DIRECT EXAMINATION

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THEORY OF THE CASE

LAST THINGS FIRST

In order to put on a citizen's case one must have a theory of defense. The jury wants and expects to hear the defendant's side of the case and it is the defense counsel's job to marshal and present the cast of characters who will present the defendant's side of the story. After all, every reasonable person knows there are two sides to every story. And at the close of the prosecutor's case the jury has heard only one side of the dispute. Therein lies the defense attorney's dilemma: in order to win, the defense must generally put on a case.

STORY TO TELL

Given that the defense also has a story to tell, it should be told, simply, and to the point. Mother Goose! However, before Counsel can select which witness to call or what testimony to elicit he or she must have a clear concept of what story needs to be told in defense of his client. Counsel must know the law in order to present a defense which is legally sufficient under the anticipated charge of the court and have a good working knowledge of the available facts in order to insure that a factual basis for the defense is presented.

The bottom line, however, is not the charge of the court or the legal sufficiency of the evidence, it is that the citizen's story catches the jury's fancy. So, we start preparing our case at its conclusion, the closing argument. Your closing argument that is the story line, along with all the counsel's examination should follow. The opening serves as an advertisement for coming attractions to insure that the audience stays tuned and pays attention as the story unfolds. The story should have a beginning, middle and a conclusion and the order and substance of the witnesses called by the defense should build the story's plot to a finale.

General background information and testimony personalizing the citizen enables the cold courtroom audience to feel more comfortable with and more receptive to a fellow citizen accused of wrongdoing. And the story, as portrayed through your witnesses, should follow logically from beginning to end. A general rule might be to place your strongest witnesses (both as to who they are and what they have to say) at the beginning and at the end of the defense presentation. But whatever the order the story needs to flow like a fairy tale, understanding the limitations of its audience's sophistication and attention span. Some simply will tolerate and comprehend more than others.

APPEARANCES COUNT

Consideration should be given to discussions regarding appropriate attire and demeanor with careful attention to the particular audience (Jury) you anticipate will be hearing the case.

You must gauge the impact of the sum total of your witness' occupation, education, intelligence, demeanor, appearance and interest in the outcome of the case, will have on the fact finder.

You need to ascertain his or her prior criminal record, and as best you can, participation acts similar to those charged against your citizen accused. *US v. Hodnet*, 537 F.2d 828 (5th Cir. 1976), rehearing denied. 540 F.2d 1086 (allowing Government to inquire of defense witness regarding her "attitudes toward drug use and …presence during a prior illegal drug transaction to which [defendant] was not a party" in order "…to show her bias and prejudice in favor of those engaged in drug sales").

ADVISE EACH WITNESS OF HOW HE OR SHE FITS IN "BIG PICTURE"

In addition to familiarity with their own direct testimony each witness needs to know the "big picture", the overall story line and defense, and how his testimony fits in and is important to the total effort. Advising the witnesses of the order in which they will be called often enables them to better see the entire forest and reduces anxiety as well.

WITNESS NEEDS TO BE PREPARED FOR THE COUNTER ATTACK

The greatest fear most witnesses have is the what is "HE" going to ask me, referring to the prosecutor's cross-examination. To alleviate that anxiety and better prepare the witness for what will be asked of him it is useful to take him or her through the standard litany of cross-examination questions dwelling upon those weak points of their background or testimony that it is anticipated the prosecution will seek to expose. Where those areas are "open and obvious", consideration should be given to bringing them out on direct or reduce the "sting."

THE "REAL EVIDENCE" IS NOT ALWAYS TESTIMONIAL

Generally, the jury will share the building with the defendants and the witnesses. That includes not only the courtroom but the rest rooms, the hallways, the snack bar and parking lot. Particularly in conspiracy cases the most damaging spectacle the jury will observe is not the defendants and their counsel huddled around counsel table, whispering in the courtroom, but out in the hallway giggling together or flashing the "at-a-boy" signal to the previously "disinterested" witness who has just stepped off the stand.

ANTICIPATING IMPEACHMENT
BEST TO KNOW HOW DEEP IS THE WATER
BEFORE DIVING IN…

But before deciding to put your citizen on the stand or calling a witness to testify one needs to know what dangers that course presents.

DISCOVERY OF YOUR WITNESS' STATEMENTS IN THE PROSECUTOR'S POSSESSION

Every effort should be made to discover any prior statements in the Government's possession which might be used to impeach your client or his witnesses as a "prior inconsistent statement" under FED. R. CRIM. P. Rule 613.

DISCOVERING THE DEFENDANT'S STATEMENT

[See Pretrial Motion Outline]

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 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 is able to legally bind the defendant with respect to the activities involved in the charges.

WRITINGS OR TAPE RECORDINGS OF THE DEFENDANT

FED. R. CRIM. P. 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, 112-16 (2d Cir. 1969) *cert. denied*, 397 US 961 (1970) (holding failure to disclose held harmless). See also *US v. Buralino*, 576 F.2d 446 (2d Cir. 1978), cert. denied, (F.B.I. destruction of poor quality back-u tape recordings of defendants was strongly criticized as an infringement on Rule 16, but nevertheless held to be harmless error); *US v. 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. 1976);
US v. Rosenberg, 299 F.Supp. 1241 (S.D.N.Y. 1969) (Frankel, J.).

The Defendant's voluntary, unsolicited utterances are not discoverable under Rule 16(a)(1)(A). *US v. Reeves*, 730 F.2d 1189 (8th Cir. 1984); *US v. VonStoll*, 726 F.2d 584 (9th Cir. 1984).

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. denied*, 423 US 1087 (1976).

When an 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. denied*. 444 US 841, 100 S.Ct. 80 (1979).

DEFENDANT'S ORAL STATEMENTS

Rule 16(a)(1)(A) mandates disclosure of oral statements either before or after arrest only when they re 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).

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. Ficravanti*, 412 F.2d 407, 411-12 n.12 (3d Cir. 1969), *cert. denied*, 396 US 83 (1969). See the cases collected in *US v. Johnson*, 525 F.2d 999, 1004 (2d Cir. 1975), *cert. denied.* 424 US 920 (1976).

However, the Tenth Circuit has held that summaries of conversations between the defendant and undercover Government agents are not discoverable under Rule 16(a)(1)(A). *US v. McClure*, 734 F.2d 484 (10th Cir. 1984).

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) (holding that agent's rough notes are discoverable as Jencks Act material). However, a Government agent's notes are not discoverable under the Jencks Act when the witness had neither signed, read, nor heard his entire statement. The adoption contemplated by the statute must be more formal. *US v. Hogan*, 763 F.2d 697, 704 (5th Cir. 1985). 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) and *US v. Harris*, 543 F.2d 1247 (9th Cir. 1976). *Contra US v. Cole*, 634 F.2d 866 (5th Cir. 1981).

In order for same to be 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).

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

> "[t]he 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) (reserving 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).

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).

Recordation 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 not intimate that testimony of such corporate officers or other officials is now "discoverable as statements of the defendant." FED. R. CRIM. P. Rule 16, Advisory Committee Notes, 1974.

SANCTIONS [RULE 16(d)(2)]

If a party fails to comply with a Rule 16 request, the trial court may:

(1) order such party to permit the discovery:
(2) grant a continue
(3) prohibit introduction of the undisclosed evidence; or
(4) enter such other order as is just under the circumstances.

In determining the appropriate sanction, the court should consider:

(1) the validity of reasons for non-compliance;
(2) the extent of prejudice, if any, to the opposing party; and
(3) any other relevant circumstances.

