CJA Resources:
Making the Most of the Panel Attorney's Toolkit
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Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes

Ch. 3: Authorization and Payment for Investigative, Expert, or Other Services

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§ 310 In General

§ 310.10 Availability

§ 310.10.10 Overview

(a) Investigative, expert, or other services necessary to adequate representation, as authorized by subsection (e) of the Criminal Justice Act (CJA) (18 U.S.C. § 3006A), are available to persons who are eligible under the CJA, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services.

(b) In this connection, a person with retained counsel is financially unable to obtain the necessary services if the person's resources are in excess of the amount needed to provide the person and the person's dependents with the necessities of life, provide defendant's release on bond, and pay a reasonable fee to the person's retained counsel, but are insufficient to pay for the necessary services.

§ 310.10.20 Retained Counsel and Fee Arrangements

(a) In responding to requests for services under 18 U.S.C. § 3006A(e) by a person represented by retained counsel, the court should inquire into the fee arrangement between the retained attorney and the client.

(b) If the court finds the fee arrangement unreasonable in relation to fees customarily paid to qualified practitioners in the community for services in criminal matters of similar duration and complexity, or that it was made with a gross disregard of the defendant's trial expenses, the court may order the retained attorney to pay out of such fees all or such part of the costs and expenses as the court may direct.

(c) The procedure outlined in the Guide, Vol. 7A, § 210.40.40 applies to such persons who are financially able to pay some, but unable to pay all, the costs of necessary services.

§ 310.10.30 Pro Se Representation

(a) Persons who are eligible for representation under the CJA, but who have elected to proceed pro se, may, upon request, be authorized to obtain investigative, expert, and other services in accordance with 18 U.S.C. § 3006A(e).

(b) The court should authorize subsection (e) services for pro se litigants and review and approve resulting claims in the same manner as is its practice with respect to requests made by CJA panel attorneys. However, in

matters for which appointment of counsel is discretionary under 18 U.S.C. § 3006A(a)(2), the court should make a threshold determination that the case is one in which the interests of justice would have required the furnishing of representation.

(c) Although a federal defender organization may be requested to provide administrative assistance to pro se litigants who wish to arrange for subsection (e) services, the investigative, paralegal or other services or resources of the organization should ordinarily be employed only when the organization is appointed as counsel of record, responsible for the conduct of the litigation.

§ 310.20 Limitations

§ 310.20.05 Engaging Relatives for Compensable Services

(a) Prior to engaging any relative (as the term is defined in 5 U.S.C. § 3110) to perform CJA compensable services, other than as associate counsel in the same law firm (**see:** Guide, Vol. 7A, § 230.53.10), counsel should first provide notification of the relationship and potential services to the presiding judicial authority.

(b) The court may, in the interest of justice, and upon finding that timely procurement of necessary services could not await prior notification, approve payment for such services up to the dollar threshold for obtaining services without prior authorization under 18 U.S.C. § 3006A(e)(2) and the CJA Guidelines (Guide, Vol. 7A, § 310.20.30).

§ 310.20.10 With Prior Authorization

(a) With prior authorization, compensation for investigative, expert, and other services is limited to the amounts in the following table for CJA-compensable work performed on or after the effective date. For guidelines applicable to capital cases, **see:** Guide, Vol. 7A, § 660.10.40 and § 660.20.

§ 310.20.10(a) Waivable Case Compensation Maximums for Investigative, Expert, and Other Services

If services were performed between...	The compensation maximum is ...	Authority
01/01/16 to present	$2,500	Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, enacted on Dec. 18, 2015.

§ 310.20.10(a) Waivable Case Compensation Maximums for Investigative, Expert, and Other Services		
If services were performed between...	**The compensation maximum is ...**	**Authority**
05/27/10 to 12/31/15	$2,400	Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111-174, enacted on May 27, 2010.
12/8/04 to 5/26/10	$1,600	Omnibus Appropriations Act, Fiscal Year 2005, Pub. L. No. 108-447, H.R. 4818, enacted December 8, 2004.
11/14/86 to 12/7/04	$1,000	Pub. L. No. 99-651, 1986 HR 3004, enacted November 14, 1986.

(b) The waivable case compensation maximum amounts apply per organization or individual, exclusive of reimbursement for expenses reasonably incurred, and per individual authorization to perform said service, except with regard to capital cases. **See:** Guide, Vol. 7A, § 660.20.

(c) A separate authorization should be obtained for each type of service for each person served, and for each defendant served, and for each case.

(d) While the service provider may be compensated separately for each person served, care should be taken to ensure that duplicate charges are not being made for the same services.

(e) If, under 18 U.S.C. § 3006A(e), such services are rendered by members of an organization such as a corporation, unincorporated association, or partnership (other than those created under 18 U.S.C. § 3006A(g)), in their capacities as members of that organization, compensation is deemed to have been earned by the organization and is paid to it only once, per CJA client served, in an amount not to exceed the statutory maximum, exclusive of reimbursement for expenses reasonably incurred.

§ 310.20.20 Waiving the Case Compensation Maximums

(a) Payment in excess of the case compensation limit for services authorized prior to the performance thereof may be made when certified by the court or U.S. magistrate judge and approved by the chief judge of the circuit (or an active or senior circuit judge to whom excess compensation approval authority has been delegated) as being necessary to provide fair compensation for services of an unusual character or duration.

(b) If it can be anticipated that the compensation will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or the active or senior circuit judge to whom excess compensation approval authority has been delegated). **See:** Appx. 3A (Sample Request for Advance Authorization for Investigative, Expert, or Other Services).

§ 310.20.30 Without Prior Authorization

(a) 18 U.S.C. § 3006A(e)(2)(A) authorizes the obtaining of investigative, expert, and other services, without prior authorization but subject to subsequent review, providing the cost of the services obtained does not exceed the amounts listed in the following table, plus expenses reasonably incurred. For information regarding obtaining investigative, expert, and other services in capital cases, **see:** Guide, Vol. 7A, § 660.

§ 310.20.30(a) Limitations on Services Without Prior Authorization

If services were performed between...	The compensation maximum is ...	Authority
05/27/10 to present	$800	Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111-174, enacted on May 27, 2010.
12/8/04 to 5/26/10	$500	Omnibus Appropriations Act, Fiscal Year 2005, Pub. L. No. 108-447, H.R. 4818, enacted December 8, 2004.
11/14/86 to 12/7/04	$300	Pub. L. No. 99-651, 186 H.R. 3004, enacted November 14, 1986.

(b) The limitation noted above in § 310.20.30(a) may be waived, however, if the presiding judge or U.S. magistrate judge (if the services were rendered in a case disposed of entirely before the U.S. magistrate judge), in the interest of justice, finds that timely procurement of necessary services could not await prior authorization. **See:** 18 U.S.C. § 3006A(e)(2)(B).

§ 310.20.40 Periodic Increases to the Waivable Case Compensation Maximums

The Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111-174, enacted on May 27, 2010, amended the CJA to increase the waivable case compensation amounts listed in § 310.20.10 and § 310.20.30 simultaneously with any subsequent, cumulative adjustments under 5 U.S.C. § 5303 in the rates of pay under the General Schedule (currently calculated based on the determination of the annual Employment Cost Index adjustment), rounded to the nearest hundred dollars. The

Administrative Office will provide notice when new threshold amounts are effective under this provision.

§ 310.30 *Ex Parte* Applications

Ex parte applications for services other than counsel under 18 U.S.C. § 3006A(e) must be heard *in camera*, and must not be revealed without the consent of the defendant. The application must be placed under seal until the final disposition of the case in the trial court, subject to further order of the court. Maintaining the secrecy of the application prevents the possibility that an open hearing may cause defendants to reveal their defense. Appointed counsel may not be required to submit evidence of a prior attempt to enter into a stipulation with the U.S. attorney as a prerequisite to obtaining services under 18 U.S.C. § 3006A(e). The court may encourage counsel to enter into stipulations, in the interest of expedition and economy, without, however, disclosing the contents or otherwise compromising the secret nature of the *ex parte* application.

§ 310.40 Claims for Services Other than Counsel

All claims for services other than counsel, under 18 U.S.C. § 3006A(e), should include the following:

(a) a statement as to the type of, dates of, and time expended for, the services provided;

(b) an explanation of the fee arrangement (e.g., hourly rate, *per diem* rate, etc.);

(c) an itemized statement of all expenses for which reimbursement is claimed; and

(d) supporting documentation, where practicable, for all expenses of lodgings and subsistence, and for any expenses in excess of $50.

§ 310.50 Forms for the Authorization and Payment for Services Other than Counsel

Forms for the authorization and payment for services other than counsel, together with instructions for the execution and distribution thereof, can be found on the judiciary's public website.

§ 310.60 Interim Payments

§ 310.60.10 Non-Death Penalty Cases

(a) Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to an

individual whose services are obtained under 18 U.S.C. § 3006A(e). For instructions on the procedures for effecting interim payments to persons other than counsel, as well as a sample memorandum order on this subject which provides for two alternative payment methods, **see:** Appx. 3B (Procedures for Interim Payments to Service Providers in Non-Death Penalty Cases).

(b) The payment options provided in Appx. 3B are designed to strike a balance between the interest in relieving subsection (e) service providers of financial hardships in extended and complex cases, and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess compensation. Other interim payment arrangements which effectuate this balance may be devised in consultation with the Administrative Office of the U.S. Courts' (AO) Defender Services Office.

§ 310.60.20 Death Penalty Cases

Presiding judicial officers are urged to permit interim payment in death penalty cases. Because the CJA compensation maximums for investigative, expert, and other services set out in § 310.20.10(a) do not apply in capital cases, different procedures and memorandum orders must be used in those cases. **See:** Guide, Vol. 7A, § 660.20. These procedures and sample memorandum orders are also set forth in Appx. 3C (Procedures for Interim Payments to Service Providers in Capital Proceedings).

§ 310.65 Proration of Claims

§ 310.65.10 In General

(a) If services were provided for more than one CJA representation, the time spent in common, including travel time, must be represented on the voucher forms by:

- prorating the service time among the representations on separate vouchers; or
- billing the entire service time on a voucher pertaining to one of the representations

The supporting materials to the vouchers must explain the method of billing and, when applicable, cross-reference the other CJA representations (**see:** § 310.65.20).

(b) When a service provider incurs travel or other expenses applicable to more than one CJA representation, the entire amount of the expenses must be billed on one voucher.

Time or expenses "spent in common" includes work performed simultaneously or within the same unit of time, or expenses incurred, for more than one representation (e.g., travel for more than one client). Double billing of time or expenses is prohibited (e.g., billing the same travel time or expenses applicable to more than one representation on more than one voucher).

(c) A "CJA representation" is one in which the attorney is:

- a federal public or community defender providing representation under the CJA or related statutes, or
- a CJA panel attorney or other attorney or entity authorized to obtain services for a particular representation under the CJA or related statutes.

Reference to a "voucher" in this section includes invoices submitted to a federal public or community defender organization for work performed for that entity.

For information regarding the overlap of billing time periods in the interpreter context specifically, **see:** § 320.15.30.

§ 310.65.20 Cross-Referencing Vouchers

(a) Whenever a service provider submits a voucher, as provided by this section, that includes time spent in common, if the time is prorated then each CJA representation must be cross-referenced on the supporting documentation to each voucher. If the time is billed to one representation, the other representations must be cross-referenced on the supporting documentation to that voucher. However, to ensure that an appointed attorney does not receive inappropriate information as to another attorney's use of the service provider, the CJA representations that are cross-referenced should not be identified by name and case number if the work was performed for an attorney other than the one who will be certifying the voucher, although the number of other representations should be listed.

(b) After the attorney certifies the service provider's voucher, the service provider, upon the request of the court's designated CJA voucher review personnel, must provide the name, case number, and any other identifying information for such representations.

§ 310.65.30 Prorating Time Limitation

Proration of time among CJA representations must not result in a service provider billing a larger amount than would have been billed if all the time was assigned to one voucher.

§ 310.65.40 Application of the Case Compensation Maximum

Where compensation is claimed on a voucher for time spent in common on more than one CJA representation, the compensation will be applied to the pre-authorized and case compensation maximum amounts for the representation on that voucher.

§ 310.65.50 Time Spent in Common with Non-CJA Representations

(a) If the service provider is billing under the CJA for time or expenses, including travel, that were spent in common for a purpose other than a CJA representation, the service provider must report such information so that the court can determine whether, in fairness to the provider, the time or expenses should be apportioned and the provider compensated for the time or expenses reasonably attributable to the CJA.

Note: There is no apportionment between a contract court interpreter's work for a court unit and the CJA, **see:** § 320.15.30.

(b) The service provider should explain the rationale for billing under the CJA, and the court may conduct a further inquiry.

(c) In determining whether time or expenses spent in common for a purpose other than a CJA representation should be apportioned, the court should consider:

- the time or expenses reasonably expended in the performance of the service provider's duties under the CJA in relation to the time and expenses expended furthering other purposes;
- the significance to the representation of the duties performed or expenses incurred; and
- the likelihood that the service provider would have performed the services or incurred the expenses under the CJA in the absence of the other purposes.

§ 310.70 Review of Vouchers

Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.

§ 320 Authorization of Investigative, Expert, and Other Services

§ 320.10 Investigators

When necessary to an adequate representation as described above, the court may authorize, under 18 U.S.C. § 3006A(e), the services of an investigator.

§ 320.15 Interpreters

§ 320.15.10 Terms of Compensation

(a) Interpreting services provided under the CJA may be compensated:

- according to the terms and conditions set forth in the court interpreter services contract;
- on an hourly rate basis; or
- on another appropriate basis.

(b) Interpreters should be compensated consistently throughout the district or, if applicable, in individual court locations.

§ 320.15.20 Reviewing the Rate of Compensation

(a) In determining the reasonableness of rates paid to interpreters under the CJA, courts should utilize either:

(1) the half- and full-day rates established by the Director for contract court interpreters performing in-court services; or

(2) an hourly rate. The half- and full-day rates (prorated hourly) or the hourly overtime rate should be used as a guidepost for the reasonableness of the hourly rate.

(b) Justification should be submitted to the presiding judicial officer if compensation is sought for an interpreter by a method different from or in an amount in excess of presumptive or maximum rates adopted by a court.

(c) Appointed counsel may negotiate rates with the interpreter consistent with the guidance contained in this section.

§ 320.15.30 Overlap of Billing Time Periods

(a) Contract court interpreters must not bill or receive funds from any other federal court unit, federal public defender, community defender organization, or other attorneys or entities obtaining interpreting services under the CJA or related statutes for any services rendered during the same half- or full-day for which the contract court interpreter is being compensated pursuant to the court interpreter services contract. **See:** Guide, Vol. 5, § 220.30.20. Thus, an interpreter retained by the court under the court contract for a one-half or full-day period may not bill the CJA for any work performed during that same half-day or full-day period even if the court no longer requires the interpreter's services.

(b) An interpreter billing on a half- or full-day rate basis, hourly basis, or other unit of time under the CJA must not charge any other federal court unit, federal public defender, community defender, CJA panel attorney, or other person or entity otherwise authorized by the court to obtain the services of an interpreter under the CJA or related statutes for any services rendered within the same time period.

