug use); *US v. Deutsch*, 475 F.2d 55, 57-58 (5th Cir. 1973), *overruled on other grounds by U.S. v. Henry,* 749 F.2d 203 (5th Cir. 1984); *US v. Austin*, 492 F. Supp. 502, 505-06 (N.D. Ill. 1980).

## EVIDENCE UNDERMINING CONFIDENCE CRIME OCCURRED

Medical examination disclosing no evidence that kidnap victim had been sexually assaulted is producible. *US v. Poole*, 379 F.2d 648 (7th Cir. 1967).

## EVIDENCE UNDERMINING CONFIDENCE THAT DEFENDANT WAS PERPETRATOR

Eyewitness' oral statement that gave description which differed from defendant's appearance ("defendant's complexion was too dark for him to have been the man she saw"). *Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968), *cert. den.*, 593 US 180. Fact that substance on defendant's shorts had been analyzed to be paint, not blood. *Miller v. Pate*, 386 US 1 (1967); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) (stating name of witness who had stated that the defendant was not at the scene of the crime); *US ex rel Meers v. Wilkins*, 326 F.2d 135 (2d Cir.

1964) (noting identity of any witnesses who can give favorable testimony for accused); *US v. Hinkle*, 307 F. Supp. 117 (D.D.C. 1969); *Lee v. US*, 388 F. 2d 737, 739 (9th Cir. 1968).

OR RAISING A DEFENSE

Eyewitness report indicating self-defense. *Butler v. Maroney*, 319 F.2d 622 (3d Cir. 1963). Fact that defendant appeared under influence of alcohol shortly after offense, *Miller v. Pate*, 388 F.2d 737 (9th Cir. 1968).

TRANSCRIPTS

An accused may be entitled to transcripts of prior proceedings.

*US v. Talbert*, 706 F.2d 464 (4th Cir. 1983);
*US v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir. 1980);
*Peterson v. US*, 351 F.2d 606 (9th Cir. 1965).

PROTECTIVE ORDERS

The 1975 Advisory Committee Note stated that "[a]lthough the rule does not attempt to indicate when a protective order should be entered, a protective order may be appropriate where there is a reason to believe that a witness would be subject to physical or economic abuse if his identity is revealed." 8 MOORE'S FEDERAL PRACTICE 16.04(2) at 16-62. *See US v. Pelton*, 578 F.2d 701 (8th Cir. 1978), *cert. den.*, 99 S.Ct. 451 (holding where a defendant was denied production of her own tape recorded statements when tapes were not used as evidence by Government, contained nothing exculpatory [determined after ex parte in camera inspection], and would have revealed the identities of individuals cooperating with the government, protective order was held appropriate).

## ***IN CAMERA*** **INSPECTIONS**

In Camera inspections have been recommended "as a means for resolving the conflict between a defendant's need for evidence and the government's claim of privilege based on needs of public security." *US v. Brown*, 539 F.2d 467 (5th Cir. 1976); *US v. Buckley*, 586 F.2d 498 (5th Cir. 1978), *reh. den.*, 589 F.2d 1114, *cert. den.*, 99 S.Ct. 1972 (1979); *US v. Parker*, 586 F.2d 422 (5th Cir. 1978), *reh. den.*, 590 F.2d 333, *cert. den.*, 99 S. Ct. 2408 (1979).

(a) Predicate for Request.

Before an *in camera* inspection is required, the defendant must (1) specify with reasonable particularity (normally by his cross examination at trial) that a certain document exists; (2) that there is reason to believe that the document is a statutory

"statement"; and (3) that the government failed to provide it in violation of a Rule or act. *See US v. Robinson*, 585 F.2d 247 (7th Cir. 1979); *Goldberg_v. US* 94 (1976); *US v. Conroy*, 589 F.2d 1258 (5th Cir. 1979) (holding by Fifth Circuit reversed because the trial judge refused to inspect a thick file *in camera*).

(b) Cases Requiring Inspection.

(i)Whether disclosure of tapes allegedly containing confidential Presidential communications should be made. *US v. Nixon*, 418 US 683 (1974).

(ii)Whether disclosure of grand jury minutes subject to deletion of "extraneous" material should be made, *Dennis v. US*, 384 US 855 (1966).

(iii)Whether Jencks Act requires disclosure of documents to the defense, *Palermo v. US*, 360 US 343 (1959).

(iv)Whether the identity of an informer should be released to the defense, *Rovario v. US*, 353 US 53 (1957).

(v)*US v. Linstrom*, 698 F.2d 1154, 1166-68 (11th Cir. 1983), where the trial court abused its discretion in denying defense access to witness' psychiatric records after *in camera* review because the defendant was prejudiced when the jury was prevented from examining valuable evidence on witness' capacity to know, comprehend and relate the truth.

(c ) Cases Not Requiring Inspection.

(i) In *Kett v. US*, 722 F.2d 687, 689 (11th Cir. 1984), the Court's refusal to order disclosure after an *in camera* examination did not require reversal where the informant's testimony contained nothing material to the defense of entrapment.

(iii) *US v. Kramer*, 711 F.2d 789 (7th Cir.), cert. den. court's refusal to order disclosure after an *in camera* review of two pre-sentence reports containing statements by two government witnesses to probation officers and notes made by an IRS agent after an interview with a government witness did not require reversal because the reports contained no information helpful to the defendant.

In a plurality opinion, the Supreme Court recently has determined that an accused's right to disclosure of witnesses and evidence is more properly a matter of Fifth Amendment "due process", than Sixth Amendment "compulsory process" and same is adequately protected by a trial court's review of the material "*in camera*" to determine whether the Court would conclude same would have changed the outcome of the trial. *Pennsylvania v. Ritchie*, 94 L.Ed.2d 40 (1987).

**PRELIMINARY EXAMINATION**

The Preliminary Examination, FED. R. CRIM. P. Rule 5.1 is intended to determine whether probably cause exists to bind the defendant over to the grand jury. However, an additional function, which is of utmost importance to the defense, is the discovery and fixing under oath of the Government witness' testimony. In light of the limited opportunity for discovery of expected testimony of Government witnesses the preliminary examination serves as the only effective means of "deposing" those witnesses.