See *US v. Hartley*, 678 F.2d 961, 977 (11th Cir. 1982), cert. denied, 459 US 1170 (1983) (there was no abuse of discretion to consider late date at which the government discovered and decided to use reports), *abrogated on other grounds by U.S. v. Goldin Industries, Inc.,* 219 F.3d 1268 (11th Cir. 2000);
US v. Sarcinelli, 667 F.2d 5, 6-7 (5th Cir. 1982) (holding abuse of discretion to effect is dismissal of entire case and less severe sanctions available).

The Government's failure to comply with Rule 16 is grounds for reversal only is the defendant can show substantial prejudice.

US v. Jones, 730 F.2d 593, 596-97 (10th Cir. 1984) (no material handicap in cross-examination);
US v. Hemmer, 729 F.2d 10, 13 (1st Cir.) (no effect on defense strategy);
US v. Jennings, 724 F.2d 436, 444-45 (5th Cir.) (cross-examination adequate, defense knew undisclosed facts).

DEFENSE WITNESS' STATEMENT TAKEN BY OR GIVEN TO LAW ENFORCEMENT

Rule 16 makes no provision for the disclosure of statement s of defense witnesses which have been given to or are in the possession of the prosecution and which may be used for impeachment.

However, where the defense witness is not a potential witness for the prosecution, then production of his statement would arguably not fall under the Jenck's Act's [18 U.S.C. §3500 (2)] prohibition against disclosure prior to trial [see also: Rule 26.2(a)] and accordingly, the statement of a witness the government does not intend to call should be discoverable as they are not covered by the Rule's exemption. *US v. Bremer*, 482 F.Supp. 821 (W.D. Okla. 1979).

Also, to the extent that such statements may contain favorable, exculpatory, or mitigating information the "due process" clause should require disclosure under *Brady v. Maryland*, 373 US 83 (1963).

The Supreme Court has recognized three distinct situations in which the *Brady* doctrine, requiring disclosure of evidence favorable to an accused as a matter of "due process", applies:

1. The prosecutor has not disclosed information despite a specific defense request;

2. The prosecutor has not disclosed information despite a general defense request for all exculpatory information or without any defense request at all: and

3. The prosecutor knows or should know that the conviction is based on false evidence.

The Supreme Court dealt with the ethics 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 "[T]here 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 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*, 373 US at 87.

The Supreme Court's decision in *US v. Bagley*, 473 US 667, 87 L.Ed.2d 481 (1985), declared:

> "[*Brady*] evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. At 494.

In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), the Supreme Court placed the onus on the prosecution to produce exculpatory evidence that was significant enough to result in a denial of defendant's right to a fair trial. The significance of such evidence is not evaluated in isolation but

considered cumulatively with all the similarly exculpatory or impeachment information of which any member of the prosecution team is aware.

In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995) the evidence found material was that: one out of four eye witnesses' description did not match Kyles; statements made by a witness of the state did not express concern that he might be a suspect; license plates from cars at the scene which might have revealed suspects the state did not pursue.

> "The fourth and final aspect of Bagley material to be stressed here is it s definition in terms of suppressed evidence considered collectively, not item by item. [T]he prosecution … must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" [that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley*, 115 S.Ct. 1555, 1558 (1995)] is reached. This in turn means that he individual prosecutor had a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclosure is good faith or bad faith… the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitley*, 115 S.Ct. 1555, 1567, 1568 (1995).

PRETRIAL DISCLOSURE OF "EXCULPATORY" EVIDENCE

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 2.1.*

See contra *US v. Leighton*, 265 F.Supp 27, 35 (S.D.N.Y. 1967);
Ashley v. Texas, F.2d 622 (3d Cir. 1963);
US v. American Oil Co., 286 F. Supp 742, 754 (D.N.S. 1963);
US v. Moore, 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).

See *US v. Agurs*, 427 US 97, 110-11 (1976) (holding that some evidence so clearly exculpatory that due process requires disclosure, even with no Brady request).

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 trial. *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 Constitutional mandate of the "due process" clause to the Fifth Amendment preempts any statutory prohibition against early disclosure contained in the Jenck's Act or Federal Rules where pretrial discovery is required to insure the evidence's usefulness.

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 718 (9th Cir. 1971); *US v. Auten*, 632 F.2d 478 (5th Cir. 1980) (stating that a prosecutor cannot "compartmentalize" his information by not inquiring of the "prosecutorial team").

> "The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." *US v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971).

Contra *Luna v. Beto*, 395 F.2d 135 (5th Cir. 1968).

See also *US v. Gatto*, 763 F.2d 1040 (9th Cir. 1985).

Rule 16(a)(1)(A)'s due diligence requirement relates only to the prosecutor and his awareness of another federal agency's possession of requested statement.

This is because the rationale which underlies the Brady rule is not only based upon the desire to proscribe prosecutorial misconduct but to insure that the defendant receives a fair trial. Consequently, the fact that a Government agency suppresses evidence from the prosecutor should not be controlling where such adversely affects the defendant's right to a fair trial.

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), or from state government sources. *See US v. Walker*, 720 F.2d 1527, 1535 (11th Cir. 1983), *cert. denied,* 104 S.Ct. 1614 (1984) (state's agreement with government witness for remuneration for

testimony); *US v. Luis-Gonzalez*, 719 F.2d 1539, 1548 (11th Cir. 1983) (government witness' state misdemeanor convictions not on FBI "rap sheet" containing felony convictions).

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 RULES 16.06[1]; *US v. Roberts* 338 F.2d 640, 648.(2d Cir. 1968).

In *California v. Trombetta*, 104 S.Ct. 2528 (1984), the Supreme Court held that the prosecution has no constitutional duty to *preserve* evidence unless (1) its exculpatory value is immediately apparent and (2) it is of such a nature that the defendant could not obtain comparable evidence by other reasonable means. The Court did not, however, suggest how to measure the exculpatory value of evidence not preserved, such as breath samples taken from DWI suspects.

Brady Motions 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 identitfy the defendant); however, the very nature of the *Brady* rule makes a particularized request in many instances a practical impossibility.

> "If the defense does not 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." *Giles v. Maryland*, 386 U.S. 66 (1967) (Fortas, J., concurring). *Cf. US v. Agurs*, 427 US 97 (1976)

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

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), *Brady v. Maryland*, 373 US 83 (1963);

Evidence impeaching Government witnesses ("…favorable to the accused either direct or impeaching"), *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968).