(c) When an interpreter is invoicing under the CJA on a half-day rate basis and works one half-day for a court unit and another half-day for a CJA representation, or is invoicing two separate half-days for different CJA representations, then the first half-day should be billed at the half-day rate and the second at the difference between the half-day and full-day rates, unless otherwise negotiated.

(d) It is permissible to prorate compensation among more than one CJA representation (but expenses must be invoiced to one CJA representation) or to apportion compensation, including expenses, between a CJA representation and a non-CJA purpose (not including a federal court unit). **See:** § 310.65.

§ 320.20 Psychiatrists, Psychologists

§ 320.20.10 Type of Examinations

Chapter 313 of Title 18, as amended by the Insanity Defense Reform Act of 1984 (Chapter IV of the Comprehensive Crime Control Act of 1984), provides for **court-directed** psychiatric or psychological examination of individuals in connection with the various proceedings to determine mental condition authorized under that chapter. The functions of these separate proceedings are to determine:

(a) the mental competency of a defendant to stand trial (18 U.S.C. § 4241);

(b) insanity at the time of the offense (18 U.S.C. § 4242);

(c) the mental condition of an acquitted person hospitalized following a finding of not guilty only by reason of insanity (18 U.S.C. § 4243);

(d) the present mental condition of a convicted defendant (18 U.S.C. § 4244);

(e) the present mental condition of an imprisoned person who objects to transfer to a treatment facility (18 U.S.C. § 4245); and

(f) the present mental condition of a hospitalized person due for release (18 U.S.C. § 4246).

In addition, mental condition examinations may be conducted for purposes other than those specified in 18 U.S.C. chapter 313, e.g., to aid the defendant in preparing a defense.

§ 320.20.20 Source of Payment

(a) CJA funds are used to pay for psychiatric and related services obtained in accordance with 18 U.S.C. § 3006A(e) upon a determination that the services are "necessary for an adequate defense." These are "defense" services, where the defendant selects the expert and controls the disclosure of the expert's report.

(b) It is important to note that psychiatrists and related experts may be used in many circumstances in which payment is made from a source **other** than the CJA appropriation. In these situations the court or the government selects the expert and persons other than the defendant also have access to the expert's report. The Department of Justice (DOJ) generally pays for these "non-defense" services. The chart in § 320.20.60 summarizes payment responsibility for the various circumstances in which psychiatric and related services are utilized.

§ 320.20.30 Limitation of Amount

The limitations contained in § 310.20 apply to compensation claims submitted by "defense" psychiatrists and related experts, to be paid out of the CJA appropriation. For information regarding "dual purpose" examinations, **see:** § 320.20.50.

§ 320.20.40 Procedures for Payment

(a) CJA Appropriation – Defense Services

(1) Form CJA 21 (Authorization and Voucher for Expert and Other Services) should be used for all payments for "defense" services in non-capital cases.

(2) Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services) should be used for all payments for "defense" services in death penalty cases.

(3) The form CJA 21 or CJA 31 should clearly describe the purpose of the expert's service.

(4) If separate vouchers are submitted for examination and testimony, they should be cross-referenced by voucher number.

(b) DOJ

Compensation claims for psychiatric and related services to be paid for by the DOJ should be referred to the U.S. attorney or assistant U.S. attorney.

§ 320.20.50 Dual Purpose Examinations

(a) On occasion, a psychiatrist or related expert will be asked to examine an individual for both a "defense" purpose and a "non-defense" purpose. In these cases, the defense has waived the confidentiality of the "defense" portion of the examination. In such dual purpose examinations, for the convenience of the expert providing the service, the entire compensation claim may be submitted on Form CJA 21, or, in a death penalty proceeding, Form CJA 31. The CJA will pay the expert the total amount approved and obtain reimbursement to the CJA appropriation from the DOJ for one-half of the cost. As a result of the AO's need to seek reimbursement from the DOJ, claims submitted for dual purpose examinations must be accompanied by separate court orders that indicate:

- who requested the examination;
- the specific purpose(s) of the examination;
- to whom the examination is directed; and
- to whom copies of the report are to be given.

(b) The limitation in § 320.20.30 applies to 50 percent of the claim for a dual purpose examination in which a portion of the examination is for "defense" purposes.

(c) In some "dual purpose" examinations both portions of the examination are chargeable to the same payment source. For instance, if the examination included evaluation of competency to stand trial under 18 U.S.C. § 4241 and evaluation of sanity at the time of the offense under 18 U.S.C. § 4242, the DOJ would be responsible for both portions of the examination and the entire compensation claim should be submitted to the U.S. attorney or assistant U.S. attorney.

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	**CJA**	**DOJ**
(a) To determine mental competency to stand trial, under 18 U.S.C. § 4241		

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	**CJA**	**DOJ**
(1) Examination costs		Yes, regardless of which party requests, including examination on court's own motion
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
(3) Testimony costs for examiner if called at trial	If witness appears on behalf of defense	If witness appears on behalf of government
(b) To determine existence of insanity at time of offense, under 18 U.S.C. § 4242		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at trial		Yes, regardless of which party calls
(c) To determine existence of insanity at time of offense, under CJA subsection (e)		
(1) Examination costs	Yes	
(2) Testimony costs for examiner if called at trial	Yes	
(d) To determine mental condition of hospitalized person found not guilty only by reason of insanity, under 18 U.S.C. § 4243		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
(e) To determine mental condition of convicted person suffering from mental disease or defect, under 18 U.S.C. § 4244		
(1) Examination costs		Yes
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls
(f) To determine mental condition of imprisoned person, under 18 U.S.C. § 4245		

§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services		
Type of Service	**CJA**	**DOJ**
(1) Examination costs		Yes, including costs of additional examiner selected by imprisoned person in accordance with 18 U.S.C. § 4247(b)
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by imprisoned person in accordance with 18 U.S.C. § 4247(b)
(g) To determine mental condition of hospitalized person due for release, under 18 U.S.C. § 4246		
(1) Examination costs		Yes, including costs of additional examiner selected by hospitalized person in accordance with 18 U.S.C. § 4247(b)
(2) Testimony costs for examiner if called at hearing		Yes, regardless of which party calls, including additional examiner selected by hospitalized person in accordance with 18 U.S.C. § 4247(b)
(h) Examination of a person in custody as a material witness		Yes, under all circumstances
(i) Examination and testimony costs for expert witnesses not appointed under 18 U.S.C. §§ 4241, 4242, 4243, 4244, 4245, 4246	If requested by the defense	If requested by the government, or if appointed as an independent expert on court's own motion under Fed. R. Evid. 706

§ 320.30 Transcripts

§ 320.30.10 Authorization and Payment

(a) For panel attorneys, the preferred method for payment of transcripts authorized by the court is for the court reporter or reporting service to claim compensation directly on a Form CJA 24 (Authorization and

Voucher for Payment of Transcript). Alternatively, the panel attorney may pay for the court-authorized transcript and obtain reimbursement as an "out-of-pocket expense," using Form CJA 24. **See:** Guide, Vol. 7A, § 230.63.20. Regardless of which method is used, the limitations set forth in § 310.20 and the $7,500 limitation set forth in Guide, Vol. 7A, Ch. 6 are inapplicable with regard to the cost of transcripts.

(b) In a direct appeal in a case in which counsel is assigned under the CJA, neither the CJA nor 28 U.S.C. § 753(f) requires the signing of a pauper's oath or certification by the court that the appeal is not frivolous in order to obtain a transcript.

(c) For procedures regarding federal defender organization transcript payments, **see:** Guide, Vol. 7A, § 430.10.

§ 320.30.20 Accelerated Transcript Costs

Routine apportionment of **accelerated** transcript costs among parties in CJA cases is prohibited. The following resolution was adopted by the Judicial Conference in March 1980, and modified in September 1986:

> That the furnishing of accelerated transcript services in criminal proceedings should be discouraged; however, recognizing that there are some circumstances in which such transcript services are necessary and required by either the prosecution or the defense, or both, accelerated transcript services may be provided.
>
> That in those cases where accelerated transcript services are provided, the party from whom the request or order emanates shall pay for the original, and if the requesting or ordering party is other than defense counsel appointed under the Criminal Justice Act, the CJA counsel shall be entitled to a copy at the copy rate.
>
> That the present practice, in some districts, of routinely apportioning the total cost of accelerated transcript services equally among the parties should be abandoned.

See: JCUS-SEP 86, p. 90.

§ 320.30.30 Commercial Duplication in Multi-Defendant Cases

(a) In multi-defendant cases involving CJA defendants, no more than one transcript should be purchased from the court reporter on behalf of CJA defendants. One of the appointed counsel or the clerk of court should arrange for the duplication, at commercially competitive rates, of enough copies of the transcript for each of the CJA defendants for whom a transcript has been approved. The cost of such duplication will be

charged to the CJA appropriation. This policy would not preclude the furnishing of duplication services by the court reporter at the commercially competitive rate.

(b) In individual cases involving requests for **accelerated** transcripts, the court may grant an exception to the policy set forth in (a) of this subsection based upon a finding that application of the policy will unreasonably impede the delivery of accelerated transcripts to persons proceeding under the CJA. Such finding should be reflected on the transcript voucher.

§ 320.30.40 Standards for Transcripts of Other than Federal Court Proceedings

In negotiating agreements and contracts for providing transcripts of other than federal court proceedings, including, for example, transcription or translation of wiretap recordings, it is recommended that the standards for the size and format of a page be the same as those used for transcripts of federal court proceedings.

§ 320.40 Fact Witnesses and Depositions

§ 320.40.10 Fees and Expenses of Fact Witnesses

(a) Generally speaking, fees and expenses of fact witnesses for defendants proceeding under the CJA are paid by the DOJ. **See:** Fed. R. Crim. P., Rule 17(b); 28 U.S.C. § 1825.

(b) Section 1825 of 28 U.S.C. specifically provides for the payment of witness fees by the DOJ in all federal criminal proceedings, and in proceedings for a writ of habeas corpus or in proceedings under section 2255 of that title upon certification of a federal public defender or assistant federal public defender, or clerk of court upon the affidavit of other counsel appointed under the CJA.

(c) If advance witness travel funds are required, the court should issue the subpoena order, so stating, to authorize the travel advance by the marshal. These expenses will not be paid from CJA funds.

§ 320.40.20 Depositions

Depositions are covered by Fed. R. Crim. P., Rule 15, rather than 18 U.S.C. § 3503 (repealed).

(a) Expenses incurred in the taking of fact witness depositions (notarial fees, interpreters, transcripts, etc.) are paid by the DOJ, regardless of which party requested the deposition.

(b) The costs of attendance of fact witnesses for either party at the deposition are paid by the DOJ under Rule 17 (b).

(c) The costs of attendance of expert witnesses for the defense at the deposition are paid under the CJA.

(d) Reasonable travel and subsistence expenses incident to attendance of counsel and the defendant at the deposition are paid by the DOJ (1) if the government is the requesting party, or (2) if the defendant is the requesting party and is unable to bear the deposition expenses, based on resources that would be used to determine financial eligibility for appointed counsel. However, it should be noted that the presence of the defendant is not essential to defense depositions since the confrontation clause only requires the defendant's presence if the depositions are intended to be used against the defendant.

§ 320.40.30 Travel Expenses, Subsistence, and Fees of Counsel in Habeas Corpus Cases

In habeas corpus and 28 U.S.C. § 2255 cases, the court may order the state or the government to pay the "expenses of travel and subsistence and fees of counsel" to attend the taking of a deposition at the request of the state or government. **See:** Rules Governing §§ 2254 and 2255 Cases in U.S. District Courts, Rule 6.

§ 320.50 Guardian Ad Litem

§ 320.50.10 Proceedings Involving Juveniles

A guardian ad litem appointed under 18 U.S.C. § 5034 is not eligible for compensation under the CJA or any other authority. Any person who is appointed as both counsel and guardian ad litem in one case under § 5034 should prorate time spent fulfilling the duties of these two offices. Only time spent as counsel on a case is compensable and should be reflected on the CJA claim.

§ 320.50.20 Prisoner Transfer Proceedings

A guardian ad litem appointed in proceedings to verify consent of a minor or incompetent prisoner to transfer from the United States to a foreign country is eligible for compensation under the CJA under 18 U.S.C. § 4109(b). **See:** Guide, Vol. 7A , § 230.23.20(d) on compensation limits and Guide, Vol. 7B (International Prisoner Transfer Proceedings).

§ 320.60 Commercial Computer-Assisted Legal Research Services

(a) The court may authorize counsel to obtain computer-assisted legal research services, where the research is performed by employees of a commercial legal research firm or organization rather than by appointed counsel, provided that the total amount charged for computer-assisted

legal research services is reasonable. Requests by counsel for authority to obtain such computer-assisted legal research services should include: a brief explanation of the need for the research services; and an estimate of the charges.

(b) Claims for compensation for such services should be submitted on Form CJA 21 (Authorization and Voucher for Expert and Other Services), or, in a death penalty proceeding, Form CJA 31 (Death Penalty Proceeding: Ex Parte Request for Authorization and Voucher for Expert and Other Services). For information concerning reimbursement for the cost of direct use, by appointed counsel, of computer-assisted legal research services, **see:** Guide, Vol. 7A, § 230.63.30.

§ 320.70 Other Services and Computer Hardware and Software

§ 320.70.10 Other Services

In addition to investigators, psychiatrists, psychologists, and reporters, services other than counsel may include, but are not necessarily limited to:

- interpreters;
- computer systems and automation litigation support personnel and experts;
- paralegals and legal assistants, including law students;
- neurologists and other medical experts; and
- laboratory experts in such areas as ballistics, fingerprinting, and handwriting.

§ 320.70.20 Notarial and Stenographic Expenses

The use of CJA funds is authorized to pay expenses of eligible defendants for stenographic and notarial expenses required to perpetuate and authenticate testimony of expert witnesses for such defendants.

§ 320.70.30 Extraordinary Office Expenses

(a) CJA attorneys are expected to use their own office resources, including secretarial help, for work on CJA cases. **See:** Guide, Vol. 7A, § 230.66.10.

(b) However, unusual or extraordinary expenses of these types may be considered "other services necessary for an adequate defense" and may be paid from CJA funds under 18 U.S.C. § 3006A(e).

(c) In determining whether the expense is unusual or extraordinary, consideration should be given to whether the circumstances from which the need arose would normally result in an additional charge to a fee-paying client over and above that charged for overhead expenses. **See:** Decision of the Comptroller General, B-139703, Feb. 28, 1974, 53 Comp. Gen. 638.

§ 320.70.40 Computer Hardware, Software, or Litigation Support Services

(a) Overview

(1) Providing an adequate defense may require CJA panel attorneys to utilize computer hardware, software, or litigation support services not typically available in a law office. In such cases, following the standards in § 320.70.30, counsel may apply to the court for authorization of CJA funds for the acquisition of such property or services.