Defense counsel must request such hearing and where an intervening indictment is returned the need for a preliminary examination to determine probably cause is obviated since the grand jury has already made such determination. Accordingly, courts have uniformly held that once an indictment is returned a defendant is not enlisted to a preliminary examination. *Sciortino v. Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. den.*, 390 US 906 (1968); *US v. Chase*, 372 F.2d 483 (4th Cir. 1967), *cert. den.*, 387 US 907; *Boone v. US*, 380 F.2d 911 (6th Cir. 1960); FED. R. CRIM. P. Rule 5(c); Federal Magistrates Act of 1968, 18 U.S.C. § 3060(e).

However, the courts have time and again emphasized the importance of a preliminary hearing, *White v. Maryland*, 373 US 59 (1963); *Pointer v. Texas*,380 US 400 (1965). In *Coleman v. Alabama*, 399 US 1 (1970), the court held that the preliminary hearing was a "critical stage" of the criminal process at which the defendant is entitled to appointed counsel (even though the state procedure there involved did not require a preliminary hearing as a matter of right and even though those state procedures provided that the sole purpose of the hearing was the determination of probable cause to bind the defendant over to the Grand Jury).

Furthermore, an increasing number of courts are now recognizing that one of the critical functions of the preliminary hearing is discovery for the defendant. MOORE'S FEDERAL PRACTICE: CRIMINAL 8 5.102(2). This is especially true in light of the more limited rights of discovery accorded criminal defendants. *Blue v. US*, 342 F.2d 894, 901 (D.C. Cir. 1964), *cert. den.*, 380 US 944 (1965) (recognizing that since one of the critical functions of the preliminary hearing was discovery, the defendant should be entitled to a new trial if he can show he was unfairly surprised by evidence at trial which he should have rebutted had he been provided a pre-trial examination). *See also Dancy v. US*, 361 F.2d 75 (D.C. Cir. 1966); *Brown v. Faintlerous*, 442 F.2d 838 (D.C. Cir. 1971) (applying in juvenile proceeding). *Contra Coleman v. Burnett*, 477 F.2d 1187 (D.C. Cir. 1973) (holding discovery is not purpose of preliminary examination).

For example, in *Ross v. Sirica*, 380 F.2d 557 (D.C. Cir. 1967), the D.C. Circuit Court held that the return of an indictment did not cure defects in a preliminary hearing which had begun but had not yet been completed.

And, courts have uniformly condemned the "…disquieting history of Governmental laxity" in holding prompt preliminary hearings. *US v. Green*, 305 F.Supp. 125, 130-34 (S.D.N.Y. 1969).

In *US ex rel Wheeler v. Flood*, 269 F. Supp. 194 (S.D.N.Y. 1967), the court held that delaying preliminary hearings for two and one-half and three and one-half weeks after arrest until the Government had obtained indictments was unreasonable and that the defendants were entitled to release or a preliminary hearing.

*See also* *US v. Rogers*, 455 F.2d 407 (5th Cir. 1972) (holding that the only remedy for denial of a prompt preliminary examination was release "prior to indictment").

Rule 5(c) now provides that a preliminary examination, unless waived by the defendant, must be conducted within a "reasonable time" but in no event later than 10 days following his initial appearance upon arrest [FED. R. CRIM. P. Rule 5(a)] if the defendant is in custody, and no later than 20 days if he is not in custody.

Where the Government drags its feet in providing a preliminary examination a motion requesting a prompt hearing should be filed. The motion should set out the critical nature of such proceedings in the criminal process and that denial of such hearing would deprive the defendant of his Constitutionally protected rights to equal protection, due process and "fundamental fairness" guaranteed by the Fifth and Fourteenth Amendments (and violates Rule 5(c) where the prescribed period has not been complied with).

Another approach is to file a Petition for Writ of Habeas Corpus which would afford the defendant additional sworn discovery at the habeas hearing. *US ex rel. Wheeler f. Flood*, 269 F. Supp. 194 (S.D.N.Y. 1967).

Rule 5.1 specifically provides that the Magistrate's determination can be based entirely upon hearsay evidence. Accordingly, the Government will often attempt to prove up probably cause using only their "case agent" who may be testifying entirely from written reports and without any actual knowledge of any of the events. This may supply some valuable information but it will be next to useless for impeachment purposes later at trial or at a pre-trial hearing. Therefore, prior to the hearing counsel should obtain from the prosecutor the names of all Government agents who participated and have first hand information regarding the facts of the case. If the U.S. Attorney is uncooperative, this information ought to be your first priority when questioning the agent who is brought to the hearing to testify. Once the names of these other witnesses are obtained they should be subpoenaed under Rule 17(a) and (b). courts have held that a defendant is entitled to call even potential witnesses against him in order to demonstrate that probable cause is lacking. *Washington v. Clemmer*, 339 F.2d 715 (D.C. Cir. 1964); *US v. King*, 482 F.2d 768 (D.C. Cir. 1973). And, the defendant could call such witnesses as defense witnesses since Rule 5.1(a) provides that the defendant ". . . may introduce evidence in his own behalf." While you may be prohibited from cross-examining these witnesses you will at least be able to obtain discovery through direct, non-leading questions and thereby pin down, under oath, the story of those who actually witnessed the events and who will be called to testify at trial.

Rule 5.1(a) also provides that "[o]bjections to evidence on the grounds that it was acquired by unlawful means are not properly made at the preliminary examination." It follows that since the primary concern of the defense is discovery, such objections should generally be avoided in order to obtain as much information as possible. However, where the Government's only evidence to support probable cause was illegally obtained, counsel should object and request that he Magistrate require that the Government demonstrate the admissible evidence will be available at trial. Committee Note to FED. R. CRIM. P. Rule 5.1(a); *US v. Umans*, 368 F.2d 725 (2d Cir. 1966).

The Jencks Act's requirement of the production of statements of Government witness for impeachment purposes has been held not applicable at preliminary hearing. MOORE'S FEDERAL PRACTICE: CRIMINAL 25.102[3].