See also *Giglio v. US*, 405 US 150 (1972);
Giles v. Maryland, 386 US 66, 76 (1967);
US v. Miller, 411 F.2d 825 (2d Cir. 1969);

prior sexual relations by a prosecutrix in a rape case,
Giles v. Maryland, 386 US 66 (1967) (remanding for further proceedings);

medical examination disclosing no evidence that kidnap victim had been sexually assaulted;

See *US v. Poole*, 379 F.2d 648 (7th Cir. 1967) (eyewitness's oral statement that gave description which differed form 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. denied*. 593 US 180, [psychiatric reports indicating the defendant's insanity],
Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963) (eyewitness report indicating self-defense);
Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963) (evidence with paint, no blood);
Miller v. Pate, 388 F.2d 737 (9th Cir. 1968) (fact that defendant appeared under influence of alcohol shortly after offense);
US ex rel Thompson v. Dye, 221 F.2d 1955 (3d Cir. 1955) (the criminal record of prosecution witness);
In re Ferguson, 489 F.2d 1234 (9th Cir. 1971) (unreliability of Government witness);
Mesarosh v. US, 352 US 1 (1956) (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) (instructions to Government witness not to speak with defense counsel, or to do so only in presence of Government counsel);
Gregory v. US, 369 F.2d 185, 187-189 (D.C. Cir. 1966);
Coopolinio v. Helpern, 266 F. Supp 930 (S.D.N.Y. 1967) (evidence of a witness's unstable mental condition);

See also Giles v. Maryland, 386 US 66, 75 n.6 (1967) (fact that Government witness was an informer);
US v. Oft, 489 F.2d 872 (7th Cir. 1973) (information that prosecution's key witness was the paramour of the defendant's murdered wife);
Alcorta v. Texas, 355 US 28 (1957) (information indicating Government witness' untruthfulness [e.g. witness' false testimony]);
Napue v. Illinois, 360 US 264 (1959) (scientific information regarding ballistics or fingerprint examinations indicating defendant did not fire weapon in question);
Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) (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) (identity of any witnesses who can give favorable testimony for accused);
US v. Hinkle, 307 F. Sup 117 (D.D.C. 1969);
US v. Cody, 722 F.2d 1052, 1062 (2d Cir. 1983) (FBI Agents' threats inducing witness to continue recording conversations with RICO defendant);
Austin v. McKaskle, 724 F.2d 1153, 1156 (5th Cir. 1984) (witness' perjured testimony of aggravating factors at sentencing hearing leading to life sentence).

A defendant's objection to the Government's use of undisclosed *Brady* testimony is not waived by the extensive cross-examination of the witness if the trial court, in overruling the objection, expressly sets direction of the trial proof on the matter. *See US v. Hogan*, 763 F.2d 697, 701 (5th Cir. 1985).

RECIPROCAL DISCOVERY

STATEMENTS OF YOUR WITNESSES MAY BE DISCOVERABLE BY PROSECUTION
[FED. R. CRIM. P. Rule 26.2]
[See Pretrial outline 21-24]

Calling a defense witness, *other than the defendant*, will render any relevant prior statements on that witness producible to the prosecution upon request after the witness testifies on direct.

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' statements in much the same manner as the Jencks Act provided for production of prosecution witness' statements. The Rule expressly provides that "[A]fter a witness other than the defendant has 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 also US v. Nobles*, 422 US 231, 232 (1975); *US v. Tarnowski*, 583 F.2d 903, 906 (6th Cir. 1978), *cert. denied*., 440 US 918 (1979).

Rules 5.1 (h), 12i, 32i(2), 32.1(e) and 46j expressly cite the applicability of rule 26.2 at preliminary hearing, suppression hearing, sentencing retraction hearings, bond hearing and hearings on write of Habeas Corpus. Thus making clear that 26.2 requires the production of witness statements at pre-trial proceeding.

SANCTIONS

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." FED. R. CRIM. P. Rule 26.2(e).

See *Taylor v. Illinois*, 484 US 400, 108 S.Ct.646, 98 L.Ed.2d 798 (1988) (defense witness was excluded as a sanction for discovery abuse).

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 FED. R. CRIM. P. Rule 16(d) Advisory Committee Notes; 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- CRIMINAL RULE § 16.05, at 16-64, where the prosecution fails to comply.

While neither Rule 16 nor *Brady v. Maryland* make provision for discovery of defense witness' conviction record "rap sheets," FED. R. CRIM. P. Rule 609 provides for the impeachment use of non-remote prior convictions.

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME [FED. R. EVID. RULE 609]
(See Federal Rules of Evidence Outline)

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime:

a. Was punishable by death or imprisonment in excess of one year …and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or

b. Involved dishonesty or false statement, regardless of the punishment.

REMOTENESS [FED. R. EVID. RULE 609(b)]

A conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction, or release from confinement whichever is later. However, the proponent of said evidence upon notice and a fair opportunity to contest its admission may proffer and the court may admit same where it determines that its probative value outweighs its prejudicial effect.

FINALITY OF CONVICTION [FED. R. EVID. RULE 609(c)]

Pendency of appeal does not render underlying conviction inadmissible for impeachment purposes.

STATE.

In Texas, only final convictions, not on appeal, are admissible for impeachment purposes. Miler v. State, 472 S.W.2d 261 (Tex. Cr. App. 1971). *Cf. Poore v. State*, 524 S.W.2d 254 (Tex. Cr. App. 1975) (holding that the burden on party offering the witness to show conviction not final).

FEDERAL.

FED. R. EVID. Rule 609(e) provides that the "pendency of an appeal …does not render evidence of a conviction inadmissible." *US v. Rose*, 526 F.2d 745 (8th Cir.), *cert. denied*, 430 US 908 (1977).

DETAILS OF OFFENSE ARE INADMISSIBLE

Tucker v. US, 409 F.2d 1291 (5th Cir. 1969);
US v. Bray, 445 F.2d 178, 182 (5th Cir.), *cert. denied*. 404 US 1002 (1971).

EFFECT OF PARDON, ANNULMENT OR CERTIFICATION OF REHABILITATION [FED. R. EVID. Rule 609(c)]

DISTINCTION BETWEEN STATE AND FEDERAL:

STATE:

In Texas, if the sentence was suspended and then set aside or probation was granted and the term was successfully completed then the conviction is not admissible for impeachment purposes. TEX. R. CRIM. P. Art. 38.29.

However, a pardon does not render a prior conviction inadmissible for impeachment purposes, *Sipanek v. State*, 272 SW2d 508 (Tex. Cr. App. 1925); *Jones v. State*, 147 SW2d 508 (Tex. Cr. App. 1941); unless such pardon is premised upon proof of innocence, *Logan v. State*, 448 SW2d 462 (Tex. Cr. App. 1969).

FEDERAL:

FED. R. EVID. Rule 609(c) provides that a prior conviction is not admissible for impeachment purposes where:

> "(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure … and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or
> (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence."
>
> *US v. Wiggins*, 566 F.2d 944 (5th Cir. 1978)(holding defendant apparently has obligation of showing that his release [e.g. from "half-way house"]" …amounted to a finding of rehabilitation").

Accordingly, while it may be incumbent upon defense counsel to seek discovery of his own witness' rap sheets to keep from being blindsided, access to such records is limited exclusively to law enforcement agencies. And where divulging a witness' identity will have no adverse effect, such records may be sought on the grounds that given the prosecution's inherent investigative advantage, prosecuting authorities have access to such "non reciprocal" information gathering networks creates an unfair imbalance of advantage favoring the prosecution on the grounds that given the Government's investigative advantage, allowing prosecuting authorities' access to such "nonreciprocal" information gathering networks creates an unfair imbalance, depriving the defendant of his right to "due process." *Wardius v. Oregon*, 412 US 470 (1973).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

VS. NO. *

*

MOTION TO COMPEL DISCLOSURE OF
DEFENSE WITNESS' CONVICTION RECORDS

TO THE HONORABLE *, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION:

Now comes the Defendant, *, who by and through his undersigned Counsel moves this Honorable Court to compel the U.S. Attorney's Office for the *District of Texas, * Division, to disclose to Defendant the information and data compiled with respect to any arrests and/or convictions of defense witness in this cause and for good cause therefore would show unto this Honorable court the following:

I.

That the U.S. Government has vast and wide reaching resources [DEA, Customs, Immigration and Naturalization Service, Internal Revenue Service, Computers] in compiling data on prospective witnesses both for the prosecution and those anticipated for the defense.

II.

That the U.S. Government has access to and utilizes "rap sheet" retrieval methods available to the Government to determine prior arrests or convictions of prospective witnesses.