(2) Before seeking court approval for any computer hardware or software with a cost exceeding the limitations in § 310.20.30(a), or for the utilization of computer systems, litigation support products, services, personnel, or experts with an expected combined cost exceeding $10,000, appointed counsel must consult the National Litigation Support Team in the Defender Services Office, Administrative Office of the United States Courts (phone number: 510-637-3500) for guidance. Counsel must inform the court in writing of the Defender Services Office's advice and recommendation regarding counsel's proposed expenditure. **See also:** Appx. 3D (Sample Order Authorizing the Acquisition of Computer [Hardware and/or Software] under the CJA).

(b) Acquisition of Computer Hardware and/or Software

(1) The request for acquisition of the computer hardware and/or software, or for the procurement of litigation support services should be submitted on a Form CJA 21 (Authorization and Voucher for Expert and Other Services), or, in a death penalty proceeding, Form CJA 31 (Death Penalty Proceedings: Ex Parte Request for Authorization and Voucher for Expert and Other Services).

(2) Property purchased with CJA funds is the property of the United States and remains so after the case is completed.

(3) When property is purchased, counsel must provide the Defender Services Office with a copy of the following documents to ensure the property is properly accounted for: a copy of the court's order

approving the request; a copy of the completed Form CJA 21 (or Form CJA 31); the purchase order from the vendor and any receiving documents, such as a copy of the packing slip or the company's invoice.

(4) Because computer hardware or storage devices being used by counsel may contain confidential or privileged information, all case-related materials must be removed before the hardware is returned as described below. Unless otherwise required by the court or by law, counsel should retain copies, electronic or otherwise, of the case-related materials for the client's file.

Note: When large amounts of electronic information are placed on drives or storage devices purchased with CJA funds, counsel may apply to the court to retain the drive or an alternative drive as the most cost-effective and efficient method for preserving the data.

(5) Upon the completion of the case, counsel must contact the National Litigation Support Team in the Office of Defender Services at (510) 637-3500 for instructions on returning any software, and directions for deleting case-related material from any hardware and returning it to the National Litigation Support Team for the permanent removal of case-related material. If appointed counsel has acquired software, then counsel should provide all accounting information for the software, including any serial numbers, activation codes, or other identifying information, and remove the software from his or her machines. If appointed counsel acquired computer hardware, it must be returned in good condition.

§ 320.70.50 Paralegals, Legal Assistants, and Other Non-Secretarial Support

(a) For services of paralegals, legal assistants, and other non-secretarial professional support personnel employed by appointed counsel, the court will determine a reasonable hourly compensation rate that may not exceed the lesser of the rate paid to counsel under the CJA or the rate typically charged by counsel to a fee-paying client for such services.

(b) Authorizing compensation at such rates should result in greater efficiency and lower costs for the CJA program than would occur if counsel performed and charged for these services.

§ 320.80 Reimbursement of Expenses

§ 320.80.10 Determination of Reasonableness

In determining the reasonableness of expenses of persons furnishing investigative, expert, or other services, claimants and the court should be guided by the provisions of

these Guidelines regarding reimbursement of expenses of counsel. **See:** Guide, Vol. 7A, § 230.63 and § 230.66. Gross receipts or other taxes levied on fees for expert services rendered under the CJA are not reimbursable expenses.

§ 320.80.20 Government Travel Rates

Government travel rates at substantial reductions from ordinary commercial rates may be available from common carriers for travel authorized by the court in connection with representation under the CJA. To obtain such rates, investigators and other service providers must contact the clerk of court and obtain prior approval from the presiding judicial officer.

§ 320.90 Record Keeping

(a) Investigative, expert, and other service providers must maintain contemporaneous time and attendance records for all work billed by them, as well as expense records.

(b) Such records are subject to audit and must be retained for three years after approval of the appointed counsel's or the service provider's final voucher, whichever is later, for a representation.

CRIMINAL E-DISCOVERY

A Pocket Guide for Judges

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Table of Contents

I. Overview

The rapid growth of digital technology and its spread into every facet of life are producing increasingly complex discovery issues in federal criminal cases. There are several advantages to electronically stored information (ESI, or e-discovery), including speed, efficiency, and quality of information. To ensure these benefits are realized, judges and lawyers working on federal criminal cases need guidance on how best to address e-discovery issues.

Judges can play a vital oversight role to ensure that e-discovery moves smoothly, trial deadlines are met, and the parties and courts are able to review and identify critical evidence. This pocket guide was developed to help judges manage complex e-discovery in criminal cases. A note of appreciation goes to Judge Xavier Rodriguez (W.D. Tex.), and Magistrate Judges Laurel Beeler (N.D. Cal.) and Jonathan W. Feldman (W.D.N.Y.), for their suggestions and advice, as well as to our fellow members of the Joint Electronic Technology Working Group, who improved this publication.

A. Lack of Criminal e-Discovery Guidance

Although the Federal Rules of Criminal Procedure offer guidance on a number of topics, they offer little help to judges and litigants concerning how to conduct e-discovery. As the Sixth Circuit noted in *United States v. Warshak*, Rule 16 of the Federal Rules of Criminal Procedure is "entirely silent on the issue of the form that discovery must take; it contains no indication that documents must be organized or indexed."[1] To be sure, Rule 16 provides a court the discretion to fashion discovery orders to serve the particular needs of a case, but it does not "specify the manner in which production is done."[2]

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1. 631 F.3d 266, 296 (6th Cir. 2010). In that case, the defendant argued that the "district court must order the government to produce electronic discovery in a particular fashion." In rejecting this argument, the court noted that there is "a dearth of precedent suggesting that the district court was wrong" in allowing the government to produce discovery in an electronic format different from what the defendant sought. *Id.*

2. *See* Fed. Crim. Rules Handbook § IV (Arraignment and Preparation for Trial) (Dec. 2012).

B. Civil e-Discovery Rules and Practices Do Not Lend Themselves to Criminal e-Discovery

The rules governing civil and criminal discovery are fundamentally dissimilar due to the different public policies underlying criminal and civil litigation, constitutional requirements, and special ethical obligations of prosecutors and defense counsel. Consequently, courts have generally refrained from applying civil e-discovery rules to criminal discovery.[3]

An essential difference between civil and criminal discovery is breadth:

> A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified. Fed. Rules Crim. Proc. 16(a)(2), 26.2. In a civil case, by contrast, a party is entitled as a general matter to discovery of any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence." Fed. Rule Civ. Proc. 26(b)(1).[4]

Federal Rule of Criminal Procedure 16 does not mandate any mechanisms or procedures for addressing e-discovery equivalent to those found in Federal Rules of Civil Procedure 26 and 34. Rule 16 includes "data" as a proper object of criminal discovery, but the rule does not address the mechanics of e-discovery.

Furthermore, the nature of the parties and proceedings differ in criminal cases. Unlike civil cases, where discovery is an adversarial process in which the government's discovery obligations are similar to any litigant's, the government has unique nonadversarial discovery obligations in criminal cases. As a representative of the sovereign, prosecutors are obliged to prosecute impartially and ensure that justice

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3. The Sixth Circuit rejected the defendant's argument that the electronic discovery format standards of Federal Rule of Civil Procedure 34(b)(2)(E)(i) should apply to criminal cases. *Warshak*, 631 F.3d at 296. Nonetheless, two magistrate judges have turned to civil e-discovery rules for guidance because there is a void in the criminal rules regarding this issue. *See* United States v. O'Keefe, 537 F. Supp. 2d 14, 18–19 (D.D.C. 2008); United States v. Briggs, No. 10CR184S, 2011 WL 4017886, at *8 (W.D.N.Y. Sept. 8, 2011).

4. Degen v. United States, 517 U.S. 820, 825–26 (1996).

is done.[5] For example, the Due Process Clause imposes a "fundamental fairness" requirement on the government's discovery, as expressed in the government's *Brady* and *Giglio* obligations.[6] Additionally, speedy trial rights may be implicated when defendants have little time to come to grips with vast e-discovery.[7] Similarly, defendants are entitled to effective assistance of counsel at trial and during plea negotiations.[8] Defense counsel's effectiveness may depend on whether he or she has reviewed and understands the e-discovery in time to enter into informed plea negotiations.[9] When the government provides e-discovery in a reasonably organized fashion, it can help the defense efficiently review discovery and can lead to more productive plea discussions, less litigation, and speedier resolution of a case.

Criminal investigations and third-party subpoenas by both the prosecution and defense often bring vast quantities of ESI to criminal e-discovery. Complex ESI cases usually require litigation support resources not typically found in criminal defense practices. Indigent defendants need adequate funding to obtain those resources.

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5. ABA Model Rules of Professional Responsibility 3.8, comt. 1; *see also* Berger v. United States, 295 U.S. 78 (1935).

6. *See also* United States v. Bagley, 473 U.S. 667, 675 (1985) (withholding *Brady* evidence violates due process). The prosecutor's *Brady* obligation is addressed in ABA Model Rule of Professional Conduct 3.8(d) (requiring prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

7. *See* U.S. Const. amend. VI; 18 U.S.C. § 3161 ("Speedy Trial Act").

8. Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

9. Although lawyers need not review every document in a voluminous e-discovery production before entering into a plea bargain, they should review a reasonable and targeted portion of discovery so as to provide reasonably effective advice regarding resolution. Thus, depending upon the nature and complexity of the e-discovery, to conduct plea negotiations the defense may need to have e-discovery in a reasonably useable format, and have engaged in thoughtful e-discovery review.

C. A Practitioner's Guide to Criminal e-Discovery

One attempt to provide comprehensive, national guidance is the ESI Protocol (see Appendices A & B), which was produced by a joint working group composed of the Department of Justice and representatives of the criminal defense bar.[10] The ESI Protocol is one approach for judges to use to encourage interparty cooperation and reduce the need for judicial intervention. Indeed, some federal district courts have begun integrating the ESI Protocol into their courtroom practices.[11]

The ESI Protocol draws on many sources, including case law, local rules, and seasoned defense and prosecution practitioners' experience. Its goal is to provide courts and litigants with best practices consisting of general principles, recommendations, and concrete strategies for improving efficiency, minimizing expense, increasing security, and decreasing frustration and litigation. Importantly, the ESI Protocol does not enlarge or diminish any party's substantive legal discovery obligations imposed by applicable federal statutes, rules, or case law.[12]

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10. The Recommendations for Electronically Stored Information Discovery Production in Federal Criminal Cases (hereinafter "the ESI Protocol") was produced by the Joint Electronic Technology Working Group (JETWG), which comprises representatives of the Administrative Office of the U.S. Courts (AOUSC), Defender Services Office (DSO), the Department of Justice (DOJ), Federal Public and Community Defender Organizations (FPDOs and CDOs), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States Judiciary and other AOUSC offices. The Federal Judicial Center does not endorse any specific discovery approach, including the ESI Protocol.

11. *See, e.g.*, Best Practices for Electronic Discovery in Criminal Cases: Western District of Washington (Mar. 21, 2013), *available at* http://www.wawd.uscourts.gov/sites/wawd/files/32113BESTPRACTICESFORELECTRONIC.pdf; Northern District of California, Criminal Justice Act, Capital and Non-Capital Criminal Representation (2001), *available at* http://www.cand.uscourts.gov/pages/965 (linking to the ESI Protocol).

12. *See*, *e.g.*, Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); 18 U.S.C. § 3500 (the "Jencks Act"); *and* Federal Rules of Criminal Procedure 16 & 26.2.

The ESI Protocol will be familiar to most federal criminal practitioners. The Department of Justice trains its prosecutors to use the ESI Protocol in cases involving complex e-discovery. Most federal defenders and Criminal Justice Act (CJA) representatives receive similar training on the ESI Protocol.

II. Common Issues in Criminal e-Discovery

Both prosecutors and defense attorneys struggle with the same e-discovery issues: large volume; a variety of sources and formats; hidden information (metadata and embedded data); differing formats for production; software and hardware limitations; and finding efficient, cost-effective ways to review ESI. Some challenges are unique to criminal practice, such as incarcerated defendants' access to e-discovery, while others are the same as those arising in civil practice. For many prosecutors and defense counsel, a lack of experience with ESI presents a significant challenge; but it is the lack of resources—money, personnel, training—that often overshadows all other problems. And even when resources are available, considerable time is often required to arrange for and execute the processing necessary to make ESI readily available.

For CJA counsel, the challenges of ESI may be especially daunting. Often, they are solo practitioners who lack the resources for sophisticated software tools. Because they are usually appointed post-indictment, they need to get up to speed on matters that the government may have spent many months or years investigating and preparing—while at the same time getting up to speed on how to manage electronic discovery. Besides training and software tools, they often may need experienced litigation support assistance, which can be provided pursuant to 18 U.S.C. § 3006A.

The following are e-discovery issues that judges may need to understand or address.

A. Funding the Defendant's e-Discovery

There was a time when voluminous e-discovery cases were confined to white-collar prosecutions, and those defendants typically paid the costs

of their own defense. Today, even routine drug cases and bank robberies often involve extensive cell phone data or other ESI.[13] This has funding consequences for indigent defendants and the court.

When a case has complex e-discovery issues, the judge considering a CJA appointment may need to factor in the additional cost of reviewing, organizing, and working with e-discovery.[14] The Act is silent about when a defendant would be so destitute as to need appointed counsel, but the cost of working with complex e-discovery can itself exceed what many defendants can afford even if they are able to pay for counsel.[15]

Some CJA panels have formal tiers or informal lists of specialized lawyers for capital, financial, or immigration cases. Courts that take their CJA attorneys' skills into consideration can also consider creating

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13. Smartphone data provides an example of the magnitude of e-discovery. Many smartphones hold sixteen to sixty-four gigabytes of data, not including storage cards (which can double that amount), and have cloud access to much more data. They contain emails, call history and contact information, calendars, text messages, GPS data, photographs, videos, internet history, and social media information, all of which can result in thousands of potentially relevant items of discovery. Multiple-defendant cases could dramatically increase that amount. Add to that the corresponding laptops, tablets, desktops, and surveillance data also readily accessible, and the amount of e-discovery can quickly exceed document-based paper discovery in a white-collar or corporate prosecution from fifteen years ago.

14. The court can ask the government to give it early notice if the case involves voluminous e-discovery.

15. The Criminal Justice Act can authorize payment of e-discovery review costs when the extent of those costs would render a defendant unable to pay for e-discovery review regardless of whether a defendant can otherwise afford retained counsel. 18 U.S.C. § 3006A(e)(1) allows retained counsel to apply for services to be paid through the CJA system. *See* Guide to Judiciary Policies and Procedures, Vol. VII, § 310.10.20, *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-310-general#a310_10. If outside assistance is needed, the protocol for authorization and payment for investigative, expert, or other services in CJA-appointed cases is governed by Vol. VII, Chapter 3 of the Guide to Judiciary Policies and Procedures. *See* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter3.aspx. If counsel anticipates that the costs will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or the active or senior circuit judge who has been delegated authority to approve excess compensation). *See* Vol. VII, § 310.20.20 for further information and a sample order, *available at* http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-310-general#a310_20.

a list of those lawyers who are proficient in e-discovery.[16] Although attorneys who lack familiarity with ESI will face a learning curve, experience with cases involving large amounts of ESI over time will develop a set of CJA lawyers readily capable of handling these cases.