Once probable cause is found then the Magistrate must fix the terms of pre-trial release, Rule 5.1(c), and defense counsel should address himself to considerations discussed herein regarding bail and pre-trial release.

With regard to a transcript of the proceedings, it will usually be up to the defense counsel to provide a court reporter, since Magistrates Courts now use tape recording devices which are poor substitutes for a stenographic transcript and provide no useful means of impeachment later at trial.

Appointed counsel should not attempt to have a stenographic transcript of the preliminary hearing provided under the Criminal Justice Act. The tape or other recording is simply inadequate and has proved extremely clumsy as a meaningful impeachment device. There is authority recognizing this need for adequate recording of the hearing.

> "Recording of testimony at an early stage of the process perpetuates the fresh memory of witnesses, making it available n case of subsequent death, disability, flight and allowing impeachment or refreshing of recollection at trial." *Washington v. Clemer*, 39 F.2d 715, 717 (D.C. Cir. 1964).

And it should be urged that it denies an indigent his Constitutional rights to due process, equal protection and effective assistance of counsel to deprive him of a meaningful equivalent of a stenographic transcript.

## PRETRIAL CONFERENCE

The pre-trial conference provided for by FED. R. CRIM. P. Rule 17.1 may be held at any time after the indictment or information is filed at the request of either party. In many jurisdictions such conferences are had as a matter of course on the court's own motion and are often informal in nature. However, the Committee on Pre-Trial Procedures recommends that such proceedings be held in open court and transcribed. *Recommended Procedures in Criminal Pretrials*, F.R.D. 75, 97 (1965).

This conference which has a broad mandate, gives the parties an opportunity to dispose of various types of pre-trial matters including:

(1) resolution of unresolved discovery questions; *US v. Westmoreland*, 41 F.R.D. 419, 426 (D. Ind. 1967).

(2) entering into stipulations regarding undisputed facts; ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial*, 5.4(a).

(3) marking documents and other exhibits; ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial*, 5.4(a).

(4) exercising from otherwise admissible statement material which is inadmissible or prejudicial; ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial*, 5.4(a).

(5) severance of defendants or offenses; ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial*, 5.4(a).

(6) conduct of voir dire; ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial*, 5.4(a).

(7) determining the number of peremptory challenges; ABA Standards for Criminal Justice, *Discovery and Procedure Before Trial*, 5.4(a).

(8) possibility of making Jencks Act statements available prior to trial in order to avoid unnecessary waste of time; *Recommended Procedures in Criminal Pretrial*, 37 F.R.D. 95, 102-103 (1965); Ogden v. US, 303 F.2d 724, 734 (9th Cir. 1962).

Many of these otherwise innocuous housekeeping chores, such as the marking of documents and exhibits, have an obvious value as discovery devices.

This conference also affords defense counsel the opportunity to seek reconsideration of discovery matters which may have been previously denied. For instance, the disclosure of the identity of Government' witnesses at a pre-trial conference on the eve of trial may not pose any threat of intimidation which may have reasonably been feared when the original request was denied long before the trial.

The pre-trial conference may also afford defense counsel an additional opportunity to obtain Government witness' statements on the eve of trial. The Jencks Act does not prohibit such pre-trial disclosure and counsel would do well to remind the court at the pre-trial conference that such disclosure would expedite the trial and obviate any need for lengthy trial delays after the witness has testified on direct. *Ogden v. US*, 385 F.2d 132 (9th Cir. 1962).

The Government is expressly prohibited from using any ad-missions which are made by a defendant or his attorney at such conference unless reduced to writing and signed by the defendant and his attorney.

Furthermore, any agreements reached by the parties at this conference must be voluntary and the court is without the power to coerce parties to resolve issue on which there is a dispute. *US v. Westmoreland*, 41 F.R.D. 419, 426 (D. Ind. 1967); WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 292 at 574-75.

Defense counsel might also utilize the pre-trial conference as an opportunity to exchange witness lists with the prosecution. By offering to disclose the identity of defense witnesses in exchange for that of Government witnesses at the conference, Government counsel will often feel compelled to reciprocate in order not to appear unreasonably uncooperative in the presence of the Court. Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L. J. 1276, 1287 (1996).

The pre-trial conference also serves as an opportunity to request that all exhibits and evidence which the Government intends to introduce at trial be marked, and to request stipulations of fact or expected testimony, since the prosecutor is often more amendable to such requests in the presence of the court where same are reasonable and would help expedite the trial.

It is recommended that the defendant be present at the pre-trial conference. *Judicial Conference Recommended Procedures*, 37 F.R.D. at 98-99 (1965), ABA Standards, *Discovery and Procedure Before Trial*, at 130 (1969). This not only protects defense counsel but also serves the salutary purpose of allowing the defendant to keep informed and participate in the proceedings against him.

## DEPOSITION

FED. R. CRIM. P. Rule 15 provides for the taking of depositions in criminal cases. However, unlike the counterpart under the civil rules, depositions in criminal cases are allowable only in very limited situations.

Depositions in criminal cases have no discovery function, *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. den.*, 371 US 955 (1963), and may be taken only by "order" of the trial court. FED. R. CRIM. P. Rule 15(a).

Furthermore, Rule 15 requires that the moving party establish the following prerequisites in order to obtain a court order for taking a deposition:

(1) That the prospective witness may be unable to attend or be prevented from attending a trial or hearing,

(2) That the testimony of the witness is material, and

(3) That it is "necessary to take his deposition in order to prevent a failure of justice."

All of the above conditions must be satisfied or the motion to take a deposition will be denied. *In re US*, 348 F.2d 624 (1st Cir. 1965); *US v. Steel*, 359 F.2d 381 (2d Cir. 1966); *In re Russo*, 19 F.R.D. 278 (E.D.N.Y. 1956), *_aff'd*, 241 F.2d 285 (2d Cir. 1957), *cert. den.*, 385 U.S. 816 (1957).

The requisite showing of "materiality" does not require that the defendant show that the expected testimony will "exonerate" him or that same will surely acquit him, but only that the

anticipated testimony is "material" to some defense. *US v. Hagedorn*, 253 F. Supp. 969, 971 (S.D.N.Y. 1966).