III.

These vast investigative resources of the U.S. Attorney's Office in gathering information regarding prospective witnesses provides a nonreciprocal benefit to the Government which interferes with and denies to the Defendant the ability to secure a fair trial and violates the due process and "fundamental fairness" requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States and further deprives this Defendant of the basic tools to adequately defend the charges against him by reason of his limited resources in violation of the Constitutional right to the equal protection of the laws.

WHEREFORE, the Defendant, *, respectfully prays that this Honorable Court order and compel the U.S. Attorney's Office in the *District of Texas, * Division, to permit the Defendant to view and copy the data and information compiled by the Government on prospective witnesses in this cause, and for such other and further relief as this Honorable Court should deem just and proper.

Respectfully submitted:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	§	
VS.	§	NO. *
*	§	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL DISCLOSURE OF DEFENSE WITNESS' CONVICTION RECORDS

TO THE HONORABLE *, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION:

STATEMENT OF FACTS

The U.S. Government through its vast and wide-reaching investigative and information gathering resources compiles data and information on prospective witnesses regarding prior arrests and/or conviction records appearing on their "rap sheets" which are retrieved through the computers and other sources available to the Government.

ARGUMENT

The nonreciprocal nature of the Government's vast and wide-reaching resources in compiling data on prospective jurors violates the mandate of the equal protection clause that a State not permit a Defendant to be deprived of "…the basic tools of an adequate defense" by reason of his poverty. *Britt v. North Carolina*, 404 US 226, 227 (1971).

This practice creates and unfair imbalance of advantage favoring the prosecution and 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 (1973).

Practices such as the gathering of information regarding prospective witness through means available only to the Government provides "nonreciprocal benefits to the State" with regard to the investigation and preparation of its case and as the Supreme Court recently noted in *Wardius v. Oregon*, 412 US 470 (1973). "…[W]hen 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. *Id*.

> "[T]he State's inherent information gathering advantages suggest that if there is to be imbalance in discovery rights, it should work in the defendant's favor." *Id.*

CONCLUSION

A criminal trial "…is not a sporting event," Giles v. Maryland, 386 US 66 (1967) (Fortas, J., concurring), and where the vast and far-reaching investigative and information gathering resources of the Government in compiling data on prospective witnesses far outstrip those of a defendant thereby depriving said defendant of equal access to information regarding prospective witnesses, then such practice violates the defendant's right to "equal protection" of the laws and provides "nonreciprocal benefits to the State" which interferes with the defendant's ability to secure a fair trial at this vital and critical stage of the criminal process, all in violation of the Defendant's Constitutionally protected rights to due process and "fundamental fairness."

Accordingly, this Honorable Court should compel the Government to disclose such information regarding prospective witness to the defense.

Respectfully submitted:

IMPEACHING YOUR OWN WITNESS

WHO MAY IMPEACH [FED. R. EVID. RULE 607]

The credibility of a witness may be attacked by any party, including the party calling him, *US v. Hagenstab*, 575 F.2d 1035 (2d Cir.), *cert. denied*, 439 US 827 (1978); *US v. Craig*, 573 F.2d 513 (7th Cir. 1978); however, counsel may not lead his own witness. FED. R. EVID. Rule 611(c).

State "Voucher Rule" denied Defendant his Sixth Amendment right of compulsory process and right to cross-examine one's own witness. *Chambers v. Mississippi*, 410 US 284 (1973) (holding defense counsel entitled to cross-examine witness regarding statements against interest even though hearsay and even though, in fact, impeaching witness was called by defense).

However, the prosecutor may not use a witness' prior inconsistent statement for the *primary* purpose of getting otherwise inadmissible evidence before the jury. *US v. Miller*, 664 F.2d 94, 97 (5th Cir. 1981), *cert. denied*. 459 US 854 (1982) (emphasis added).

In *US v. Hogan*, 771 F.2d 82 (5th Cir. 1985), during a prosecution for conspiracy to import marijuana, the Government had called a witness for the "primary purpose" of impeaching him with inadmissible hearsay evidence. The Fifth Circuit refused to reverse the conviction on this ground because (1) no part of the witness' testimony was applicable to the importation charge, which related to a prior, successful smuggling operation, and (2) the witness made no reference to that prior operation.

LEADING YOUR OWN WITNESS

LEADING QUESTIONS [FED. R. EVID. RULE 611(c)]

Rule 611(c) restricts "leading questions" to cross-examination unless "necessary to develop" the witness' testimony, "a hostile witness, and adverse party, or witness identified with an adverse party."

TESTIMONY ON DIRECT RENDERING EXCLUDED ILLEGALLY OBTAINED EVIDENCE ADMISSIBLE:

Offering defense testimony also raises the potential threat that same will open the door to previously excluded illegally obtained evidence, even if the area impeached was only "suggested" in direct. *Harris v. New York*, 401 US 222 (1971) (allowing use of a confession obtained in violation of Miranda for impeachment purposes); *US v. Havens*, 64 L.Ed.2d 559 (1980) (allowing evidence illegally obtained in violation of Defendant's Fourth Amendment rights, to be used for impeachment of response elicited on cross-examination which court found was 'reasonably suggested" by his direct examination).

See also *US v. Hickey*, 596 F.2d 1082, 1088-89, 444 US 853 (1979) (suppressed statements may only be used to impeach defendant as to statements volunteered during his direct testimony).

LEADING HOSTILE AND ADVERSE WITNESSES

FED. R. CRIM. P. Rule 611(c) provides that one may lead one's own witness where he or she is:

(1) a *hostile* witness,
(2) an *adverse party*, or
(3) one *identified* with an adverse party.

MODE OF INTERROGATION [FED. R. EVID. RULE 611]

SCOPE OF EXAMINATION [FED. R. EVID. RULE 611(b)]
(See Rules of Evidence Outline):

One may arguably limit the scope of cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witnesses. See FED. R. CRIM. P. Rule 611 (b) (limiting the original draft which allowed cross-examination "…on any matter relevant to any issue in the case"); H.R. Rep. No. 93-650, Cong. First Sess. 12.1973; see also *US v. Haili*, 443 F.2d 1295, 1299 (9th Cir. 1971); *Casey v. US*, 413 F.2d 1303 (5th Cir. 1969), *cert. denied*, 3976 US 1039 (1970); *US v. Evanchik*, 413 F.2d 950 (2d Cir. 1969); *US v. Cole*, 617 F.2d 15 (5th Cir. 1980) (permitting interrogation outside the scope of direct as to witness' credibility). However, as a practical matter such is a dangerous adventure.

REFRESHING YOUR WITNESS' RECOLLECTION

Where the witness has knowledge of certain facts, but fails to recall or advert to same, counsel may attempt to refresh the witness' memory by a question suggesting the matter forgotten, or utilize any of the means which may serve to jog the witness' memory, *US v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 329 US 806 (stating that anything may be used to refresh a witness' recollection, "a song, a scent, a photograph, an allusion, even a past statement known to be false"); including hearsay, *US v. Heath*, 580 F.2d 1011, 1020 (10th Cir. 1978); *Esperti v. US*, 406 F.2d 148, 150 (5th Cir. 1960); *Johnston v. Earle*, 313 F.2d 686, 688 (9th Cir. 1962); and otherwise inadmissible evidence, *US v. Faulkner*, 538 F.2d 724, 727 (6th Cir. 1976), *cert. denied*, 429 US 1023; *Collins v. Penn Cent. Transp. Co*., 497 F.2d 1296, 1298 (2d Cir. 1974).