In multidefendant cases, the court may be able to minimize costs by calling for cooperative sharing among defendants. This has been done for years whenever there is voluminous paper discovery, and many of those principles can apply to electronic discovery. One of the defense attorneys (often the federal defender) may take the lead for meet-and-confer discussions with the government regarding e-discovery productions and for distributing and providing basic organization of ESI when the defendants enter an agreement concerning discovery. The court can encourage centralizing e-discovery management and can approve a litigation support specialist, a technologist, or a paralegal working under that lawyer's supervision.

It also may be beneficial to place the discovery into a cloud-based document-review platform,[17] so defendants, counsel, investigators, and experts can access it as needed from various locations. Depending on what software different CJA lawyers have, all codefendants may not be able to use or take advantage of the same format of ESI production.[18] But any decision to rely on cloud-computing or reviewing services should include consideration of whether that service provider has provided adequate security to protect confidential, privileged, or oth-

16. On the other hand, courts must decide whether to expect all panel members to be prepared to handle e-discovery on a large scale, given that every practitioner should develop a baseline comfort with e-discovery. In August 2012, the ABA modified its ethics rule on competency to include familiarity with technology that may be used in representation. Comment 8 to Model Rule 1.1 provides: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the *benefits and risks associated with relevant technology* . . . ." (emphasis added).

17. A document-review platform uses a database and tools to capture, organize, analyze, and review e-discovery. Whether stand-alone, networked, or in the cloud, these platforms may enable multiple individuals to securely manage and access a large amount of data.

18. By way of example—and not as an endorsement of either Apple computer systems or Microsoft Windows—one common challenge is that a number of CJA-panel attorneys use Apple operating system ("Mac") computers, but Apple systems work differently than the Windows computers that are standard with the DOJ and FDOs.

erwise sensitive e-discovery.[19] The Department of Justice and the defense bar expect to address criminal e-discovery security best practices in the near future, but in the interim, counsel should remain vigilant in protecting e-discovery.

Processing "raw" ESI into usable evidence that can be reviewed electronically is expensive and time-consuming.[20] As of 2015, in a relatively small case, processing five boxes (12,500 sheets) of paper business records costs approximately $4,800 and takes a trained DOJ litigation support professional employee three days. Similarly, processing twenty-five gigabytes of complex ESI costs approximately $3,200 and takes an employee two weeks.[21] Today, there is no software tool for producing all discovery in a single, easy-to-use package. Hopefully that will change as electronic discovery matures.

Fortunately, there are resources that can provide advice and guidance to judges about cost-effective means of managing e-discovery:

- The National Litigation Support Team (NLST), part of the Defender Services Office (DSO) of the Administrative Office of the U.S. Courts, is available to help attorneys for indigent defendants struggling with extensive e-discovery. The NLST writes recommendations for funding requests, advises courts and parties about economical and practical solutions to e-discovery issues, and provides direct assistance to lawyers.[22]

19. ESI protocol, Recommendation ¶ 10.

20. The term "processing" usually involves formatting ESI so that the native file can be placed into a review platform where it can be viewed, culled, organized, searched, and analyzed. For example, processing a native email container file (a collection of emails) involves extracting individual emails and their attachments, while keeping track of the relationship between the emails and attachments, and converting the files to formats that can be read through a review tool. For more information about processing raw ESI see *infra* section II.D.

21. The 2015 market rates for processing ESI range from $125 to $150 per gigabyte.

22. Before seeking court approval for any computer hardware or software with a cost exceeding $800, or for utilizing computer systems, litigation support products, services, or experts exceeding $10,000, appointed counsel must consult with the DSO for guidance. CJA counsel must then inform the court in writing of the DSO's advice and recommendation regarding proposed expenditures. Guide to Judiciary Policies and Procedures, vol. VII, § 320.70.40, *available at* http://www.uscourts.gov/

The court can ask for assistance from the NLST.[23]

- The DSO has three national coordinating discovery attorneys (CDAs) who are experts in e-discovery, have experience with CJA cases, and are knowledgeable about litigation technology. They work with CJA counsel and federal defenders in multidefendant cases to manage large volumes of e-discovery efficiently and cost-effectively to best fit the defendants' needs. The court can ask CJA counsel to request that the case be referred to a CDA through the National Litigation Support Team.[24]
- All circuits except the Fifth, Eleventh, and D.C. have case budgeting attorneys (CBAs) who work with judges and CJA panel attorneys to develop and review budgets for criminal "mega cases."[25] They assist in addressing attorney and paralegal time, as well as expert, investigative, and other costs, to ensure that critical defense needs are budgeted to optimize resources while fostering high-quality, cost-controlled represen-

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FederalCourts/AppointmentOfCounsel/Viewer.aspx?doc=/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol_07.pdf.

23. The NLST can be contacted at (510) 637-3500. Further information about the NLST can be found on fd.org at http://www.fd.org/navigation/litigation-support/subsections/who-is-the-national-litigation-support-team.

24. Further information regarding CDAs can be found on the J-Net at http://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/services-coordinating-discovery-attorneys-available-selected-federal-criminal-justice-act-cases (not accessible to the public).

25. For CJA panel attorneys, "mega cases" are either: (a) federal capital prosecutions and capital habeas corpus cases, or (b) noncapital representations with the potential for extraordinary cost (attorney work expected to exceed 300 hours or total expenditures for attorneys and investigative, expert, and other service providers expected to exceed $30,000 for an individual CJA defendant). This is distinguished from "mega budget cases," referring to federal and community defender office cases that will substantially impact their office budgets (by a 10% or $500,000 increase or more), so that an additional budget is developed to fund just that one case. *See Case-Budgeting Techniques and Other Cost-Containment Policies* (June 30, 2014), *available at* http://www.fd.org/docs/select-topics/cja/case-budgeting-techniques-and-other-cost-containment-strategies.pdf?sfvrsn=8.

> tation. In appropriate cases, the budgets may address litigation support costs, and the CBAs have working relationships with the NLST to consult on litigation support matters. Judges in a district without a CBA can contact the DSO for assistance.[26]

There are considerable funding consequences to voluminous e-discovery. The court should expect additional CJA costs in these cases, but managing e-discovery can be done thoughtfully and reasonably to mitigate costs.

B. Lack of ESI Experience, Knowledge, and Competency

Unfortunately, many criminal practitioners still do not have an adequate understanding of e-discovery issues and litigation technology. However, attorney competency ethics standards are evolving to require an adequate understanding of e-discovery and the technology needed to review it.[27] Lawyers who are unfamiliar with e-discovery can associate or consult with others who have the expertise.[28] Nonetheless, they remain responsible for e-discovery decisions and should be able to do the following, either themselves or in association or consultation with others:

- Implement procedures to preserve potentially discoverable electronic information.

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26. Further information on case budgeting and case budgeting attorneys can be found on the J-Net at http://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/case-budgeting (not accessible to public). Judges who do not have a CBA in their circuit can contact the duty attorney for the Defender Services Office at (800) 788-9908.

27. For example, the State Bar of California issued a formal ethics opinion on this subject in the summer of 2015. *See* State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. No. 2015-193 (2015). This development follows the 2012 American Bar Association amendment to its Model Rule 1.1, stating that lawyers need to "keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*." ABA Model Rules of Professional Conduct, Model Rule 1.1, comt. 8 (emphasis added).

28. If a CJA attorney needs to retain expert assistance, payment would have to be approved by the court.

- Assess e-discovery needs and issues.
- Plan and perform appropriate searches.
- Understand how to manage, review, and produce e-discovery in a manner that preserves its integrity.

Because discoverable information is increasingly found and produced electronically, lawyers who are e-discovery illiterate may delay trial preparation. Technological "dinosaurs" may also miss potentially beneficial evidence, for example, by overlooking valuable metadata in electronic records because they are entrenched in printing their discovery. They also may make critical mistakes early in the case, inadvertently choosing production formats that they cannot use or that will not help find the evidence they need. When such mistakes result in not finding exculpatory evidence, they risk being ineffective.

The benefits of e-discovery can be lost on uninformed counsel. In making counsel appointments and resourcing cases, judges should be mindful that handling complex e-discovery cases requires an adequate understanding of ESI and available technology.

C. Necessity of Litigation Support Assistance

In any sizeable e-discovery case, finding appropriately skilled expert assistance is critical to reviewing the evidence and deciding whether to negotiate a plea agreement or take the case to trial. Individuals with litigation support expertise can be found in a variety of traditional job roles, working as paralegals, investigators, information technology (IT) specialists, computer technicians, data processors, software specialists, and more. Finding the correct fit of litigation support staff to the case early is a priority.

Litigation support specialists should have legal and IT experience and training to organize, analyze, and present case materials through technology equipment and computer programs. They should have the ability to harvest and extract electronic data and metadata from ESI; assist in meet-and-confer sessions regarding the exchange of ESI; monitor and manage discovery productions (both production and receipt); provide advice on how to search data; and manage the day-to-day operations of strategically collecting, processing, organizing, reviewing,

analyzing, and presenting case data. Using both project management and technology, they ensure that e-discovery is handled in a cost-effective and time-efficient manner that allows for effective organization, easy retrieval, and quality client representation.

Just as judges should be mindful of attorney knowledge and experience in managing e-discovery, they should also be aware that even knowledgeable attorneys need skilled litigation support.

D. The Workflow in Processing ESI

ESI generally takes one of two possible forms: preprocessed (raw) or postprocessed. Some raw ESI is not ready to be reviewed electronically; it must be processed[29] into a digital file that can be loaded into document-review software. Similarly, paper records can be processed into electronic files like TIFFs with extracted text or searchable PDFs with the extracted text embedded in the file itself.

The workflow for processing ESI can be complicated. When ESI is in a proprietary format (for example, a Google Mail file), it cannot be reviewed with industry-standard tools; instead, review requires specialized hardware, software, and expertise to convert the data into a form that can be reviewed with standard tools.[30] Even if the discovery is produced in an optimal way,[31] defense counsel may still need expert assistance, such as litigation support personnel, paralegals, or database vendors, to convert e-discovery into a format they can use and to decide what processing, software, and expertise is needed to assess the ESI. Next, the ESI should be organized to facilitate finding informa-

29. *See supra* n. 20 for a definition of "processing."

30. Many state and federal law enforcement agencies have outdated computer systems, so the data in these outdated systems cannot be viewed with current industry-standard litigation support software. This is particularly common with audio and video files, necessitating conversion to industry-standard formats.

31. Parties should not be obstructionist and ought to produce discovery in a usable format if they reasonably can. According to the ESI Protocol, when a producing party elects to engage in processing ESI, the results of that processing (unless it contains work product) should be produced as discovery; this saves the receiving party the expense of replicating the work. ESI Protocol, Recommendations ¶ 6(d). That said, the ESI Protocol states that the government is not obligated to convert ESI into a format specified by the defense beyond what it would do for its own case preparation or discovery production.

tion. In voluminous e-discovery cases, parties must be able to rely on document-review software, which can be costly. Nonetheless, it saves money because it speeds up the review process and improves counsel's ability to find information. Such software affords counsel a variety of search strategies, including word searches, document searches, date searches, sender/recipient searches, concept searches, and predictive coding searches.[32]

E. Varieties of Evidence-Review Software

There is a vast array of software tools for handling all of the stages of electronic discovery: preserving, collecting, and harvesting data; processing and/or converting ESI; searching and retrieving information; reviewing ESI; and presenting evidence. There is frequently overlap between what various products can do. No single software tool does everything needed for e-discovery. Some tools specialize in processing raw ESI into formats that another tool can then use, while other tools specialize in a discrete function such as document review, strategic analysis, case organization, production of discovery, or evidence display in the courtroom. As a result, litigants have different collections of tools. That creates compatibility and conversion issues.

A meet-and-confer is an important stage in tackling those compatibility and conversion issues, particularly when the parties do not already have an established routine for exchanging discovery or when they face novel or difficult ESI issues. One goal of the meet-and-confer is to address technical issues so that the ESI produced in discovery is readable and usable. An important part of that process is the parties' discussion of production formats, volume, timing, and other issues.[33]

F. Volume of e-Discovery

The great volume of e-discovery poses a serious challenge due to the variety of devices on which ESI can be created and stored, the ease of

32. Technology-assisted review (also called predictive coding) is a process for prioritizing or coding a collection of documents using a computerized system that the harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents, and then extrapolates those judgments to the remaining data.

33. *See* ESI Protocol, attached as Appendix B.

various forms of telecommunication (such as texting and social media), and the declining cost of storage. ESI can come from many custodians[34] or sources—mobile phones, smartphones, tablets, laptops, desktops, computer network servers, external ESI storage devices (such as flash drives or external hard drives), cloud storage, GPS tracking devices, social media. Because of this, the amount of ESI in criminal cases has grown exponentially, and this growth is expected to continue, significantly complicating management and review of evidence. For example, in 2011, court-appointed defense counsel in one multi-defendant case had to review discovery comprising 240,000 pages of documents on 19 DVDs and CD ROMS, 185 banker boxes of paper documents (approximately 460,000 pages), and 30 forensic images (that is, copies) of complete computers, servers, and thumb drives holding approximately 4.3 terabytes of data.[35] Additionally, the defendants gathered 750,000 pages of third-party information directly relevant to their defenses. Cases like this benefit substantially from sophisticated software and advanced review practices such as technology-assisted review.

It is important to recognize that complex ESI requiring technological assistance is not constrained to computer and white-collar fraud crimes. Vast amounts of ESI are found in small cases as well. Even relatively modest amounts of e-discovery, depending on format, can create obstacles to reviewing evidence. Moreover, simple cases of possession of drugs or guns, for example, can involve smartphones and computers containing gigabytes or even terabytes of data. Lawyers unaided by technology cannot review this much data.

G. Form of Production—ESI Formats

The format in which ESI is gathered affects how the data can be used. For example, text messages collected as text-only files can be searched for particular words or combinations of words. But if the metadata for those same text messages is also gathered, then thousands or millions of text messages can not only be searched for particular words, they

34. In e-discovery terms, "custodian" refers to the person whose data was collected.

35. Applying litigation support standard calculations, 4.3 terabytes of data is the equivalent of 215 million pages, or 86,000 banker boxes, of documents.

can also be sorted by date, custodian, and author or addressee, and software can plot who communicated with whom, how frequently, when, and where. Such information can have tremendous utility in criminal cases.

Lawyers need specialized litigation software to work with ESI in its many formats. For example, they need software to review ESI documents, which can be as basic as a PDF viewer or far more complex. Most document-review platforms allow parties to view many file types. The DOJ and most civil law firms have managed their own discovery materials with software programs and technical personnel for years. Criminal defense practitioners, especially those involved in indigent defense, are relative latecomers to this world. Most CJA panel attorneys do not have litigation support software that can view and organize TIFF or native file productions. Similarly, most do not have tools to take advantage of a "load file,"[36] extracted metadata, or files in native or near-native ESI format.[37] It is only recently that federal defender offices gained that capability nationally. As a result, the DOJ may be able to produce discovery in a reasonably usable format, but CJA counsel may not be able to utilize the most robust litigation software available. To provide computer-challenged defense counsel with reasonably useable e-discovery, the U.S. Attorney's Office typically provides e-discovery on disks that contain software for viewing, searching, and tagging documents. For more sophisticated defense counsel, the DOJ typically creates load files or otherwise configures its e-discovery productions in industry-standard formats. Of course, there are instances where typical practices do not work well, and those are proper subjects for a meet-and-confer.