The Organized Crime Control Act of 1970 [codified as 18 U.S.C. § 3503] provides for the taking of depositions in criminal cases and was regarded to have superseded the provisions of Rule 15.1, WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 251; however, FED. R. CRIM. P. Rule 15, incorporates the provisions of the Omnibus Crime Bill.

Much of the language of the Organized Crime Control Act pro-visions relating to depositions is taken without change from Rule 15. However, the statute provides for depositions to be taken by the government, and expressly restricts a party to the taking of a deposition of its own witness. 18 U.S.C. § 3503(a). While the requirements for taking a deposition seem to have been slightly liberalized from those of Rule 15, permitting the taking of a deposition "whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken or preserved," the Courts have interpreted this provision to mean that if the three specified conditions of FED. R. CRIM. P. Rule 15(a) are met, then the "exceptional circumstances" test of the statute is satisfied. *US v. Singleton*, 460 F.2d 1148 (2d Cir. 1972), *cert. den.*, 410 US 984.

The statute further provides that the scope of examination and cross-examination at a deposition shall be the same as would be allowed at the trial itself [18 U.S.C. § 3503 (d)] and, interestingly, the Government is required to make available to the defendant any statements of a witness that the Government would be required to make available if the witness were testifying at the trial (pursuant to the Jencks Act) [18 U.S.C. § 3503(e)]. With respect to the use of a deposition at trial, the statute contains an additional definition of what is meant by the "unavailability" of a witness at trial, allowing the use of a deposition where "…the witness refuses in the trial or hearing to testify concerning the subject of the deposition or the part offered." 18 U.S.C. § 3503(f).

Absent a showing that a prospective witness may die before trial or is otherwise unable to attend because of sickness or disability, *US v. Hagedorn*, 253 F. Supp. 969 (S.D.N.Y. 1966); *US v. Foster*, 81 F. Supp. 281, 284 (S.D.N.Y. 1948); orders for depositions are rarely granted in criminal cases. This only serves to re-emphasize the importance of a transcript of the preliminary hearing or other pre-trial motion hearings in "fixing" the Government's story and preserving their witnesses' sworn testimony for impeachment and other uses at trial. *But see U.S. v. Sines*, 761 F.2d 1434 (9th Cir. 1985) (holding prosecution witness was likely to be incarcerated in Thailand for many years by the time of trial, disposition would be allowed). *See also U.S. v. Poindexter*, 732 F. Supp 142 (D.D.C. 1990) (stating where witness intends to assert executive privilege, involving matters of national security , videotaped deposition is only way to balance executive's interests against those of defendant).

## PRODUCTION OF BOOKS, PAPERS, DOCUMENTS OR OBJECTS

FED. R. CRIM. P. Rule 17(c) provides for a subpoena duces tecum for the "production of documentary evidence and of objects." The rule further provides that "[t]he court may direct that books, papers, documents or objects designated in the subpoena be produced before the Court at a

time prior to the trial or prior to the time when they are to be offered in evidence and may upon the production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys." FED. R. CRIM. P. Rule 17(c).

While the stated purpose of the rule is not discovery, *US v. Carter*, 15 F.R.D. 367, 369 (D.D.D. 1954); *US v. Ferguson*, 37 F.R.D. 6, 7-8 (D.D.C. 1965), it serves a useful purpose in expediting protracted trial in which complicated or voluminous documentary evidence is anticipated. *Manual for Complex and Multi-District Litigation*, at 109 (Adm. Off. US Courts 1969); *Bowman Dairy Co. v. US*, 341 US 214 (1951); *Gevinson v. US*, 358 F.2d 761 (5th Cir. 1966), *cert. den.*, 385 US 823.

Where the defense seeks to subpoena such "documentary evidence and objections" for inspection prior to trial, a motion under Rule 17(c) for advance inspection should be filed. *US v. Ferguson*, 37 F.R.D. 6,8 (D.D>C> 1965), wherein the movant seeking pretrial production should make the following showing:

(1) That such items are relevant,

(2) That such items are not otherwise procurable by the defendant reasonably in advance of trial,

(3) That the defendant cannot adequately prepare for trial without such production and inspection in advance of trial,

(4) That the failure to obtain such pre-trial inspection will tend to unreasonably delay the trial,

(5) That the application is made in good faith and is not intended as a general fishing expedition. See *US v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952); *US v. Beardon*, 423 F.2d 805 (5th Cir. 1970), *cert. den.*, 400 U.S. 836; *US v. Leife*, 43 F.R.D. 23 (S.D.N.Y. 1967).

Under the 1966 Amendments to FED. R. CRIM. P. Rule 16, these materials producible for inspection prior to trial under a Rule 17(c) subpoena duces tecum, are obtainable under the much less demanding requirements of Rule 16. However, Rule 17(c) still provides a reasonable opportunity to obtain pre-trial inspection of materials from recalcitrant defense witnesses where the Government is not in possession of such material and does not intend to call such witness at trial.

## DISCOVERY OF ELECTRONIC SURVEILANCE

Interception of conversations by means of electronic surveillance is governed by the Fourth Amendment. *Katz v. U.S.*, 389 US 347, 353 (1967) (stating "we have expressly held that the Fourth Amendment governs not only the seizure of tangible items , but extend as well to the recording of oral statements'). In *Alderman v. US*, 394 US 165, 182 (1969), the Supreme Court established that all electronic surveillance of a defendant must be disclosed in adversary

proceedings before its legality, relevancy, or the defendant's standing can be determined by a trial court. See also *US v. Ivanor*, 494 F.2d 593 (3d Cir. 1974), *cert. den.*, 394 US 165.

> "[W]e conclude that surveillance records as to which petitioner has standing to object should be turned over to him without being screened in camera by the trial judge. Admittedly, there may be much learned from an electronic surveillance which ultimately contributes nothing to the probative evidence. But winnowing this material from those items which might have made a substantial contribution to the case against a petitioner is a task which should not be entrusted wholly to the court in the first instance. It might be otherwise if the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two for textual or substantial similarities. Even that assignment would be difficult enough for the trial judge to perform unaided. But a good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significant to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the government's case."