Even a writing prepared by another, *US v. Conley*, 503 F.2d 520, 522 (8th Cir. 1974); *US v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979); or prior testimony, *US v. Tager*, 481 F.2d 97, 100-01 (9th Cir. 1973), *cert. denied*. 415 US 914 (1974); may be used to refresh recollection, regardless when made or prepared, *US v. Horton*, 526 F.2d 844, 899 (5th Cir. 1976) (holding "where the issue, as here, is one of present recollection revived, the doctrine of contemptoraniety has little

application"); while it was traditionally held that the witness' recollection should in fact appear exhausted before it refreshed with a writing, *US v. Morlang*, 531 F.2d 183, 191 (4th Cir. 1975); same may not be there with respect to Jencks material, *US v. Jiminez*, 613 F.2d 1373, 1378 (5th Cir. 1980).

While using a writing to refresh a witness' recollection does not itself render the writing admissible by the party so utilizing same, *US v. Smith*, 521 F.2d 957, 969 (D.C. Cir. 1975), FED. R. CRIM. P. Rule 612 expressly provides that the adverse party "is entitled to have the writing produced … to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

OPINION ON ULTIMATE ISSUE [FED. R. EVID. RULE 704]

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. *United States v. Lueben,* 816 F.2d 1032 (5th Cir. 1987) (In a Section 1001 prosecution, the District Court was obliged to consider the Defense expert's testimony on the issue of whether the false statements made by the defendant were material, i.e., whether they satisfied an essential element of the offense charged, irrespective of the fact that this would be an opinion on an ultimate question of law).

IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT [FED. R. EVID. RULE 801(d)(1)(A)]

Where a declarant, who is subject to cross-examination about the statement, makes a statement at trial that is inconsistent with a prior statement given "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding," the prior inconsistent statement is admissible. *US v. Begham*, 812 F.2d 943 (5th Cir. 1987) (holding prior grand jury testimony of prison guard that he saw the defendant, fellow prison guard, strike an inmate held admissible because it was inconsistent with his trial statement that he could no longer remember what happened).

CHARTS OR SUMMARIES OF VOLUMINOUS WRITINGS, RECORDINGS OR PHOTOGRAPHS WHICH CANNOT BE CONVENIENTLY EXAMINED IN COURT MAY BE "PRESENTED" IN THE FORM OF A CHART, SUMMARY, OR CALCULATION

FED. R. EVID. Rule 1006 provided:

> "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may

order that they be produced in court." (emphasis added) FED. R. EVID. 1006.

UNDERLYING DOCUMENTS MUST BE VOLUMINOUS AND IN-COURT EXAMINATION MUST BE INCONVENIENT

> "There is no requirement in Rule 1006 …that it be literally impossible to examine the underlying records before a summary or chart may be utilized. All that is required for the rule to apply is that the underlying 'writings' be 'voluminous' and that in-court examination not be convenient."
> *US v. Scales*, 504 F.2d 558, 562 (6th Cir.), *cert. denied*, 441 US 946 (1979).

NOT REQUIRED THAT UNDERLYING DOCUMENTS THEMSELVES BE RECEIVED IN EVIDENCE AS A FOUNDATION FOR THE SUMMARIES BUT ONLY THAT THEY BE "AVAILABLE":

Although pre-rule cases often required the underlying documents to be in evidence as a foundation for use of a chart or summary, *see. e.g., McDaniel v. US*, 343 F.2d 785, 789 (5th Cir.) *cert. denied*. 382 US 826 (1965); the history and wording of Rule 1006 requires only that the underlying documents be "available." *US v. Smith*, 556 F.2d 1179 (5th Cir.), *cert. denied*, 434 US 962 (1977).

UNDER RULE 1006, CHART OR SUMMARY MAY BE CONSIDERED AS EVIDENCE RATHER THAN A MERE JURY AID

As the Fifth Circuit has held in *US v. Smith*:

> "Although the word "evidence" does not appear in [Rule 1006's] text we construe the rule as treating summaries as evidence under circumstances where, in the court's discretion, examination of the underlying documents in a trial setting cannot be done conveniently … The court could have excluded all the underlying documents and received the summaries as evidence." *Smith*, 556 F.2d at 1184.

BUT CHART STILL REQUIRED TO E ACCURATE, AUTHENTIC AND PROPERLY INTRODUCED BEFORE ADMISSION UNDER RULE 1006

Nevertheless, "even under Rule 1006, the summary or chart must be accurate, authentic and properly introduced before it may be admitted in evidence." *US v. Scales*, 594 F.2d 558, 563 (6th Cir.), *cert. denied*. 434 US 862 (1979) *and cases cited therein*.

The person "who supervised" the chart or summaries "compilation" is "the proper person to attest to the authenticity and accuracy of the chart." *US v. Scales*, 594 F.2d 558, 563 (citing Weinstein's, Evidence, ¶1006[06]). Thus, it would appear that an attorney who prepares a chart or summary in open court during examination of a witness may have the witness attest to its authenticity and accuracy because although such witness does not himself prepare same he has effectively "supervised" its "compilation."

SUMMARY OF PURELY TESTIMONIAL EVIDENCE MAY ALSO BE UTILIZED AS A JURY AID WITH LIMITING INSTRUCTION THAT IS NOT TO BE CONSIDERED AS EVIDENCE

Moreover, although summaries of purely testimonial evidence "cannot be said to come within requirements of Rule 1006," *US v. Scales*, 594 F.2d at 563; some cases allow the use of such summaries where the purpose is merely to aid the jury in its examination of evidence already admitted. *See, e.g., Epstein v. US*, 246 F.2d 563, 570 (6th Cir. 1957); *Barber v. US*, 271 F.2d 265 (6th Cir. 1959). *See also US v. Scales*, 594 F.2d at 563. Authority for such summaries exists under the "established tradition" of the various circuits and Federal Rules of Evidence 611 (a). *US v. Scales*, 594 F.2d at 563-64.

Although the danger of permitting presentation of a summary of testimony is plain [i.e. jury might rely upon alleged facts in summary as if they had already been proved; summary may be too conclusory; etc.] most summaries are routinely admitted albeit with "guarding instructions" to the effect that the chart is not itself evidence but is only an aid in evaluating the evidence." See *US v. Scales*, 594 F.2d at 563-64.

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT [FED. R. EVID. RULE 404]

(See Rules of Evidence Outline at 12-16)

EXCEPTIONS:

CHARACTER EVIDENCE GENERALLY:

Evidence of a person's character or a particular character trait is not admissible to prove that person acted in conformity therewith on a particular occasion, *except*:

CHARACTER OF ACCUSED [FED. R. EVID. RULE 404(a)(1)]

Evidence of a particular trait of the accused's:

OFFERED BY ACCUSED

See *US v. Lechoco*, 542 F.2d 84 (D.C. Cir. 1976) (holding error to exclude testimony as to accused's character for truth and veracity even though he didn't take stand and such trait not at issue, where testifying psychiatrist's opinion was based upon defendant's responses to his questions);
US v. Jackson, 588 F.2d 1046, *cert. denied*, 442 US 941 (1979) (truthfulness must be at issues);
US v. Staggs, 553 F.2d 1073 (7th Cir. 1977), *overruled on other grounds by U.S. v. Ricketts,* 146 F.3d 492 (7th Cir. 1998) (psychologist's testimony in assault on federal officer's trial, that defendant had no propensity toward violence);
US v. Davis, 546 F.2d 583 (5th Cir.), cert. denied, 431 US 906 (1977) (defendant charged with escape not entitled to show sound record at penitentiary).