To benefit from the information available in e-discovery, attorneys must know what format the original data was in, what formatting options are available, and how those options affect their potential review

36. A load file is a cross-reference file used to import images or data into databases. A data load file may contain Bates numbers, metadata, paths to native files, coded data, and extracted or OCR text. An image load file may contain document-boundary, image-type, and path information. Load files must be obtained and provided in software-specific formats to ensure they can be used by the receiving party.

37. A significant advantage to web-hosted document-review platforms for the CJA panel is that IT support is provided by the vendor, since most do not have in-house IT staff.

of the data. Attorneys who do not understand the various formats should consult with a litigation support or IT expert before receiving or processing their e-discovery.

H. Form of Production—Paper Formats

Some contemporary records and many historical records only exist on paper. Converting paper discovery to electronic formats makes it easier to duplicate, exchange, and search. But converting voluminous paper records takes time and money. Accurate document breaks (also known as document unitization[38]) too frequently are not captured when scanning paper records. When this happens, document unitization is lost, diminishing the utility of the resulting electronic files. Although the producing party is not obligated to reformat paper records into an electronic form,[39] in some cases both parties may save time and money by converting paper into electronic formats. Cost sharing may be an option if the parties agree that scanning serves both sides.

Scanning a paper record and making it searchable through optical character recognition (OCR) software is an improvement over leaving it in paper form, but it is not a perfect solution. Scanning can be prohibitively expensive. Moreover, OCR programs have established error rates, decreasing the accuracy and reliability of electronic searches of documents. That unreliability causes some attorneys to default to using their own eyes to search rather than scanning paper records for electronic review.

Today, some records custodians' systems still are configured to produce subpoenaed records in paper, even when they have the same data electronically. If a records custodian is willing to produce the information in an electronic format, the electronic version usually will yield more reliable searches.[40] However, what is efficient and afforda-

38. Document unitization is the process of determining where a document begins (its first page) and ends (its last page), with the goal of accurately describing what was a "unit" as it was received by the party or was kept in the ordinary course of business by the document's custodian.

39. *See* ESI Protocol, Principle 6.

40. There are several options for electronic formats. Sometimes the records custodian can produce the native-format version, for example, a Word document as a Word file as opposed to a paper document or a PDF. Sometimes the native format

ble for records custodians, and what electronic formats they are willing or able to produce, varies widely.

I. Disorganized and Redundant ESI

E-discovery can come from records custodians as a disorganized and redundant jumble. That sometimes arises from how custodians store their data: multiple versions of the same computer record may coexist in unrelated computer systems, especially with cloud computing. Custodians may not be aware that copies of files exist in different parts of their system since files are often copied or backed up automatically without user interaction. With the ease of web communication, the multitude of different mobile devices, and inexpensive storage, ESI is frequently copied, recopied, forwarded, backed up, and archived many times over, resulting in multiple copies of the same files. Unlike paper records, where information was actively managed by records custodians who culled records to save money, there is often little need to organize ESI and delete duplicates or drafts. Although no single software quickly solves the issue of disorganized and redundant ESI, there are workflow processes combined with different types of software that can assist counsel in reducing duplicates, organizing the materials, and identifying the most relevant information more quickly than having a human look at every page.

J. Providing Incarcerated Defendants Access to e-Discovery

Defendants in pretrial detention face significant e-discovery challenges. Their rights to assist in their defense and confront the evidence against them contemplate reviewing that evidence. When out of custody, they can use their own (or their attorney's) computers to review electronic

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is proprietary, and requires a proprietary viewer. Many video recording systems are proprietary. In some instances, a records custodian can produce a "near-native" version. For example, Google Mail (Gmail) is a web-based email system. For production, a Gmail file can be converted to an .msg file format that can be readily viewed. Alternatively, a document can be produced as an electronic TIFF image with extracted text that can be loaded into a database and electronically searched. Or documents can be converted to a searchable Adobe PDF format.

discovery. When detained, their access to computers often is very limited. Although jails have long had policies for managing inmates' paper discovery, most do not have policies allowing inmates to review electronic discovery. Moreover, when the detention facilities do not have computers readily available for inmate evidence review, acceptable equipment and software must be purchased for incarcerated defendants to use. Although defender offices are budgeted for such equipment, CJA attorneys may need the court to fund equipment purchases or rentals.

Providing defendants in-custody access to technology that allows them to review their e-discovery reduces attorney time and costs. When incarcerated defendants cannot review e-discovery on their own time, the attorney or investigator has to bring a laptop or tablet containing the e-discovery to a jail visit and maintain control of the device while allowing the defendant to review the evidence, resulting in many hours of time billed to the CJA appropriations. Additionally, defendants may be able to locate critical evidence much more quickly than defense team members who are unfamiliar with the documentation. By reviewing and discussing evidence early, defendants help their counsel prioritize the investigation and limit the data that must be reviewed. This also creates more meaningful meetings, allowing both counsel and defendant to make timely decisions.

Jails have legitimate security and staffing interests in preventing inmates from having unfettered access to computers. A joint DOJ and defense attorney working group is studying the risks and benefits of allowing inmates access to computers for e-discovery review. They hope to produce practical recommendations. In the interim, consultation between the government, the defense, and the particular facility is most likely to result in an acceptable solution.

K. Multiple Defendants

Multidefendant, high-volume e-discovery cases are fertile ground for generating discovery disputes that require a judge's attention. For example, fraud cases involving multiple defendants may include millions of pages of documents. Multiple-defendant drug cases tend to have fewer documents, but they typically make up for that with wiretaps, surveillance photos and videos, text messages, GPS data, and social

media. These discovery items cannot be readily searched for defendant-specific materials without the use of litigation technology software. Even with software, it can take considerable time to review and analyze such complex and voluminous information.

With so many variables in play, multidefendant prosecutions may develop more conflicts over discovery than single-defendant prosecutions. One attorney may request additional information about the alleged criminal enterprise to receive more context about the case, while another may request different forms of production. Defense counsel may disagree with each other about formats of production, how the evidence is indexed and organized, and what information they are searching for. Prosecutors can find themselves caught in the middle of these competing demands and may not be able, or may not believe it is reasonable or affordable, to agree to varying (and potentially conflicting) defense counsel requests. This situation is ripe for pretrial e-discovery disputes. Judges can encourage the parties to attempt to resolve disputes without resorting to motion practice but may still be called upon to adjudicate competing discovery interests, especially where the government is subject to conflicting requests.

III. Judicial Management of Criminal e-Discovery

A. Managing Voluminous e-Discovery in Criminal Cases

As discussed earlier, voluminous e-discovery cases present difficult challenges for prosecutors and defense counsel. Depending upon the lawyers' familiarity with e-discovery, the court may need to exercise oversight in such cases. The ESI Protocol addresses the most common e-discovery issues, and the court can direct the parties to the ESI Protocol for guidance. Often, e-discovery disputes are simply the result of the lawyers' inexperience with e-discovery or their misunderstanding of technical terminology. Knowing that the lawyers are knowledgeable about e-discovery and/or that they have qualified litigation support, IT, or paralegal assistance will be of great assistance to judges managing these cases.

One key to success with these cases is addressing e-discovery issues early. Missteps at the outset of the case are costly to unwind or correct, and they waste time and money. To get the parties to address e-discovery issues early, the ESI Protocol recommends three steps:

1. At the outset of the case, the parties should meet and confer about the nature, volume, and mechanics of producing e-discovery.[41]

2. At the meet-and-confer, the parties should address what is being produced; a table of contents; the forms of production; volume; software and hardware limitations; inspection of seized hardware; and a reasonable schedule for producing e-discovery.[42]

3. The producing party transmits its e-discovery in sufficient time to permit reasonable management and review, and the receiving party should be proactive about testing the accessibility of the ESI when it is received.[43]

Although the Federal Rules of Criminal Procedure do not specify when evidence must be produced, some judges find it useful to have standing orders that direct the parties to come up with a discovery plan when dealing with complex e-discovery matters.

To get the parties started on the right foot, the court may want to address the topic of e-discovery at one of the initial hearings, even before the parties have conducted their first meet-and-confer session. A discovery status conference can be scheduled after the meet-and-confer takes place. Proposed colloquies are offered in Appendices C and D.

B. Early Discussion of e-Discovery Issues

There are four steps courts can take early on in a large e-discovery criminal case. First, the court can ask the parties questions to ascertain what issues they are facing. Second, the court can be clear about its expectations for parties handling voluminous e-discovery. Third, the

41. ESI Protocol, Recommendations ¶ 5.
42. ESI Protocol, Strategies ¶ 5.
43. ESI Protocol, Strategies ¶ 5(o).

court can advise the parties of resources available to assist them. Finally, the court can schedule a discovery status conference as needed.

Ask About the Case: Appendix C offers a sample colloquy for the first appearance in the case. The court can ask the government the threshold question of whether this is a case in which the volume and/or nature of the e-discovery significantly increases the complexity of the case. In cases with court-appointed counsel, the answer may help the court decide whom to appoint and what resources and assistance appointed counsel may need.[44] Once both parties appear, the court can ask whether the parties have already addressed e-discovery issues, as that may obviate the need for further court involvement. The court can further ask if the parties are familiar with the ESI Protocol; if not, the prosecutor can provide a copy to defense counsel.

Advise About Expectations: Given the varying levels of experience and comfort with e-discovery and technology, as well as the rapid evolution of litigation software, the court can make clear from the outset its expectations for the lawyers in a complex e-discovery case.

Appendix C sets forth a list of reasonable expectations for the lawyers. These include the following:

- The lawyers should have an adequate understanding of e-discovery such that they can identify, communicate on, and solve common e-discovery problems and determine what forms of production are possible, how different software products and services can assist in the particular case, and what costs and cost savings result from their choices. The lawyers should be sufficiently familiar with the capabilities and limitations of software and services in order to select appropriate software and outside assistance. Lawyers can, of course, rely on experts to consult and advise them on what programs to use and what staff to retain.

44. *See* section II.A, *supra*, regarding funding electronic discovery.

- Although the court will encourage parties to obtain technical assistance, the lawyers are ultimately responsible for decisions involving e-discovery.
- The parties will meet and confer once they have secured expert assistance. A meet-and-confer discussion should occur well before any discovery status conference. When appropriate, the lawyers should bring experts with them to the meet-and-confer to address the technical aspects of e-discovery.

Advise About Resources: Public defenders and CJA counsel in multidefendant, complex e-discovery cases can petition the court to appoint a coordinating discovery attorney. If the court appointed counsel (either an assistant federal defender or a CJA panel attorney), counsel can contact the NLST for assistance.[45]

Schedule Discovery Conferences: Complex e-discovery cases may benefit from one or more discovery conferences, as the court deems appropriate.

C. Subsequent Status of e-Discovery Issues

Appendix D has a proposed colloquy for discovery status conferences. If status conferences are held, the judge can check on the progress of e-discovery. Depending on what the parties report has transpired since the last proceeding, the judge may remind them of the court's expectations as well as remind them of the resources available to them. Additionally, particular issues may arise that should be addressed in-depth.

Despite strong encouragement from the bench and the best intentions of the parties, the lawyers may not have conducted a meaningful meet-and-confer session. The Seventh Circuit's civil e-discovery pilot project revealed that many litigants are not diligent about conducting effective meet-and-confer sessions.[46] Even if meetings take place, if inexperienced lawyers did not bring expert assistance, or did not address

45. *See* section II.A, *supra*, for further discussion of the Defender Services Office's National Litigation Support program.

46. Seventh Circuit Electronic Discovery Pilot Program: Final Report on Phase Two 77, *available at* http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.

the matters in any depth (a so-called drive-by meet-and-confer), then problems with e-discovery may not have been avoided. Although not every case or lawyer needs these formal meetings, the court can satisfy itself that the parties have worked together to ensure productive access to e-discovery.

At the discovery status conference, the lawyers should provide a discovery disclosure schedule. The judge can clarify what is expected in continued "rolling" discovery, and that disclosure should take place expeditiously, since reviewing e-discovery can be very time-intensive. The court should take this opportunity to advise the parties about their discovery obligations. If the defense will have e-discovery, the court can check if the parties discussed that in the meet-and-confer session; if not, it could order a second meet-and-confer session.

There may be e-discovery issues that the parties have identified but have not been able to solve. If satisfied that they have tried in good faith to settle the matters first, the court can either decide the discovery dispute impromptu, or it can schedule a briefing and a discovery hearing. Subsequent discovery status conferences can be scheduled as needed.

IV. Conclusion

The purpose of this guide is to help judges give guidance and direction to lawyers handling complex criminal electronic discovery. It aims to ensure that the parties manage the case efficiently and thoughtfully, avoid unnecessary delay and costs occasioned by the nature of the e-discovery, and provide defendants full access to the evidence necessary to evaluate the case and make strategic decisions. Of course, this guide cannot answer every e-discovery question that will arise, so judges must be creative in dealing with the myriad of issues that naturally arise in this dynamic field. But this guide does offer an overall framework for addressing criminal e-discovery that can be adapted to virtually every case.

Judges using this publication are encouraged to comment and propose changes to keep it current and relevant.

Appendix A
ESI Protocol Description

A. ESI Protocol Helps Judges with e-Discovery in Criminal Cases

The ESI Protocol provides practical recommendations to facilitate electronic evidence discovery (e-discovery or ESI) in criminal cases. It seeks to increase efficiency, save money, and reduce litigation over e-discovery issues. To accomplish these goals, the ESI Protocol creates a predictable framework for e-discovery discussions and production, and encourages the parties to resolve e-discovery disputes without court intervention. It was designed to be enduring and flexible by providing both broad principles that will apply regardless of technical changes and detailed guidance that can be updated as technology evolves.

The ESI Protocol has four parts:

1. **Principles:** The 10 Principles are core tenets that set the framework for the recommendations and strategies, and they also serve as a starting place for the uninitiated. A judge can direct a lawyer to begin by reviewing the principles.
2. **Recommendations:** The 10 Recommendations address critical e-discovery topics at a policy level. They are based upon the principles' core tenets, and they are intended to endure inevitable changes in technology. The recommendations are a framework for informed discussions between the parties about e-discovery issues.
3. **Strategies and Commentary:** The strategies and commentary section addresses the same topics as the 10 Recommendations. It provides practical guidance on key practices. The strategies and commentary will evolve over time in response to changing technology and experience. This section concludes with definitions of e-discovery terms.
4. **Checklist:** This one-page checklist for lawyers and judges identifies the major specific topics to address at a meet-and-confer conference or discovery hearing.