The defendant's need to know is substantial in light of the timeliness requirements [18 U.S.C. § 2518(10)(A); FED. R. CRIM. P. Rules 12 & 4] relating to his Motion to Suppress. *US v. Rosenberg*, 299 F.Supp. 1241, 1245 (S.D.N.Y. 1969); *US v. Lumbowski*, 277 F. Supp. 713, 721 (N.D. Ill. 1967); *US v. Fainberg*, 502 F.2d 1180 (7th Cir. 1974), *cert. den.*, 420 US 926 (1975).

Furthermore, the "Due Process" Clause would require disclosure of all such favorable evidence under *Brady v. Maryland*, 373 US 83 (1963); *US v. Bryant*, 439 F.2d 642, 647-48 (D.C. Cir. 1971), *but see U.S. v. Vega,* 826 F.3d 514, 533 (D.C. Cir. 2016) (discussing *Youngblood's* impact on this holding as it relates to the duty to preserve such evidence *before* its character is known to the prosecution), and unlike a conventional search, where a defendant is at least generally aware of the occurrence of the search and what has been seized, as well as his entitlement to an inventory under FED. R. CRIM. P. Rule 41, the subject of electronic surveillance may not be apprised of sufficient facts to challenge same unless disclosure is made.

Some courts have held that the "bare claim" itself is legally sufficient to require an affirmative or negative response from the Government. *US v. Vielguth*, 500 F.2d 267 (9th Cir. 1974); *In re Evani*, 452 F.2d 1239, 1247 (D.C. Cir. 1971).

**TITLE III OF OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968**
[18 U.S.C. §§ 2510-20 & 3504]

Section 2515 of the "omnibus Crime Control Act" expressly prohibits any use of illegally intercepted conversations "…in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof…".

**SUPPRESSION OF EVIDENCE**

FED. R. CRIM. P. Rule 41(f) specifically provides for the filing of a Motion to Suppress and a pre-trial hearing thereon as the appropriate method for-enforcing a defendant's Fourth Amendment protection against unreasonable search and seizure. Thus, in every criminal case, particular attention should be given to the question of illegally obtained evidence which is discovered by the exploitation of an illegal search or arrest. And where appropriate, a Motion to Suppress should be filed prior to trial pursuant to Rule 41(f).

While this paper does not deal with the evolving substantive law of search and seizure and Fourth Amendment protections, it cannot be over-emphasized that the Motion to Suppress hearing is often the most critical stage in Federal prosecutions, and careful attention should be given to the manner in which the Government obtained evidence against the Defendant.

Even where the Motion to Suppress will not be dispositive of the criminal action, such motion should be utilized in order to limit the Government to proof at trial of evidence which has been obtained through lawful and legal processes. The Motion to Suppress hearing will often serve the additional function of "fixing" the arresting or searching officer's testimony with regard to other matters critical at the trial on the merits.

Rule 41(e), prior to the 1972 Amendment, established the grounds upon which the motion could be made as follows:

(1) that the property was illegally seized without a warrant,

(2) that the warrant is insufficient on its face,

(3) that the property seized was not that described on the warrant,

(4) that there was no probable cause for believing the existence of the grounds from which the warrant was issued, or

(5) that the warrant was illegally executed. FED. R. CRIM. P. Rule 41(f) (Such specified grounds were deleted from the amended Rule 41 in 1972).

A Motion to Suppress is also the proper remedy where evidence has been obtained in violation of the Fifth Amendment (e.g., a confession which was illegally obtained or other evidence obtained as a result of that illegally obtained confession). *Smith v. Katzenbach*, 351 F.2d 810, at p. 815 (D.C. Cir. 1965); *Grant v. US*, 282 F.2d 165 (2d Cir. 1960). There is also a statutory procedure for pre-trial suppression of evidence obtained as the result of illegally intercepted electronic or oral communication. 18 U.S.C. § 82518(10)(a). *Nardonc v. US*, 308 US 338 (1939).

Pursuant to Rule 41(f), a Motion to Suppress is a pre-trial motion and must accordingly be timely filed, FED. R. CRIM. P. Rule 12. Where the motion is not filed prior to trial, there is authority that the trial judge is free to exercise his judicial discretion in refusing to consider same where defense counsel was fully aware of the facts prior to trial and had ample opportunity to present his motion. *Small v. US*, 396 F.2d 764 (5th Cir. 1968); *US v. Allison*, 414 F.2d 407 (2d Cir. 1969), *cert. den.*, 396 US 968; *US v. Blackwood*, 456 F.2d 526 (2d Cir. 1972), *cert. den.* 409 US 863; *US v. Dykes*, 460 F.2d 324 (9th Cir. 1972), *cert. den.*, 409 US 889; *US v. Hamilton*, 469 F.2d 880 (9th Cir. 1972). Be careful to note whether local rules require a memorandum of law in support of such motions, as some courts have refused to consider a Motion to Suppress where the defendant failed to file a brief as required by local rule. *US v. Reyes*, 280 F. Supp. 267 (S.D.N.Y. 1968).

While it had been previously held that the defense was not entitled to Jencks Act statements of prosecution witnesses after they testify on direct examination at a pre-trial Motion to Suppress hearing. *US v. Sebastian*, 497 F.2d 1267 (2d Cir. 1974); FED. R. CRIM. P. Rule 12(i), now provides for such pretrial production under FED. R. CRIM. P. Rule 26.2, even if the law enforcement witness is called by the defendant.

While the motion must be in writing, it need not be sworn to or verified. 3 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 673 at 115; *US v. Warrington*, 17 F.R.D. 25 (N.D. Cal. 1955).

## STANDARD FOR REVIEW

The factual determinations by the trial court underlying its ruling on the Motion to Suppress will be accepted on appeal unless "clearly erroneous." *Jackson v. US*, 355 F.2d 862, 864-65 (D.C. Cir. 1965); *Villano v. US*, 289 F.2d 790 (10th Cir. 1962), *cert. den.*, 370 US 947; *US v. Ziemer*, 291 F.2d 100 (7th Cir. 1961), *cert. den.*, 368 US 877; *US v. Gunn*, 428 F.2d 1057, 1060 (5th Cir. 1970); *US v. Montos*, 421 P.2d 215, 219 n. (5th Cir. 1970), *cert. den.*, 397 US 1022.