OFFERED BY PROSECUTION TO REBUT SAME

See *US v. Wiley*, 534 F.2d 659 (6th Cir. 1976) cert. denied, 425 US 995 (prosecution cannot put in evidence of bad character unless defendant first puts on good character evidence – and even then, evidence of specific instances is inadmissible);
US v. Corey, 566 F.2d 429 (2d Cir. 1977);
US v. Giese, 597 F.2d 1170 (9th Cir. 1979) (admitting portions of revolutionary treaties named and read by defendant);
US v. Gilliland, 586 F.2d 1384 (10th Cir. 1978) (prosecution cannot put on bad character testimony through defense fact witnesses who do not testify as to character).

CHARACTER OF VICTIM [FED. R. EVID. RULE 404(a)(2)]

Evidence of a pertinent character trait of the victim of the crime for aggressiveness offered by an accused or by the prosecution to rebut same, or evidence of a character trait for peacefulness of the victim offered by the prosecution in a homicide prosecution to rebut evidence the victim was the first aggressor. *US v. Kelley*, 545 F.2d 619 (8th Cir. 1976); *Government of Virgin Islands v. Solis*, 475 F. Supp 542 (D. Vir. Is. 1979).

OTHER CRIMES EVIDENCE
[FED. R. CRIM. P. RULE 404(b)]
(See Evidence Outline)

While evidence of a pending indictment, probation or the knowledge of other crimes which have not been filed, may be admissible to demonstrate bias, prejudice or motive on the part of a

prosecution witness to testify favorably on behalf of those with an axe over his head, *Davis v. Alaska*, 415 US 308 (1974); *Luna v. Beto*, 395 F.2d 35 (5th Cir. 1968), *cert. denied*, 394 US 966; same would not be true of a defense witness who would in fact be testifying against his interest.

FED. R. CRIM. P. Rule 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation plan, knowledge, identity or absence of mistake or accident.

MOTIVE

See *US v. Johnson*, 525 F.2d 999 (2d Cir. 1975) (drug abuse relevant to show defendant robbed bank in order to pay off drug contact); *US v. Johnson*, 538 F.2d 926 (5th Cir. 1976), *cert. den*. 426 US 951 (1976) (prior felony record admissible to show defendant's motives in resisting arrest where he was carrying a firearm at time [constituting felon in possession]);
Cantrell v. US, 323 F.2d 613 (D.C. Cir. 1963).

INTENT

See *US v. Partyka*, 544 F.2d 345 (8th Cir. 1976) (evidence of marijuana conviction should not be admitted at trial for possession of phencyclidine);
US v. Bloom, 538 F.2d 704 (5th Cir. 1976) (evidence of trafficking in other drugs admissible at trial for possession of heroin with intent to distribute);
US v. Hearst, 563 F.2d 1331 (9th Cir. 1977);
US v. Beechum, 582 F.2d 898 (5th Cir. 1978).

In *Beechum*, the en banc Fifth Circuit overruled *US v. Broadway*, 477 F.2d 991 (5th Cir. 1973) holding that where "other crimes" evidence is offered on the issue of intent that there is no longer any requirement that the "physical elements" of the offenses be "identical." Rather under Rule 404(b), the Fifth Circuit has held there is now a two-step analysis.

RELEVANCY

The evidence of the "extrinsic offense," if "relevant" to an issue other than the defendant's character, and is offered as to the issue of "intent," then all that need be established is that the "extrinsic offense" requires the same "intent" as the crime charged. The reasoning being that such evidence makes it less likely the defendant engaged in the charged conduct with "lawful intent."

BALANCING TEST

Applying the balancing test of FED. R. EVID. Rule 403, the probative value is not substantially outweighed by the danger of prejudice. The *Beechum* court expressly recognizes that the "probative value" would be slight where intent could be established by:

(1) Other evidence,
(2) Stipulations,
(3) Inferences, or
(4) Is not contested by the defendant.

PLAN

See *US v. Krohn*, 560 F.2d 1977 (7th Cir. 1977);
US v. Thompson, 503 F.2d 1096 (5th Cir. 1974);
US v. Goodwin, 492 F.2d 1142, 1153 (5th Cir. 1976) ("when the prosecution seeks to prove design or plan by the doing of similar acts, more is required than the mere similarity that may suffice for showing intent").

KNOWLEDGE

See *US v. Quade*, 563 F.2d 375 (8th Cir. 1977);
US v. Brown, 562 F.2d 1144 (9th Cir. 1977) (holding even as to dismissed counts of indictment);
US v. Wilson, 536 F.2d 883 (9th Cir. 1976), cert. denied, 429 US 982 (defendant's denial of familiarity with cohort's disposition to commit crime makes relevant evidence of his knowledge of their criminal past [e.g. previous prison sentences]).

IDENTITY

See *US v. Park*, 525 F.2d 1279 (5th Cir. 1976) (crime too dissimilar as identity exception is narrow);
US v. Silva, 580 F.2d 144 (5th Cir. 1978) (reversible error to admit drug negotiations after sale in which defendant was charged, since defendant's sole defense was mistaken identity, intent was not a material issue, and the "other crime" was not so distinctive that it would be relevant to identify as the handiwork of the defendant).

FLIGHT

See *US v. Alonzo*, 571 F.2d 1384 (evidence of flight may be insufficient without more to support a conviction, same is still relevant to guilt);
US v. Thunder, 604 F.2d 550 (8th Cir. 1979).

REBUT A DEFENSE THEORY

See *US v. Cook*, 538 F.2d 100 (3d Cir. 1976) (reversible error to admit sodomy conviction at armed robbery trial where defense counsel on cross of arresting officer merely elicited testimony that possession of firearm was not illegal);
US v. Riqgins, 539 F.2d 719 (9th Cir. 1976);
Lovely v. US, 169 F.2d 386 (4th Cir. 1948) (in rape prosecution where consent is at issue, similar extraneous offense committed by defendant against another woman without her consent is not admissible on that issue);
Jones v. Dugger, No. 87-5363 (11th Cir. March 14, 1988) (unpublished decision) (holding defendant's Fifth Amendment privilege not violated where policeman who subjected defendant to improper interrogation testified as to defendant's demeanor during the same to rebut defendant's insanity claim, since officer did not testify to the substance of the statement).

PREDISPOSITION

See *US v. Biggins*, 511 F.2d 64 (5th Cir. 1977);
US v. Daniels, 572 F.2d 335 (5th Cir. 1978) (while evidence of "subsequent acts" may have some relevancy to predisposition, Rule 403's balancing test applied to hold same inadmissible);
US v. Boyd, 595 F.2d 120 (2nd Cir. 1978) (subsequent acts not admissible to show pre-disposition);
US v. Bramble, 641 F.2d 681 (9th Cir. 1981) (prior possession of marijuana plants not relevant to show predisposition to sell cocaine).

ORDER OF PROOF

See *US v. Juarez*, 561 F.2d 65 (7th Cir. 1977) (knowledge and interest are always material issues in narcotics prosecutions [especially where defense made no effort to defend same] no error in allowing government to introduce evidence of prior sales during case-in-chief).
US v. Halper, 590 F.2d 422 (2d Cir. 1978) (introduction of such evidence should normally await the conclusion of the defendant's case and not be offered during government's case-in-chief).