B. Overview of the ESI Protocol

Guiding principles. The ESI Protocol is built upon ten principles:

Principle 1:

> Lawyers have a responsibility to have an adequate understanding of electronic discovery.

Principle 2:

> In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI.

Principle 3:

> At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an ongoing dialogue may be helpful.

Principle 4:

> The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format.

Principle 5:

> When producing ESI discovery, a party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what the party has already done or

would do for its own case preparation or discovery production.

Principle 6:

Following the meet-and-confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case.

Principle 7:

The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted.

Principle 8:

In multidefendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a coordinating discovery attorney.

Principle 9:

The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI.

Principle 10:

> All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

Scope. The ESI Protocol is intended only for cases in which the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.[47] For example, cases involving a large volume of ESI, unique ESI issues, or multiple defendants may benefit from using the ESI Protocol. In simple or routine cases,[48] the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.[49]

Limitations. The ESI Protocol does not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, other statutes, case law (for example, *Brady* and *Giglio*), or local rules.[50] It is not intended to serve as a basis for allegations of misconduct or claims for relief, nor does it create any rights or privileges for any party.[51] Cases involving classified information have their own unique legal procedures that do not fit within the ESI Protocol.[52] The ESI Protocol applies only to postindictment criminal discovery, not civil litigation or preindictment investigations, both of which are governed by existing legal standards.[53]

An integrated process, not rules to be enforced. The ESI Protocol envisions a collaborative approach to e-discovery based upon

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47. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. *See* ESI Protocol, Recommendations at 2.

48. Even small amounts of ESI in an unusual or difficult format can increase the complexity of e-discovery, which would counsel using the ESI Protocol.

49. See ESI Protocol, Recommendations ¶ 2.

50. ESI Protocol, Recommendations ¶ 3.

51. *Id.*

52. ESI Protocol, Recommendations ¶ 5.

53. ESI Protocol, Recommendations, fn. 1.

the mutual and interdependent responsibilities of the opposing parties.[54] As such, the ESI Protocol sets forth best practices for litigants, not a set of enforceable rules.

Balancing competing goals. As with the criminal discovery rules, the ESI Protocol seeks to balance competing goals. For example, to promote cost savings, the ESI Protocol states that if the producing party elects to process ESI for its own case preparation or discovery production, then the results of that processing should—unless they constitute work product—be produced in discovery to save the receiving party the expense of replicating that work. An illustration would be that if the producing party scans paper documents to a TIFF image and OCR text, then those should be provided in discovery rather than providing only the paper documents. Nonetheless, the producing party's work product—for example, issue tags or document notes—should not be produced. Importantly, the producing party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what it has already done or would do for its own case preparation or discovery production.

No easy solutions. A natural human tendency when confronted with complex problems is to look for easy solutions. But the ESI Protocol recognizes that at this point in the evolution of e-discovery, there is no easy, one-size-fits-all solution.

Coordinating discovery for multiple defendants. In multiple-defendant cases, the ESI Protocol recommends that the defendants authorize one or more defense counsel to act as the discovery coordinator or seek the appointment of a coordinating discovery attorney (CDA). CDAs are Defender Services Program–contracted attorneys who have technological knowledge and experience, resources, and staff to assist with the effective management of complex e-discovery.[55]

Communication, not litigation. To reduce costs and save time, the ESI Protocol avoids a purely adversarial and rules-driven approach to e-discovery. First, the ESI Protocol recommends that the parties meet and confer at the outset of a case. Second, it recommends

54. *See* ESI Protocol, Introduction at 2.

55. For more information on coordinating discovery attorneys, see section III.A, *supra*, at pp. 14–15.

communication as a precondition to filing a motion about an e-discovery issue. An aggrieved party is directed to confer with opposing counsel in a good-faith effort to resolve the dispute, and to involve individuals with sufficient knowledge to understand the technical issues, or sufficient authority to settle the dispute cooperatively, before filing any motions. If a motion is filed, the ESI Protocol suggests including a statement of counsel for the moving party stating that, after consultation with the opposing party, they have been unable to resolve the dispute without court action.

Each U.S. Attorney's Office and Main Justice criminal component has one or more criminal discovery coordinators who are responsible for providing guidance to prosecutors on criminal discovery topics. Each federal and community defender office has IT or other staff and access to the National Litigation Support Team that can provide technical assistance in resolving discovery issues. Lawyers can take advantage of these resources to understand technical issues and facilitate meaningful discussion that may avoid or resolve conflicts.

To avoid unnecessary motions practice, the ESI Protocol calls for supervisor participation in resolving disputes and recommends that prosecutors and federal and community defender offices institute internal procedures that require line prosecutors and defenders to: (1) seek a supervisor's assistance in resolving an e-discovery dispute, (2) consult with supervisors before filing motions seeking judicial resolution of an e-discovery dispute; and (3) obtain a supervisor's authorization before alleging that opposing counsel has engaged in any misconduct, abuse, or neglect concerning the production of ESI. These recommendations were included to ensure that the parties explored technological and pragmatic solutions before resorting to e-discovery litigation. Of course, the recommendations for consulting with, or obtaining approval of, a supervisor do not apply to CJA or privately retained counsel.

Whether the ESI Protocol's meet-and-confer approach will succeed in our adversarial system will depend in some measure upon whether judges encourage the parties to follow the ESI Protocol. At the least, the involvement of technically knowledgeable personnel should help to avoid disputes based on technological misunderstandings.

Appendix A: ESI Protocol Description

Parties are responsible for identifying and solving e-discovery issues. The ESI Protocol identifies the responsibilities of both parties. Some examples follow.

Both Parties

- When gathering ESI, think about the nature, volume, and mechanics of managing ESI.[56]
- Conduct a meet-and-confer to discuss e-discovery issues, and address eighteen specified topics as necessary.[57] Use the one-page checklist to help identify possible issues.
- Discuss any issues concerning information provided in discovery that implicates any privilege or that is protected as confidential or personal identifying information.[58]
- Discuss a reasonable schedule for producing e-discovery.[59]
- Discuss e-discovery security if either party intends to make discovery electronically available to others.[60]
- Discuss protective orders if needed.[61]
- Memorialize any e-discovery agreements.[62]
- Give the court advance notice of any issues that will significantly affect the production or review of e-discovery, the need to request supplemental funds, or the scheduling of pretrial motions or trial.[63]

56. ESI Protocol, Strategies ¶ 2.
57. ESI Protocol, Strategies ¶ 5.
58. ESI Protocol, Strategies ¶ 5(e).
59. ESI Protocol, Strategies ¶ 5(o).
60. ESI Protocol, Strategies ¶ 5(p).
61. ESI Protocol, Strategies ¶ 5(q).
62. ESI Protocol, Strategies ¶ 5(r).
63. ESI Protocol, Strategies ¶ 5(s).

Producing Party

- When possible, produce ESI as processed to save the receiving party the expense of replicating the processing.[64]
- Create a table of contents.[65]
- Give the receiving party an estimate of discovery volume.[66]
- Identify any third-party ESI according to which device it came from.[67]
- Produce third-party ESI in the format it was received or in a reasonably usable format.[68]
- Produce discoverable materials generated by a party during its investigation in a searchable and reasonably usable format.[69]
- Produce a cover letter to accompany e-discovery that describes the number of media, the unique identifiers of the media, a brief description of the contents including a table of contents if created, and any Bates ranges or other unique production identifiers.[70]

Receiving Party

- Inspect e-discovery promptly after its receipt and give notice to the producing party of any production issues or problems that may impede using the e-discovery.[71]

64. ESI Protocol, Recommendations ¶ 6.
65. ESI Protocol, Strategies ¶ 5(b).
66. ESI Protocol, Strategies ¶ 5(h).
67. ESI Protocol, Strategies ¶ 5(l).
68. ESI Protocol, Strategies ¶ 6(g).
69. ESI Protocol, Strategies ¶ 6(h).
70. ESI Protocol, Strategies ¶ 7(c).
71. ESI Protocol, Strategies ¶ 5(o).

Appendix B
ESI Protocol

Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases

Department of Justice (DOJ) and Administrative Office of the U.S. Courts (AO) Joint Electronic Technology Working Group (JETWG)

February 2012

Introduction to Recommendations for ESI Discovery in Federal Criminal Cases

Today, most information is created and stored electronically. The advent of electronically stored information (ESI) presents an opportunity for greater efficiency and cost savings for the entire criminal justice system, which is especially important for the representation of indigent defendants. To realize those benefits and to avoid undue cost, disruption, and delay, criminal practitioners must educate themselves and employ best practices for managing ESI discovery.

The Joint Electronic Technology Working Group (JETWG) was created to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the government and defendants charged in federal criminal cases. JETWG was established in 1998 by the director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States. It consists of representatives of the Administrative Office of the U.S. Courts, Defender Services Office (DSO), the Department of Justice (DOJ), Federal Public and Community Defender Organizations (FPDOs and CDOs), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States judiciary and other AOUSC offices.

JETWG has prepared recommendations for managing ESI discovery in federal criminal cases, which are contained in the following three documents:

1. **Recommendations for ESI Discovery in Federal Criminal Cases.** The Recommendations provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security.
2. **Strategies and Commentary on ESI Discovery in Federal Criminal Cases.** The Strategies provide technical and more particularized guidance for implementing the recommendations, including definitions of terms. The Strategies will evolve in light of changing technology and experience.
3. **ESI Discovery Checklist.** A one-page checklist for addressing ESI production issues.

The Recommendations, Strategies, and Checklist are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. They are not intended for all cases. The Recommendations, Strategies, and Checklist build upon the following basic principles:

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery. (See #4 of the Recommendations.)

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI. (See #4 of the Recommendations.)

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an ongoing dialogue may be helpful. (See #5 of the Recommendations and Strategies.)

Principle 4: The parties should discuss what formats of production are possible and appropriate and what formats can be generated. Any format selected for producing discovery should maintain the ESI's integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format. (See #6 of the Recommendations and Strategies.)

Principle 5: When producing ESI discovery, a party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. (See #6 of the Recommendations and Strategies.)

Principle 6: Following the meet-and-confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case. (See #5(s) of the Strategies.)

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted. (See #7 of the Recommendations and Strategies.)

Principle 8: In multidefendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek the appointment of a Coordinating Discovery Attorney. (See #8 of the Recommendations and Strategies.)

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI. (See #9 of the Recommendations.)

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need, and are approved for, access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure. (See #10 of the Recommendations.)

The Recommendations, Strategies, and Checklist set forth a collaborative approach to ESI discovery involving mutual and interdependent responsibilities. The goal is to benefit all parties by making ESI discovery more efficient and secure, and less costly.

Recommendations for ESI Discovery Production in Federal Criminal Cases

1. Purpose

These Recommendations are intended to promote the efficient and cost-effective post-indictment production of electronically stored information (ESI) in discovery[72] between the government and defendants charged in federal criminal cases and to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues, by creating a predictable framework for ESI discovery and by establishing methods for resolving ESI discovery disputes without the need for court intervention.

ESI discovery production involves the balancing of several goals:

a) The parties must comply with their legal discovery obligations;

b) the volume of ESI in many cases may make it impossible for counsel to personally review every potentially discoverable item, and, as a consequence, the parties increasingly will employ software tools for discovery review, so ESI discovery should be done in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information;

c) the parties should look for ways to avoid unnecessary duplication of time and expense for both parties in the handling and use of ESI;

d) subject to subparagraph (e), below, the producing party should produce its ESI discovery materials in industry-standard formats;

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72. The Recommendations and Strategies are intended to apply only to disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2, *Brady*, *Giglio*, and the Jencks Act, and they do not apply to, nor do they create any rights, privileges, or benefits during, the gathering of ESI as part of the parties' criminal or civil investigations. The legal principles, standards, and practices applicable to the discovery phase of criminal cases serve different purposes than those applicable to criminal and civil investigations.

e) the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production[73]; and

f) the parties must protect their work product, privileged, and other protected information.

The following Recommendations are a general framework for informed discussions between the parties about ESI discovery issues. The efficient and cost-effective production of ESI discovery materials is enhanced when the parties communicate early and regularly about any ESI discovery issues in their case, and when they give the court notice of ESI discovery issues that will significantly affect the handling of the case.

2. Scope: Cases Involving Significant ESI

No single approach to ESI discovery is suited to all cases. These Recommendations are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.[74] In simple or routine cases, the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.

Due to the evolving role of ESI in criminal cases, these Recommendations and the parties' practices will change with technology and experience. As managing ESI discovery becomes more routine, it is anticipated that the parties will develop standard processes for ESI discovery that become the accepted norm.

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73. One example of the producing party undertaking additional processing for its discovery production is a load file that enables the receiving party to load discovery materials into its software.

74. Courts and litigants will continue to seek ways to identify cases deserving special consideration. While the facts and circumstances of cases will vary, some factors may include: (1) a large volume of ESI; (2) unique ESI issues, including native file formats, voluminous third-party records, nonstandard and proprietary software formats; and/or (3) multiple-defendant cases accompanied by a significant volume of ESI.

3. Limitations

These Recommendations and the accompanying Strategies do not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other federal statutes, case law, or local rules. They may not serve as a basis for allegations of misconduct or claims for relief, and they do not create any rights or privileges for any party.

4. Technical Knowledge and Experience

For complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery. Lawyers have a responsibility to have an adequate understanding of electronic discovery.

5. Planning for ESI Discovery Production—The Meet-and-Confer Process

At the outset of a case involving substantial or complex ESI discovery, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. The parties should determine how to ensure that any meet-and-confer process does not run afoul of speedy trial deadlines. Where the ESI discovery is particularly complex or produced on a rolling basis, an ongoing dialogue during the discovery phase may be helpful. In cases where it is authorized, providing ESI discovery to an incarcerated defendant presents challenges that should be discussed early. Also, cases involving classified information will not fit within the Recommendations and Strategies due to the unique legal procedures applicable to those cases. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. The Strategies and Checklist provide detailed recommendations on planning for ESI discovery.

6. Production of ESI Discovery

Production of ESI discovery involves varied considerations depending upon the ESI's source, nature, and format. Unlike certain civil cases, in criminal cases the parties generally are not the original custodian or source of the ESI they produce in discovery. The ESI gathered by the parties during their investigations may be affected or limited by many factors, including the original custodian's or source's information technology systems, data management practices, and resources; the party's understanding of the case at the time of collection; and other factors. Likewise, the electronic formats used by the parties for producing ESI discovery may be affected or limited by several factors, including the source of the ESI; the format(s) in which the ESI was originally obtained; and the party's legal discovery obligations, which may vary with the nature of the material. The Strategies and Checklist provide detailed recommendations on production of ESI discovery.