And where the appellate court finds beyond a reasonable doubt that the error did not contribute to the conviction, then the trial court's denial of the suppression motion may be regarded as "harmless error", even if improper. *US v. McCall*, 291 F.2d 859 (2d Cir. 1961); *Lockett v. US*, 380 F.2d 168 (9th Cir. 1968); *Smith v. US*, 360 US 264 (D.C. Illinois 1959).

## PRESERVATION OF ERROR

Where the motion to suppress is denied defense counsel need not renew his motion at trial. 3 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 678 at 142; *US v. Whitlow*, 339 F.2d 975, 980 (7th Cir. 1968); *Waldron v. US*, 219 F.2d 37, 41 (D.C. Cir. 1955); *Williams v. US*, 263 F.2d 487 (D.C. Cir. 1989); *Gurteski v. US*, 405 F.2d 253, 261 (5th Cir. 1968), *cert. den.*, 395 US 977. However, care should be taken to be certain that the record reflects that the evidence sought to be suppressed prior to trial is the same as that offered by the Government during trial or the error will not be preserved.

If the motion to suppress is granted, then the tainted evidence is not admissible at the trial of that case, nor in any subsequent trial or hearing. MOORE'S FEDERAL PRACTICE § 41.08[5] at 41-94; *Lawn v. US*, 355 US 339 (1958).

## APPEAL

An order denying a pre-trial Motion to Suppress is not appealable. 3 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 678 at 139; MOORE'S FEDERAL PRACTICE § 41.08[5] at 41-94; *Cogan v. US*, 278 US 221 (1929). Such denial must be raised on appeal of the conviction itself in the event such evidence is actually admitted at trial.

The Government, on the other hand, may appeal the granting of a pre-trial Motion to Suppress, pursuant to the 1971 Amendment to the Omnibus Crime Control Act, 18 U.S.C. § 3731. Such appellate determination of the admissibility of the evidence will be made prior to the trial on the merits in the District Court. The Act, however, provides that the U.S. Attorney must certify to the District Court "…that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." 18 U.S.C. § 3731.

## BILL OF PARTICULARS FED. R. CRIM. P. Rule 7(f)

The purpose of the Bill of Particulars is to provide the defendant with details of the alleged offense which are omitted from the pleading against him and which are necessary to enable a defendant to understand the charges against him (as guaranteed by the Sixth Amendment to the Constitution) and to protect himself from double jeopardy (as guaranteed by the Fifth Amendment of the Constitution). MOORE'S FEDERAL PRACTICE § 7.06[1]; *US v. Leach*, 427 F.2d 1107, 1110 (1st Cir. 1970), *cert. den.*, 400 US 829; *US v. Schenbari*, 884 F.2d 901 (4th Cir. 1973); *US v. Moore*, 57 F.R.D. 640 (N.D. Ga. 1972). While technically the Bill of Particulars is not a discovery device, *Cooper v. US*, 282 F.2d 257, 532 (9th Cir. 1960); *US v. Rosenberg*, 10 F.R.D. 521, 523 (S.D.N.Y. 1950); *US v. Long*, 440 F.2d 288 (8th Cir. 1971); it has the practical effect of disclosing information to the accused which is unavailable otherwise.

This broader discovery function of the Bill of Particulars has been recognized by an increasing number of courts.

US v. Dolan, 113 F. Supp. 757, 759 (D.D.C. 1953);
US v. Rosenfield, 264 F. Supp. 760 (N.D. Ill. 1967);

US v. Smith, 16 F.R.D. 372, at p. 374 (W.D. Mo. 1954);
US v. Addonizi, 451 F.2d 49, at p. 64, n. 16 (3d Cir. 1972), cert. den. 465 US 936;
3 WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 129 at 281.

The Motion for a Bill of Particulars must be filed within 10 days after arraignment and a court may, within its discretion, refuse to hear a tardy motion, MOORE'S FEDERAL PRACTICE § 7.06[3]; Advisory Committee Note to FED. R. CRIM. P. Rule 7(f). The Motion should cite the deficiencies of specific counts of the indictment and be accompanied by a brief in support thereof. While "cause" need no longer be shown in order to obtain a Bill of Particulars, see Advisory Committee Note to FED. R. CRIM. P. Rule 7(f) F.R.Cr.P]; the question of granting or denying a bill is still left to the trial court's discretion. MOORE'S FEDERAL PRACTICE § 7.06[2]; WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 129 at 281.

However, such Bill of Particulars should be liberally construed. *Walsh v. US*, 371 F.2d 436, 437 (1st Cir. 1967); *US v. Addonizio*, 451 F.2d 49 (3rd Cir. 1971), *cert. den.*, 405 US 936. The test for granting a Bill of Particulars has been described as whether such information is necessary for the defendant to adequately prepare for trial and avoid surprise. *King v. US*, 402 F.2d 289 (10th cir. 1968); *US v. Ahmad*, 53 F.R.D. 194, 199 (M.D. Pa. 1971).

Once a Bill of Particulars has been provided by the Government, its proof must conform to that Bill. Thus, a Bill of Particulars not only provides the defendant with additional facts not set out in the indictment, but limits the Government's proof as well. *US v. Neff*, 212 F.2d 297, 309 (3d Cir. 1954); *US v. Glaze*, 313 F.2d 757 (2d Cir. 1963). *See contra US v. Lacob*, 416 F.2d 756, 759 (7th Cir. 1969), *cert. den.*, 396 US 1059 (1970); *US v. Flom*, 558 F.2d 1179 (5th Cir. 1977). Once the bill is filed, great caution is necessary to insure the bill is not misleading as to hamper defendant's preparation and cause unfair surprise. *US v. Chavez*, 845 F.2d 219 (9th Cir. 1988), *opinion withdrawn on rehearing, U.S. v. Zanzucchi,* 892 F.2d 56 (9th Cir. 1989).