REMOVING ISSUE

See *US v. Roberts*, 619 F.2d 379, 383 n.2 (5th Cir. 1980) (the defendant may "affirmatively take issue of intent [identity or other issues] out of case" by making an appropriate stipulation "to avoid the introduction of extrinsic offense evidence");
US v. Mobel, 604 F.2d 748 (2nd Cir. 1979);
US v. King, 616 F.2d 1034, cert. denied, 446 US 969 (8th Cir. 1980).

See also *Marshall v. Lonberger*, 103 S. Ct. 843 (1983) (concurring and dissenting opinions).

But see *US v. Marino*, 617 F.2d 761, *cert. denied*, 449 US 1015 (5th Cir. 1980);

DISCOVERY OF EXTRANEOUS OFFENSES

Where trial court has ordered Government to advise defense of any "other crimes" evidence upon which it intended to rely, at least one court has held it to be reversible error to offer an extraneous offense where no such pretrial notice was given. *US v. Scanland*, 495 F.2d 1104 (5th Cir. 1984).

METHODS OF PROVING CHARACER [FED. R. EVID. Rule 405]
(See Rules of Evidence Outline)

Reputation or Opinion.

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. FED. R. EVID. Rule 405(a); *US v. Peterson*, 553 F.2d 324 (3d Cir. 1977) (stating evidence defendant belonged to pacifist church not admissible to show character trait of non-violence).

Specific Instances of Conduct.

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. FED. R. EVID. Rule 405(b); *US v. Pantone*, 609 F.2d 675 (3d Cir. 1979) [Rule 405 forbids use of specific instances of conduct to prove character unless character is an essential element of offense charges].

PROOF OF CHARACTER [FED. RULES EVID. RULES 405(a) AND 608(a)]
[See Evidence Outline]

Character may now be proved either by reputation opinion testimony. FED. R. EVID. Rule 405(a) (dealing with reputation or opinion as to character or trait of character generally); FED. R. EVID. Rule 608(a) (dealing with reputation or opinion as to credibility). And, the Courts have recognized a significant difference in the predicate required to prove character through opinion testimony as opposed to reputation.

BY REPUTATION TESTIMONY

Reputation testimony is by definition hearsay and a reputation witness "must have sufficient acquaintance with the principal witness and his community in order to ensure that he testimony adequately reflects the community's assessment." *US v. Watson*, 669 F.2d 1374, 1381 (11th Cir. 1982) (holding that some 2-3 month acquaintance with witness is insufficient even though the witness "lived in …the location …thirty-three years" and "worked with [witness] every day"); *Michelson v. US*, 335 US 469, 478; *US v. Angello*, 452 F.2d 1135, 1139-40 (2d Cir. 1971), *cert. denied*, 406 US 922 (1972); *US v. Salazar*, 425 F.2d 1384, 1286 (9th cir. 1970); *US v. Oliver*, 492 F.2d 943 (8th Cir. 1974) (allowing reputation testimony based upon a short period of acquaintance).

> "A proper foundation must be laid before the admission of reputation testimony. The reputation witness must be qualified through a showing of such acquaintance with the person, the community in which he lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded." *Michelson v. US*, 335 US 469, 478 (1948).

And the trial court's determination regarding the adequacy of the foundation for a reputation witness is ordinarily not overturned on appeal, *Michelson v. US*, 335 US 469, 480-81 (1948), without demonstrating an abuse of discretion. *US v. Watson*, 669 F.2d 1374, 1381 (11th Cir. 1982).

BY OPINION TESTIMONY

Historically, reputation evidence was the exclusive method for proving character. Opinion evidence was excluded. 3 Weinstein's, Evidence, ¶ 608[04], 608-20 [1978]; McCormick, Evidence, § 44, 95 (1954); Wigmore, Evidence, §§ 1981-6 (3d Ed. 1940).

However, the enactment of Rule 608(a) of the Federal Rules of Evidence in 1976 substantially enlarged the avenues by which one may prove character, by providing that the credibility of a witness may be attacked "by evidence in the form of opinion of reputation." FED. R. EVID. Rule 608(a)1. *US v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979).

Under new Rule 608(a), no foundation regarding length of acquaintance or recent information such as that required for reputation testimony is required for opinion testimony, *US v. Lollar*, 606 F.2d 587 (5th Cir. 1979); *US v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982); and such "opinion" testimony may be based upon isolated instances of conduct, or personal feelings by the witness. *US v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982).

> "The Fifth Circuit determined that prior questioning of the opinion witness regarding his knowledge of the defendant's reputation was unnecessary. The rule imposes no prerequisite condition upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards

> the principle witness." *US v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982). *See also US v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1929).

This distinction between the foundations required for reputation as opposed to opinion testimony "follows from an analysis of the nature of the evidence involved." *US v. Watson*, 669 F.2d 1374, 1382 (11th Cir. 1982).

Reputation testimony is based upon the community's assessment of the witness' character, whereas opinion testimony relates to "the witness' own impression of an individual's character." Accordingly, opinion testimony relating to character may be based upon even isolated instances which "cross-examination can be expected to expose." *US v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979).

> "The reputation witness must have sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the community's assessment… In contrast, opinion testimony is a personal assessment of character. The opinion witness is not relating community feelings; the testimony is solely the impeachment witness' own impression of an individual's character for truthfulness. Hence, a foundation of long acquaintance is not required for opinion testimony. Of course, the opinion witness must testify from personal knowledge… But once that basis is established the witness should be allowed to state his opinion, cross-examination can be expected to expose defects." *US v. Watson*, 669 F.2d 1574, 1582 (11th Cir. 1982).

In essence, the litany of arcane reputation questions mastered by almost every third year law student and lost by just as many jurors need not be asked with respect to proof of character by opinion testimony.

> "While it may be more desirable to have counsel first ask the impeaching witness about his knowledge of the defendant's reputation for truth and veracity, and whether based on that knowledge he would believe the defendant under oath, Rule 608(a) imposes no such requirement.
>
> Witnesses may now be asked directly to state their opinion of the principle witness' character for truthfulness and they may answer for example, "I think X is a liar." The rule imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings or personal hostility towards the principal witness. *US v. Lollar*, 606 F.2d 587, 589 (5th Cir. 1979) (emphasis supplied).

LIMITATIONS ON CROSS-EXAMINATION OF CHARACTER EVIDENCE

It would be improper to inquire of character witness as to "the accused reputation in the community after the criminal charges has been made public," or whether a DEA Agent's testimony that Defendant was "major narcotics trafficker" would be inconsistent with the witness' knowledge of defendant, since such questions struck at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial." *US v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977). *But see US v. Senak*, 527 F.2d 129 (7th Cir. 1975), *cert. denied*, 425 US 907 (1976) (holding that it is not per se objectionable to ask character witness questions regarding charges for which he is on trial); *US v. Morgon*, 554 F.2d 31 (2d Cir. 1977), *cert. denied*, 434 US 965; *US v. Bermudez*, 526 F.2d 89 (2nd Cir. 1975), cert. denied, 425 US 970 (1976) (holding it's OK to ask character witness if he had heard defendant had previously been arrested for marijuana offense. Prosecutor had appropriately informed court of his proposed line of questioning); see FED. R. CRIM. P. Rule 104.

OPENING UP CHARACTER GENERALLY

In proffering defense testimony counsel should be mindful that a witness' self-serving declaration also may open door to otherwise inadmissible evidence, bad character, and specific instances of misconduct. *US v. Babbitt*, 683 F.2d 21 (1st Cir. 1982); *US v. Billups*, 692 F.2d 320 (4th Cir. 1982) (stating I've never accepted "anything" for the waterfront boys); *Carson v. Polly*, 689 F.2d 562 (5th Cir. 1982) (stating I don't have no problem "controlling my temper"); *US v. Giese*, 597 F.2d 1170 (9th Cir. 1979), *cert. denied*, 444 US 971.