General recommendations for the production of ESI discovery are as follows:

a. The parties should discuss what formats of production are possible and appropriate and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standards for the format.[75]

b. ESI received from third parties should be produced in the format(s) it was received or in reasonably usable format(s). ESI from the government's or defendant's business records should be produced in the format(s) in which it was maintained or in reasonably usable format(s).

c. Discoverable ESI generated by the government or defense during the course of their investigations (*e.g.*, investigative reports, witness interviews, demonstrative exhibits, etc.) may be handled differently than in 6(a) and (b) above be-

75. An example of a format of production might be the production of TIFF images, OCR text files, and load files created for a specific software application. Another format of production would be native-file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases. ESI in a particular case might warrant more than one format of production depending upon the nature of the ESI.

cause the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, the parties' policies, and the parties' evolving technological capabilities.

d. When producing ESI discovery, a party should not be required to take on substantial additional processing or format-conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. For example, the producing party need not convert ESI from one format to another or undertake additional processing of ESI beyond what is required to satisfy its legal disclosure obligations. If the receiving party desires ESI in a condition different from what the producing party intends to produce, the parties should discuss what is reasonable in terms of expense and mechanics, who will bear the burden of any additional cost or work, and how to protect the producing party's work product or privileged information. Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

7. Transmitting ESI Discovery

The parties should discuss transmission methods and media that promote efficiency, security, and reduced costs. In conjunction with ESI transmission, the producing party should provide a general description and maintain a record of what was transmitted. Any media should be clearly labeled. The Strategies and Checklist contain detailed recommendations on transmission of ESI discovery, including the potential use of email to transmit ESI.

8. Coordinating Discovery Attorney

In cases involving multiple defendants, the defendants should authorize one or more counsel to act as the discovery coordinator(s), or seek the appointment of a Coordinating Discovery Attorney,[76] and authorize that person to accept, on behalf of all defense counsel, the ESI discovery produced by the government. Generally, the format of production should be the same for all defendants, but the parties should be sensitive to different needs and interests in multiple-defendant cases.

9. Informal Resolution of ESI Discovery Matters

a. Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.

b. The Discovery Coordinator within each U.S. Attorney's Office should be consulted in cases presenting substantial issues or disputes.

c. To avoid unnecessary litigation, prosecutors and Federal Defender Offices[77] should institute procedures that re-

76. Coordinating Discovery Attorneys (CDAs) are AOUSC-contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant cases. The CDAs may be appointed by the court to provide in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the U.S. Attorney's Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If a panel attorney or FDO is interested in utilizing the services of the CDA, they should contact the National Litigation Support Administrator or Assistant National Litigation Support Administrator for the Office of Defender Services at 510-637-3500.

77. For private attorneys appointed under the Criminal Justice Act, this subsection (c) is not applicable.

quire line prosecutors and defenders (1) to consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) to obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.

d. Any motion addressing a discovery dispute concerning ESI production should include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party, the parties have been unable to resolve the dispute without court action.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

Criminal case discovery entails certain responsibilities for all parties in the careful handling of a variety of sensitive information, for example, grand jury material, the defendant's records, witness identifying information, information about informants, information subject to court protective orders, confidential personal or business information, and privileged information. With ESI discovery, those responsibilities are increased because ESI is easily reproduced and disseminated, and unauthorized access or disclosure could, in certain circumstances, endanger witness safety; adversely affect national security or homeland security; leak information to adverse parties in civil suits; compromise privacy, trade secrets, or classified, tax return, or proprietary information; or prejudice the fair administration of justice. The parties' willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure.

All parties should limit dissemination of ESI discovery to members of their litigation team who need, and are approved for, access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

During the initial meet-and-confer and before ESI discovery is produced, the parties should discuss whether there is confidential, pri-

vate, or sensitive information in any ESI discovery they will be providing. If such information will be disclosed, then the parties should discuss how the recipients will prevent unauthorized access to, or disclosure of, that ESI discovery, and, absent agreement on appropriate security, the producing party should seek a protective order from the court addressing management of the particular ESI at issue. The producing party has the burden to raise the issue anew if it has concerns about any ESI discovery it will provide in subsequent productions. The parties may choose to have standing agreements so that their practices for managing ESI discovery are not discussed in each case. The Strategies contain additional guidance in sections 5(f), 5(p), and 7(e).

Strategies and Commentary on ESI Discovery in Federal Criminal Cases

1. Purpose

This commentary contains strategies for implementing the ESI discovery Recommendations and specific technical guidance. Over time it will be modified in light of experience and changing technology. Definitions of common ESI terms are provided in paragraph 11, below.

2. Scope of ESI Gathered

In order to promote efficiency and avoid unnecessary costs, when gathering ESI, the parties should take into consideration the nature, volume, and mechanics of managing ESI.

3. Limitations

Nothing contained herein creates any rights or privileges for any party.

4. Technical Knowledge and Experience

No additional commentary.

5. Planning for e-Discovery Production—The Meet-and-Confer Process

To promote efficient ESI discovery, the parties may find it useful to discuss the following:

a. **ESI discovery produced.** The parties should discuss the ESI being produced according to the following general categories:

   i. *Investigative materials* (investigative reports, surveillance records, criminal histories, etc.)

   ii. *Witness statements* (interview reports, transcripts of prior testimony, Jencks statements, etc.)

iii. *Documentation of tangible objects* (*e.g.,* records of seized items or forensic samples, search warrant returns, etc.)

iv. *Third parties' ESI digital devices* (computers, phones, hard drives, thumb drives, CDs, DVDs, cloud computing, etc., including forensic images)

v. *Photographs and video/audio recordings* (crime scene photos; photos of contraband, guns, money; surveillance recordings; surreptitious monitoring recordings; etc.)

vi. *Third-party records and materials* (including those seized, subpoenaed, and voluntarily disclosed)

vii. *Title III wiretap information* (audio recordings, transcripts, line sheets, call reports, court documents, etc.)

viii. *Court records* (affidavits, applications, and related documentation for search and arrest warrants, etc.)

ix. *Tests and examinations*

x. *Experts* (reports and related information)

xi. *Immunity agreements, plea agreements, and similar materials*

xii. *Discovery materials with special production considerations* (such as child pornography, trade secrets, tax return information, etc.)

xiii. *Related matters* (state or local investigative materials, parallel proceedings materials, etc.)

xiv. *Discovery materials available for inspection but not produced digitally*

xv. *Other information*

b. **Table of contents.** If the producing party has not created a table of contents prior to commencing ESI discovery production, it should consider creating one describing the general categories of information available as ESI dis-

covery. In complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party's review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.[78] Because no single table of contents is appropriate for every case, the producing party may devise a table of contents that is suited to the materials it provides in discovery, its resources, and other considerations.[79]

c. **Forms of production.** The producing party should consider how discoverable materials were provided to it or maintained by the source (*e.g.*, paper or electronic), whether it has converted any materials to a digital format that can be used by the opposing party without disclosing the producing party's work product, and how those factors may affect the production of discovery materials in electronic formats. For particularized guidance see paragraph 6, below. The parties should be flexible in their application of the concept of "maintained by the source." The goals are to retain the ESI's integrity, to allow for reasonable usability, and to reasonably limit costs.[80]

d. **Proprietary or legacy data.** Special consideration should be given to data stored in proprietary or legacy sys-

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78. *See, e.g.*, *U.S. v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) (no *Brady* violation where government disclosed several-hundred-million-page database with searchable files and produced set of hot documents and indices).

79. A table of contents is intended to be a general, high-level guide to the categories of ESI discovery. Because a table of contents may not be detailed, complete, or free of errors, the parties still have the responsibility to review the ESI discovery produced. With ESI, particular content usually can be located using available electronic search tools. There are many ways to construct a general table of contents. For example, a table of contents could be a folder structure as set forth above in paragraph 2(a)(i–xv), where like items are placed into folders.

80. For example, when the producing party processes ESI to apply Bates numbers, load it into litigation software, create TIFF images, etc., the ESI is slightly modified and no longer in its original state. Similarly, some modification of the ESI may be necessary and proper in order to allow the parties to protect privileged information, and the processing and production of ESI in certain formats may result in the loss or alteration of some metadata that is not significant in the circumstances of the particular case.

tems, for example, video surveillance recordings in an uncommon format, proprietary databases, or software that is no longer supported by the vendor. The parties should discuss whether a suitable generic-output format or report is available. If a generic output is not available, the parties should discuss the specific requirements necessary to access the data in its original format.

e. **Attorney–client, work product, and protected information issues**.[81] The parties should discuss whether there is privileged, work product, or other protected information in third-party ESI or their own discoverable ESI and should discuss proposed methods and procedures for segregating such information and resolving any disputes.[82]

f. **Confidential and personal information**. The parties should identify and discuss the types of confidential or personal information present in the ESI discovery, appropriate security for that information, and the need for any protective orders or redactions. See also section 5(p) below.

g. **Incarcerated defendant.** If the defendant is incarcerated and the court or correctional institution has authorized discovery access in the custodial setting, the parties should consider what institutional requirements or limitations may affect the defendant's access to ESI discovery, such as limitations on hardware or software use.[83]

h. **ESI discovery volume.** To assist in estimating the receiving party's discovery costs and to the extent that the producing party knows the volume of discovery materials

81. Attorney–client and work-product issues (*see, e.g.*, F. R. Crim. P. 16(a)(2) and (b)(2)) arising from the parties' own case preparation are beyond the scope of these Recommendations, and they need not be part of the meet-and-confer discussion.

82. If third-party records are subject to an agreement or court order involving a selective waiver of attorney–client or work-product privileges (see F.R.E. 502), then the parties should discuss how to handle those materials.

83. Because pretrial detainees often are held in local jails (for space, protective custody, cost, or other reasons), which have varying resources and security needs, there are no uniform practices or rules for pretrial detainees' access to ESI discovery. Resolution of the issues associated with such access is beyond the scope of the Recommendations and Strategies.

it intends to produce immediately or in the future, the producing party may provide such information if such disclosure would not compromise the producing party's interests. Examples of volume include the number of pages of electronic images of paper-based discovery, the volume (*e.g.*, gigabytes) of ESI, the number and aggregate length of any audio or video recordings, and the number and volume of digital devices. Disclosures concerning expected volume are not intended to be so detailed as to require a party to disclose what it intends to produce as discovery before it has a legal obligation to produce the particular discovery material (*e.g.*, Jencks material). Similarly, the parties' estimates are not binding and may not serve as the basis for allegations of misconduct or claims for relief.

i. **Naming conventions and logistics.** The parties should, from the outset of a case, employ naming conventions that would make the production of discovery more efficient. For example, in a Title III wiretap case generally it is preferable that the naming conventions for the audio files, the monitoring logs, and the call transcripts be consistent so that it is easy to cross-reference the audio calls with the corresponding monitoring logs and transcripts. If at the outset of discovery production a naming convention has not yet been established, the parties should discuss a naming convention before the discovery is produced. The parties should discuss logistics and the sharing of costs or tasks that will enhance ESI production.

j. **Paper materials.** For options and particularized guidance on paper materials see paragraphs 6(a) and (e), below.

k. **Any software and hardware limitations.** As technology continues to evolve, the parties may have software and hardware constraints on how they can review ESI. Any limitations should be addressed during the meet-and-confer.

l. **ESI from seized or searched third-party ESI digital devices.** When a party produces ESI from a seized or searched third-party digital device (*e.g.*, computer, cell

phone, hard drive, thumb drive, CD, DVD, cloud computing, or file share), the producing party should identify the digital device that held the ESI, and, to the extent that the producing party already knows, provide some indication of the device's probable owner or custodian and the location where the device was seized or searched. Where the producing party only has limited authority to search the digital device (*e.g.*, limits set by a search warrant's terms), the parties should discuss the need for protective orders or other mechanisms to regulate the receiving party's access to or inspection of the device.

m. **Inspection of hard drives and/or forensic (mirror) images.** Any forensic examination of a hard drive, whether it is an examination of a hard drive itself or an examination of a forensic image of a hard drive, requires specialized software and expertise. A simple copy of the forensic image may not be sufficient to access the information stored, as specialized software may be needed. The parties should consider how to manage inspection of a hard drive and/or production of a forensic image of a hard drive and what software and expertise will be needed to access the information.

n. **Metadata in third-party ESI.** If a producing party has already extracted metadata from third-party ESI, the parties should discuss whether the producing party should produce the extracted metadata together with an industry-standard load file or, alternatively, produce the files as received by the producing party from the third party.[84] Neither party need undertake additional processing beyond its own case preparation, and both parties are entitled to protect their work product and privileged or other protected information. Because the term "metadata" can encompass different categories of information, the parties should clearly describe what categories of metadata are

84. The producing party is, of course, limited to what it received from the third party. The third party's processing of the information can affect or limit what metadata is available.

being discussed, what the producing party has agreed to produce, and any known problems or gaps in the metadata received from third parties.

o. **A reasonable schedule for producing and reviewing ESI.** Because ESI involves complex technical issues, two stages should be addressed. First, the producing party should transmit its ESI in sufficient time to permit reasonable management and review. Second, the receiving party should be proactive about testing the accessibility of the ESI production *when it is received*. Thus, a schedule should include a date for the receiving party to notify the producing party of any production issues or problems that are impeding use of the ESI discovery.

p. **ESI security.** During the first meet-and-confer, the parties should discuss ESI discovery security and, if necessary, the need for protective orders to prevent unauthorized access to, or disclosure of, ESI discovery that any party intends to share with team members via the Internet or similar system, including:

   i. what discovery material will be produced that is confidential, private, or sensitive, including, but not limited to, grand jury material, witness identifying information, information about informants, a defendant's or co-defendant's personal or business information, information subject to court protective orders, confidential personal or business information, or privileged information;

   ii. whether encryption or other security measures during transmission of ESI discovery are warranted;[85]

   iii. what steps will be taken to ensure that only authorized persons have access to the electronically stored or disseminated discovery materials;

85. The parties should consult their litigation support personnel concerning encryption or other security options.

iv. what steps will be taken to ensure the security of any website or other electronic repository against unauthorized access;

v. what steps will be taken at the conclusion of the case to remove discovery materials from a website or similar repository; and

vi. what steps will be taken at the conclusion of the case to remove or return ESI discovery materials from the recipient's information system(s), or to securely archive them to prevent unauthorized access.

Note: Because all parties want to ensure that ESI discovery is secure, the Department of Justice, Federal Defender Offices, and CJA counsel are compiling an evolving list of security concerns and recommended best practices for appropriately securing discovery. Prosecutors and defense counsel with security concerns should direct inquiries to their respective ESI liaisons,[86] who, in turn, will work with their counterparts to develop best practice guidance.

q. **Other issues.** The parties should address other issues they can anticipate, such as protective orders, "claw-back" agreements[87] between the government and criminal defendant(s), or any issues related to the preservation or collection of ESI discovery.

r. **Memorializing agreements.** The parties should memorialize any agreements reached to help forestall later disputes.

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86. Federal Defender Organizations and CJA panel attorneys should contact Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org. Prosecutors should contact Andrew Goldsmith (National Criminal Discovery Coordinator) at Andrew.Goldsmith@usdoj.gov or John Haried (Assistant National Criminal Discovery Coordinator) at John.Haried@usdoj.gov.