The fact that the indictment or information is valid is no defense to a motion for a Bill of Particulars, *US v. Faulkner*, 53 F.R.D. 299, 310 (E.D. Wis. 1971); the underlying purpose of Rule 7(f) is not to cure defects in the Government's pleading, but rather to "…furnish the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at trial." *US v. White*, 16 F.R.D. 371, 375 (W.D. Mo. 1954); *US v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965); *Pipkin v. US*, 243 F.2d 491 (5th Cir. 1957); *US v. Bearden*, 423 F.2d 805, 809 (5th Cir. 1970).

And, where the information sought is necessary to the preparation of a defense to prevent surprise, then the "…accused is entitled to this 'as of right'" regardless of whether such disclosure would be privileged otherwise. *US v. White*, 16 F.R.D. 372 (W.D. Mo. 1954); MOORE'S FEDERAL PRACTICE § 7.06[2]; WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 129 at 282-283. *See also US v. US Gypsum*, 37 F. Supp. 398, 402 (D.D.C.); *Singer v. US*, 58 F.2d 74 (3d Cir. 1932); *US v. Allied Chemical & Dye Corp.*, 42 F. Supp. 425, at p. 428 (S.D.N.Y. 1941); *Fontana v. US*, 262 F.2d 288 (8th Cir. 1919).

The broader discovery function of the Bill of Particulars is necessitated by the "presumption of innocence," since "being presumed to be innocent, it must be assumed "that he is ignorant of the facts on which the pleader funded his charges'." *US v. Smith*, 16 F.R.D. 372, 386 (N.D. Mo. 1954); WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 129 at 286-287. Furthermore, the more limited discovery allowed in criminal cases warrants a more liberal construction of Rule 7(f). WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 129 at 281. Liberal construction is particularly applicable in criminal anti-trust cases and tax cases where the issues are more complex than ordinary criminal cases. *US v. Bestway Disposal Corp.*, 681 F. Supp. 1027 (W.D.N.Y. 1988); *US v. Bestway Disposal Corp.*, 681 F. Supp. 1027 (W.D.N.Y. 1988); *US v. Earnhart*, 683 F. Supp. 717 (E.D. Ark. 1987); *US v. Bailey*, 689 F. Supp. 1463 (N.D. Ill. 1988).

Bill of Particulars have been granted to provide information regarding the names and addresses of individuals who witnessed the crime. *US v. White*, 379 F.2d 559 (7th Cir. 1966); *US v. Debrow*, 346 US 374, 378 (1953); *Will v. US*, 389 US 90 (1967)(compelling disclosure of witness who over heard defendant's incriminating statements). Such requests should not be conducted as a demand for a "witness-list" but for the "identification of the times , places, and persons present in order to prepare [a] defense*." US v. Smith*, 16 F.R.D. 372, 374-75 (W.D. Mo. 1954).

Note the discussion in *Will v. US*, 389 US 90 (1967). "it is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful for trial." (emphasis added). *Will v. US*, 39 US 90 (1967).

> "Without definite specification of the time and place of commission of the overt acts complained of, and of the identity of the person or persons dealt with, there may well be difficulty in preparing to meet the general charges of the information, and some danger of surprise." *US v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954).

Bills of Particulars have been granted to order disclosure of names of individuals who merely have knowledge of the transaction charged, *US v. Soloman*, 26 F.R.D. 397 (S.D. Ill. 1967);

> the specific acts of price fixing or refusals to sell upon which the Government intends to rely in an anti-trust case,
> *US v. Metropolitan Leather and Find. Ass'n.*, 82 F. Supp. 449, 454-55 (S.D.N.Y. 1949);
>
> the name of a Government informer who witnesses the criminal act charged,
> *Rovario v. US*, 353 US 63, 64 (1967);
>
> the means employed to commit the alleged offense,
> *US v. Tucker*, 473 F.2d 1290 (6th Cir. 1973); *US v. Burgio*, 279 F.2d 843 (S.D. N.Y. 1968); *US v. Baker*, 262 F. Supp. 657, 671-72 (D.D.C. 1966); *US v. Bel-Mar Laboratories*, 284 F. Supp. 873, 888 (E.D.N.Y. 1968);

whether the defendant is charged with aiding and abetting and if so how he is alleged to have aided and abetted,
*US v. Baker*, 262 F. Supp. 657, 674 (D.D.C. 1966);

when, where and in what manner defendant is alleged to have become a member of a charged conspiracy,
*US v. Tanner*, 279 F.Supp. 457, 474 (N.D. Ill. 1967);

the names of all alleged co-conspirators not named in the indictment but known to the prosecution,
*US v. Tanner*, 279 F. Supp. 457, 475 (N.D. Ill. 1967); *US v. Baker*, 262 F. Supp. 657, 675 (D.D.C. 1966); *US v. Pilnick*, 267 F. Supp. 791, 801 (S.D.N.Y. 1967); *US v. Burgio*, 279 F. Supp. 843, 846 (S.D.N.Y. 1968);

any overt acts in furtherance of an alleged conspiracy not specified in the indictment upon which the Government may rely at trial,
*US v. Leach*, 427 F.2d 1007, 1110 (1st Cir. 1970), *cert. den.*, 406 US 829;
*US v. Pilnick*, 267 F. Supp. 791, 801 (S.D.N.Y. 1960); *US v. Baker*, 262 F. Supp. 657, 675 (D.D.C. 1966); *US v. Tanner*, 279 F. Supp 457, 478 (N.D. Ill. 1967);

the places where the overt acts of a conspiracy tare alleged to have been performed, *US v. Crisona*, 279 F.Supp. 457, 475 (S.D.N.Y. 1967);

the particular acts of an alleged conspiracy which each defendant is alleged to have personally performed,
*US v. Tanner*, 279 F. Supp. 457, 474-76 (N.D. Ill. 1967);

and the names of victims of alleged crimes (not named in the indictment),
*US v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988); *Blumenfield v. US*, 284 F.2d 46, 49 (8th Cir. 1960), *cert. den.*, 365 US 812 (1961); *US v. Moore*, 57 F.R.D. 640 (N.D. Ga. 1972); *US v. Crisona*, 271 F. Supp. 150, 156 (S.D.N.Y. 1967); *US v. Caine*, 270 F. Supp. 801, 806-807 (S.D.N.Y. 1967);

persons "as to whom [Defendant] occupied a position of organizer, supervisor, or manager."
*US v. Howard*, 590 F.2d 564, 567 (4th Cir. 1979); *US v. Sperling*, 506 F.2d 1323, 1344-45 (2d Cir. 1974), *cert. den.*, 420 US 962 (1975);

Where an informant is involved and the Government insists on the privilege of nondisclosure of his identity a motion for Bill of Particulars is a proper means of seeking such information.