RULE OF COMPLETENESS [FED. R. EVID. RULE 106]

REMAINDERS OF OR RELATED WRITINGS OR RECORDED STATEMENTS

("Rule of Completeness")
(See Evidence Outline)

You may not need to wait for your turn to put on your case. When written or recorded statement or a portion thereof is introduced, the adverse party may "require at that time" any other part of any other writing or statement, which ought in fairness, be considered contemporaneously with it. *In re Air Crash Disaster*, 635 F.2d 67 (2d Cir. 1980) (holding that the Rule requires playing of the entire tape and not just one channel); *US v. Bacon*, 602 F.2d 1248 (7th Cir. 1979) (holding that remainder of witnesses statements supporting witness' testimony on direct were admissible after statement used for impeachment on cross-examination by defense); *US v. Rubin*, 609 F.2d 51 (1980), *cert granted*. 100 S.Ct. 1645 (1980).

Purpose:

To permit contemporaneous introduction of recorded statements that place in context other writings, which, viewed alone, may be misleading. *US v. Jamar*, 561 F.2d 1103 (4th Cir. 1977).

GETTING YOUR WITNESS TO THE COURTHOUSE

COMPULSORY PROCESS OF DEFENSE WITNESSES

Sixth Amendment "compulsory process clause" guarantees a defendant the right to have the attendance and testimony of witnesses in his behalf. *Chambers v. Mississippi*, 410 US 284, 302 (1973) (overturning state "voucher" rule); *Webb v. Texas*, 409 US 95, 97-8 9Holding that judges unnecessarily strong admonition regarding perjury law had effect of exerting "such duress on the witness' minds as to preclude him from making a free and voluntary choice whether or not to testify"); *US v. Heller*, No. 86-5966 (11th Cir. 1987) (holding where government agents intimidated an important defense witness into testifying falsely, the defendant is deprived of his right to present testimony in his defense).

Admonition to defense witness by court or prosecution which interferes with witness' "free and unhampered determination … as to whether to testify and if so as to the content of such testimony" constitutes a deprivation of the defendant's Sixth Amendment right to "Compulsory process." *Webb v. Texas*, 409 US 95 (1972) (stating court's admonition); *US v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (noting government agent's admonition); *US v. Morrison*, 535 F.2d 233, 228 (3d Cir. 1976) (noting prosecutor's admonition); *US v. Hendricksen*, 564 F.2d 197 (5th Cir. 1977) (noting plea bargain of co-defendant included promise not to testify).

But, at least one court has held that where the defense refused to provide the prosecution with a list of witnesses, the trial court's refusal to permit the defendant to call three of his expert witnesses was a proper sanction for abuse of discovery. *See Chappee v. Rose*, 843 F.2d 25 (1st Cir. 1988).

OFFERS OF PROOF [FED. R. EVID. RULE 103(a)(2)]

(See Rules of Evidence Outline)

Where the prosecutor's objection to your question or proposed testimony is sustained and the evidence excluded, Counsel must make an offer of proof setting out the substance of the evidence that was not admitted, unless same is apparent from the context within which questions were asked. FED. R. EVID. Rule 103 (a)(2.; *US v. Winkle*, 587 F.2d 705 (5th Cir. 1979) (holding Fifth Circuit "will not even consider the propriety of the decision to exclude evidence if no offer of proof was made at trial"); *Espino v. City of Kingsville*, 676 F.2d 1075 (5th Cir. 1982); *US v. Cutler*, 676 F.2d 1245 (9th Cir. 1982).

It has also been held that a party cannot argue new theories of the relevancy of evidence on appeal which were not presented to the trial court until post-trial motions; *US v. Lara-Hernandez*, 588 F.2d 272 (9th Cir. 1978). *See also US v. Artega-Limones*, 529 F.2d 1183 (5th Cir. 1976); *US v. Sims*, 617 F.2d 137 (9th Cir. 1980); *US v. Pugliese*, 713 F.2d 1574 (2nd Cir. 1983).

Rule 103(c) further provides that in order to prevent inadmissible evidence from being suggested to the jury by any means such as making statements, offers of proof or asking questions within the hearing of the jury, that such proceedings should be conducted out of the hearing of the jury. FED. R. EVID. Rule 103(c); *US v. Miller*, 594 F.2d 1085 (6th Cir. 1979) (holding prosecutor should have made offer of proof outside hearing of jury before asking question as to witnesses' "gay" relationship to physician on trial for controlled substance violation).

LAYING THE PROPER PREDICATE

Before popping the ultimate question of a witness, counsel should first lay a foundation for that witness' response. Not just because it may be legally required but also because it is helpful for the jury to place that response in its factual context and to understand the basis for the witness' answer.

Counsel must orient both the witness and his audience as to time and place, demonstrate who the witness is and what familiarity or expertise he or she has with the subject matter being addressed. For example, knowing that someone lives two doors down from and has passed the street corner in question everyday for he past 10 years tells the fact finder something about he witness' familiarity with the subject matter depicted in a photograph you have him identify for the jury.

PHOTOGRAPH EVIDENCE

Q. I show you Defense Exhibit A and ask whether this photograph fairly and accurately depicts what it purports to show as it/he/she appeared _____?

MOTION PICTURE PROJECTIONIST:

Q. Would you please state at what speed this motion picture film was exposed?

Q. How many frames per second?

Q. Could you please tell the jury at what speed, frames per second, it will be projected?

Q. Does that actually reproduce the actual timing or speed at which the movement depicted on the film was taken?

MICROFILM/MICROFISH

Q. Would you please state for the jury what method you utilize in maintaining the records of _____?

Q. Is it part of the regular course of business at _____ to keep and microfilm these records that you have described?

Q. Are these microfilms made and maintained in compliance with accepted standards of quality for permanent photographic records?

Q. Are all originals records made at or about the time of each transaction or occurrence reflected therein?

Q. How are your microfilms catalogued and filed?

Q. How do you go about retrieving microfilm from your records?

Q. As these microfilms are very small, how do you normally go about viewing them?

Q. Were you requested to locate the microfilm record of _____?

Q. Did you do so?

Q. Were you subpoenaed to bring same to Court with you today?

Q. Did you do that?

Q. Has there been any alteration or other change in this microfilm since it came into your possession?

Q. Can this microfilm, Defense Exhibit A, be viewed by the Court and Jury through the use of a projection and screen without changing or altering the record in any way?

SOUND RECORDINGS

Q. I show you this piece of apparatus (tape recorder) marked for identification as Defendant's Exhibit A and ask you if you have ever seen it before?

Q. Would you please tell the Court and Jury what it is and explain its purpose?

Q. Have you ever used same before?

Q. Are you familiar with its operation?

Q. Have you ever used such equipment?

Q. How many times?

Q. What is the quality of reproduction of conversations by this machine?

Q. Does this machine fairly and accurately reproduce the statements of the person speaking?

Q. How does the reproduction compare with the actual voice of the speaker at the time the recording is made?

Q. Would you please explain how this device operates?

Q. Is that how you operated the machine when you recorded _____?

Q. Have you had the opportunity to replay the recording?

Q. Is this recording, Defendant's Exhibit B, a fair and accurate reproduction of the conversation you heard on _____?

Q. Did you recognize the voices portrayed on that recording, marked Defendant's Exhibit B?

Q. Whose voices did you recognize?