Disclosure of the identity and whereabouts of an informer is required where the defendant is able to show that such information is "relevant and helpful" to the defense. *Rovario v. US*, 353 US 53, 60-61 (1957). The Fifth Circuit's test as to what is "relevant" and "helpful" is whether the

informant's "testimony would lend credence" to the defendant's theory, and if so, then his "request for disclosure should be granted." *US v. Freund*, 525 F.2d 873, 877 (5th Cir. 1976).

Where the informer is found to have been a participant in the alleged criminal activity then his identity is "relevant and material" to the defense and disclosure should be required, *Rovario v. US*, 353 US 53 (1957) (noting informant alleged to have purchased narcotics from the defendant); *Lopez-Hernandez v. US*, 394 F.2d 820 (9th Cir. 1968) (noting informant introduced defendant to an undercover agent).

*Cf.* *US v. Davis*, 487 F.2d 249 (5th Cir. 1973) (stating disclosure not required where informant's role consisted solely of introducing the defendant to agents).

Normally, no disclosure is required where informant was "mere tipster" who played no part in the prohibited transaction. *US v. Clark*, 482 F.2d 103 (5th Cir. 1973); *US v. Acosta*, 411 F.2d 627 (5th Cir. 1969). However, where the informant's credibility is at issue, disclosure may be required even where his testimony is only relevant to the issue of probable cause for an arrest or search. *US v. Anderson*, 509 F.2d 724, 279 (9th Cir. 1975).

In a case discussing the effect of the Supreme Court's opinion in *McCrary v. Illinois*, 386 US 300 (1967)(upholding a State statutory privilege for the informant's identity at a preliminary hearing to determine probable cause); the Fifth Circuit noted in *US v. Fruend*, 525 F.2d 873 (5th Cir. 1976), that,

> "Nevertheless, McCrary does not operate as a bar to ordering disclosure in all probable causes cases…. In a proper case, the trial court may wish to examine the informant to assess his credibility or accuracy." *US v. Fruend*, 525 F.2d 873, 877 (5th Cir. 1976).

*See also* *Curry v. Estelle*, 531 F.2d 1260 (5th Cir. 1976);
*US v. Kiser*, 716 F.2d 1268, 1271-2 (9th Cir. 1983)..

Where the Government is unable to locate an informant whose identity is found to be "relevant and helpful" to eh defense, then such informant's unavailability for the defense, even if through no fault of the prosecution, violates the Defendant's constitutional right to "due process" where "…there is a reasonable possibility that, if [the informant] had been available to testify, the defendant would not have been convicted." *US v. Walton*, 411 F.2d 283, 288 (9th Cir. 1969); *US v. Leon*, 487 F.2d 389 (9th Cir. 1973).

If the identity of the informant is "already known" to the defendant then any privilege asserted by the government is irrelevant. *US v. Godkins*, 527 F.2d 1321 (5th Cir. 1976); *US v. Moreno*, 536 F.2d 1042, 1048 n.7 (5th Cir. 1976).

> "If the identity of the informer is admitted or known then there is no reason for pretended concealment of his identity, and the privilege of secrecy would be merely an artificial obstacle of proof." 8 Wigmore, Evidence, § 2374 at 766 (rev. ed. 1961).

Furthermore, defense counsel should demand that the government articulate the interests it has in resisting disclosure. It is not enough to merely assert that the informant's identity cannot be disclosed for "security reasons." And where "the record is silent about the interests which the government may have in resisting disclosure and production" then an "in camera" hearing would be required to make a determination. *US v. Fischer*, 531 F.2d 783, 788 (5th Cir. 1976).

The trial court has the discretion to either grant or deny the motion for a Bill of Particulars. *US v. Zavala*, 839 F.2d 523 (9th Cir. 1988). No abuse of discretion will be apparent as long as the defendant has a defense available to him.

Where the defense motion for a Bill of Particulars is denied the court should be requested to state the reasons for said denial in writing in order to provide adequate means of review. *US v. Wells*, 387 F.2d 807, 808 (7th Cir. 1967).

Also, denial is appropriate in situations where the principal goal of a Bill of Particulars has already been accomplished. *US v. Marquez*, 686 F. Supp. 1354 (N.D. Ill. 1988).

## OTHER DISCOVERY

(1) Rule 5.1, Preliminary Examination
(2) Rule 17.1, Pre-trial Examination

(3) Rule 15, Deposition

(4) Rule 17(c), Production of Books, Papers, Documents or Objects

## SEVERANCE

When defendants have been properly joined under Rule 8(b), a district court should grant severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt. *See Zafiro v. U.S.*, 113 S. Ct. 933, 939 (1993).

The general rule is that "persons indicted together are tried together, especially in conspiracy cases." *See U.S. v. Pofahl*. 990 F.2d 1456, 1483 (5th Cir. 1993).

*But see* In *U.S. v. Neal*, the defendants alleged that they were entitled to severance because their involvement was extremely limited and, therefore, a spillover effect would occur. *U.S. v. Neal*, 27 F.3d 1035, 1045 (5th Cir. 1994).

In *Neal*, the Court held that the defendant's convictions vacated and remanded for a new trial given that the undisputed leader of the conspiracy would have testified on their behalf had severance been granted. *U.S. v. Neal*, 27 F.2d at 1047.

The defendants established a bona fide need for the leader's testimony as the substance of that testimony was exculpatory in nature. *U.S. v. Neal*, 27 F.3d at 1047.