87. A "claw-back" agreement outlines procedures to be followed to protect against waiver of privilege or work-product protection due to inadvertent production of documents or data.

s. **Notice to court.**

i. *Preparing for the meet-and-confer.* A defendant who anticipates the need for technical assistance to conduct the meet-and-confer should give the court adequate advance notice if it will be filing an ex parte funds request for technical assistance.

ii. *Following the meet-and-confer.* The parties should notify the court of ESI discovery production issues or problems that they anticipate will significantly affect when ESI discovery will be produced to the receiving party, when the receiving party will complete its accessibility assessment of the ESI discovery received,[88] whether the receiving party will need to make a request for supplemental funds to manage ESI discovery, or the scheduling of pretrial motions or trial.

6. Production of ESI Discovery

a. **Paper Materials.** Materials received in paper form may be produced in that form,[89] made available for inspection, or, if they have already been converted to digital format, produced as electronic files that can be viewed and searched. Methods are described below in paragraph 6(b).

b. **Electronic production of paper documents.** Three possible methodologies:

i. *Single-page TIFFs.* Production in TIFF and OCR format consists of the following three elements:

(1) Paper documents are scanned to a picture or image that produces one file per page. Documents should be unitized. Each elec-

88. *See* paragraph 5(o) of the Strategies, above.

89. The decision whether to scan paper documents requires striking a balance between resources (including personnel and cost) and efficiency. The parties should make that determination on a case-by-case basis.

tronic image should be stamped with a unique page label or Bates number.

(2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as image file.

(3) Load files that tie together the images and text.

ii. *Multi-page TIFFS.* Production in TIFF and OCR format consists of the following two elements:

(1) Paper documents are scanned to a picture or image that produces one file per document. Each file may have multiple pages. Each page of the electronic image should be stamped with a unique page label or Bates number.

(2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as the image file.

iii. *PDF.* Production in multi-page, searchable PDF format consists of the following one element:

(1) Paper documents scanned to a PDF file with text generated by OCR included in the same file. This produces one file per document. Documents should be unitized. Each page of the PDF should be stamped with a unique Bates number.

iv. *Note re: color documents*. Paper documents should not be scanned in color unless the color content of an

individual document is particularly significant to the case.[90]

c. **ESI production.** Three possible methodologies:

i. *Native files as received.* Production in a native file format without any processing consists of a copy of ESI files in the same condition as they were received.

ii. *ESI converted to electronic image.* Production of ESI into a TIFF or PDF and extracted text format consists of the following four elements:

(1) Electronic documents converted from their native format into a picture/image. The electronic image files should be computer-generated, as opposed to printed and then imaged. Each electronic image should be stamped with a unique Bates number.

(2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.

(3) Metadata (*i.e.*, information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry-standard format. The metadata must include information about structural relationships between documents, *e.g.*, parent–child relationships.

(4) Load files that tie together the images, text, and metadata.

90. Color scanning substantially slows the scanning process and creates huge electronic files, which consume storage space, making the storage and transmission of information difficult. An original signature, handwritten marginalia in blue or red ink, and colored text highlights are examples of color content that may be particularly significant to the case.

iii. *Native files with metadata.* Production of ESI in a processed native-file format consists of the following four elements:

(1) The native files.

(2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.

(3) Metadata (*i.e.*, information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry-standard format. The metadata must include information about structural relationships between documents, *e.g.*, parent–child relationships.

(4) Load files that tie together the native file, text, and metadata.

d. **Forensic images of digital media.** Forensic images of digital media should be produced in an industry-standard forensic format, accompanied by notice of the format used.

e. **Printing ESI to paper.** The producing party should not print ESI (including TIFF images or PDF files) to paper as a substitute for production of the ESI unless agreed to by the parties.

f. **Preservation of ESI materials received from third parties**. A party receiving potentially discoverable ESI from a third party should, to the extent practicable, retain a copy of the ESI as it was originally produced in case it is subsequently needed to perform quality control or verification of what was produced.

g. **Production of ESI from third parties.** ESI from third parties may have been received in a variety of formats, for example, in its original format (native, such as Excel or Word), as an image (TIFF or PDF), as an image with searchable text (TIFF or PDF with OCR text), or as a

combination of any of these. The third party's format can affect or limit the available options for production as well as what associated information (metadata) might be available. ESI received from third parties should be produced in the format(s) it was received or in reasonably usable format(s). ESI received from a party's own business records should be produced in the format(s) in which it was maintained or in reasonably usable form(s). The parties should explore what formats of production[91] are possible and appropriate and discuss what formats can be generated. Any format selected for producing discovery should, if possible and appropriate, conform to industry standards for the format.

h. **ESI generated by the government or defense.** Paragraphs 6(f) and 6(g) do not apply to discoverable materials generated by the government or defense during the course of their investigations (*e.g.*, demonstrative exhibits, investigative reports and witness interviews—see subparagraph i, below, etc.) because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, and the parties' evolving technological capabilities. Thus, such materials may be produced differently from third-party ESI. However, to the extent practicable, this material should be produced in a searchable and reasonably usable format. Parties should consult with their investigators in advance of preparing discovery to ascertain the investigators' ESI capabilities and limitations.

i. **Investigative reports and witness interviews.** Investigative reports and witness interviews may be produced in paper form if they were received in paper form or if the final version is in paper form. Alternatively, they may be produced as electronic images (TIFF images or PDF files),

91. An example of a format of production might be the production of TIFF images, OCR text files, and load files created for a specific software application. Another format of production would be native-file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases.

particularly when needed to accommodate any necessary redactions. Absent particular issues such as redactions or substantial costs or burdens of additional processing, electronic versions of investigative reports and witness interviews should be produced in a searchable text format (such as ASCII text, OCR text, or plain text (.txt)) in order to avoid the expense of reprocessing the files. To the extent possible, the electronic image files of investigative reports and witness interviews should be computer-generated (as opposed to printed to paper and then imaged) in order to produce a higher-quality, searchable text, which will enable the files to be more easily searched and more cost-effectively utilized.[92]

j. **Redactions**. ESI and/or images produced should identify the extent of redacted material and its location within the document.

k. **Photographs and video and audio recordings**. A party producing photographs or video or audio recordings that either were originally created using digital devices or have previously been digitized should disclose the digital copies of the images or recordings if they are in the producing party's possession, custody or control. When technically feasible and cost-efficient, photographs and video and audio recordings that are not already in a digital format should be digitized into an industry-standard format if and when they are duplicated. The producing party is not required to convert materials obtained in analog format to digital format for discovery.

l. **Test runs.** Before producing ESI discovery, a party should consider providing samples of the production format for a test run and, once a format is agreed upon, produce all ESI discovery in that format.

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92. For guidance on making computer-generated versions of investigative reports and witness interview reports, see the description of production of TIFF, PDF, and extracted text formats in paragraphs 6(b)(ii)(1) and (ii).

m. **Access to originals.** If the producing party has converted paper materials to digital files, converted materials with color content to black and white images, or processed audio, video, or other materials for investigation or discovery, it should provide reasonable access to the originals for inspection and/or reprocessing.

7. Transmitting ESI Discovery

a. ESI discovery should be transmitted on electronic media of sufficient size to hold the entire production, for example, a CD, DVD, or thumb drive.[93] If the size of the production warrants a large-capacity hard drive, then the producing party may require the receiving party to bear the cost of the hard drive and to satisfy requirements for the hard drive that are necessary to protect the producing party's IT system from viruses or other harm.

b. The media should be clearly labeled with the case name and number, the producing party, a unique identifier for the media, and a production date.

c. A cover letter should accompany each transmission of ESI discovery providing basic information, including the number of media, the unique identifiers of the media, a brief description of the contents (including a table of contents if created), any applicable bates ranges or other unique production identifiers, and any necessary passwords to access the content. Passwords should not be in the cover letter accompanying the data, but in a separate communication.

d. The producing party should retain a write-protected copy of all transmitted ESI as a preserved record to resolve any subsequent disputes.

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93. Rolling productions may, of course, use multiple media. The producing party should avoid using multiple media when a single media will facilitate the receiving party's use of the material.

e. **Email transmission.** When considering transmission of ESI discovery by email, the parties' obligation varies according to the sensitivity of the material, the risk of harm from unauthorized disclosure, and the relative security of email versus alternative transmission. The parties should consider three categories of security:

   i. *Not appropriate for email transmission*: Certain categories of ESI discovery are never appropriate for email transmission, including, but not limited to, certain grand jury materials; materials affecting witness safety; materials containing classified, national security, homeland security, tax return, or trade secret information; or similar items.

   ii. *Encrypted email transmission*: Certain categories of ESI discovery warrant encryption or other secure transmission due to their sensitive nature. The parties should discuss and identify those categories in their case. This would ordinarily include, but not be limited to, information about informants, confidential business or personal information, and information subject to court protective orders.

   iii. *Unencrypted email transmission*: Other categories of ESI discovery not addressed above may be appropriate for email transmission, but the parties always need to be mindful of their ethical obligations.[94]

8. Coordinating Discovery Attorney

Coordinating Discovery Attorneys (CDAs) are AOUSC-contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant

94. Illustrative of the security issues in the attorney–client context are ABA Op. 11-459 (Duty to Protect the Confidentiality of E-mail Communications with One's Client) and ABA Op. 99-413 (Protecting the Confidentiality of Unencrypted E-Mail).

cases. The CDAs may be appointed by the court to provide additional in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document-management assistance. They can serve as a primary point of contact for the U.S. Attorney's Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If you have any questions regarding the services of a CDA, please contact either Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org.

9. Informal Resolution of ESI Discovery Matters

No additional commentary.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

See sections 5(f) (Confidential and personal information), 5(p) (ESI security), and 7(e) (Email transmission) of the Strategies for additional guidance.

11. Definitions

To clearly communicate about ESI, it is important that the parties use ESI terms in the same way. Below are common ESI terms used when discussing ESI discovery:

a. **Cloud computing.** With cloud computing, the user accesses a remote computer hosted by a cloud service provider over the Internet or an intranet to access software programs or create, save, or retrieve data, for example, to send messages or create documents, spreadsheets, or databases. Examples of cloud computing include Gmail, Hotmail, Yahoo! Mail, Facebook, and online banking.

b. **Coordinating Discovery Attorney (CDA)**. An AOUSC-contracted attorney who has technological know-

ledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant cases, and who may be appointed by a court in selected multiple-defendant cases to assist CJA panel attorneys and/or FDO staff with discovery management.

c. **Document unitization.** Document unitization is the process of determining where a document begins (its first page) and ends (its last page), with the goal of accurately describing what was a "unit" as it was received by the party or was kept in the ordinary course of business by the document's custodian. A "unit" includes attachments—for example, an email with an attached spreadsheet. Physical unitization utilizes actual objects such as staples, paper clips, and folders to determine pages that belong together as documents. Logical unitization is the process of human review of each individual page in an image collection using logical cues to determine pages that belong together as documents. Such cues can be consecutive page numbering, report titles, similar headers and footers, and other logical cues.

d. **ESI (Electronically Stored Information).** Any information created, stored, or utilized with digital technology. Examples include, but are not limited to, word-processing files, e-mail and text messages (including attachments); voicemail; information accessed via the Internet, including social networking sites; information stored on cell phones; information stored on computers, computer systems, thumb drives, flash drives, CDs, tapes, and other digital media.

e. **Extracted text.** The text of a native file extracted during ESI processing of the native file, most commonly when native files are converted to TIFF format. Extracted text is more accurate than text created by the OCR processing of document images that were created by scanning and will therefore provide higher quality search results.

f. **Forensic image (mirror image) of a hard drive or other storage device.** A process that preserves the en-

tire contents of a hard drive or other storage device by creating a bit-by-bit copy of the original data without altering the original media. A forensic examination or analysis of an imaged hard drive requires specialized software and expertise to both create and read the image. User created files, such as email and other electronic documents, can be extracted, and a more complete analysis of the hard drive can be performed to find deleted files and/or access information. A forensic or mirror image is not a physical duplicate of the original drive or device; instead it is a file or set of files that contains all of the data bits from the source device. Thus a forensic or mirror image cannot simply be opened and viewed as if you were looking at the original device. Indeed, forensic or mirror images of multiple hard drives or other storage devices can be stored on a single hard drive of sufficient capacity.

g. **Image of a document or document image.** An electronic "picture" of how the document would look if printed. Images can be stored in various file formats, the most common of which are TIFFs and PDFs. Document images, such as TIFFs and PDFs, can be created directly from native files or created by scanning hard copy.

h. **Load file.** A cross-reference file used to import images or data into databases. A data load file may contain Bates numbers, metadata, paths to native files, coded data, and extracted or OCR text. An image load file may contain document boundary, image type, and path information. Load files must be obtained and provided in software-specific formats to ensure they can be used by the receiving party.

i. **Metadata.** Data that describes characteristics of ESI, for example, the author, date created, and date last accessed of a word processing document. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image. Metadata can describe how, when and by whom ESI was created, accessed, modified, formatted, or collected. Metadata can be supplied by applications, users, or the file system, and it can be altered

intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Metadata is found in different places and in different forms. Some metadata, such as file dates and sizes, can easily be accessed by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Note that some metadata may be lost or changed when an electronic copy of a file is made using ordinary file-copy methods.

j. **Native file.** A file as it was created in its native software, for example a Word, Excel, or PowerPoint file, or an email in Outlook or Lotus Notes.

k. **OCR (Optical Character Recognition).** A process that converts a picture of text into searchable text. The quality of the created text can vary greatly depending on the quality of the original document, the quality of the scanned image, the accuracy of the recognition software, and the quality control process of the provider. Generally speaking, OCR does not handle handwritten text or text in graphics well. OCR conversion rates can range from 50–98% accuracy depending on the underlying document. A full page of text is estimated to contain 2,000 characters, so OCR software with even 90% accuracy would create a page of text with approximately 200 errors.

l. **Parent–child relationships.** Related documents are described as having a parent–child relationship, for example, where the email is the parent and an attached spreadsheet is the child.

m. **PDF (Portable Document Format).** A file format created by Adobe that allows a range of options, including electronic transmission, viewing, and searching.

n. **TIFF (Tagged Image File Format).** An industry-standard file format for storing scanned and other digital black-and-white, grey-scale, and full-color images.

ESI Discovery Production Checklist

- ☐ Is this a case where the volume or nature of ESI significantly increases the case's complexity?
- ☐ Does this case involve classified information?
- ☐ Does this case involve trade secrets, or national security or homeland security information?
- ☐ Do the parties have appropriate technical advisors to assist?
- ☐ Have the parties met and conferred about ESI issues?
- ☐ Have the parties addressed the format of ESI being produced? Categories may include:
    - ☐ Investigative reports and materials
    - ☐ Witness statements
    - ☐ Tangible objects
    - ☐ Third-party ESI digital devices (computers, phones, etc.)
    - ☐ Photos, video and audio recordings
    - ☐ Third-party records
    - ☐ Title III wiretap information
    - ☐ Court records
    - ☐ Tests and examinations
    - ☐ Experts
    - ☐ Immunity and plea agreements
    - ☐ Discovery materials with special production considerations
    - ☐ Related matters
    - ☐ Discovery materials available for inspection but not produced digitally
    - ☐ Other information
- ☐ Have the parties addressed ESI issues involving:
    - ☐ Table of contents?
    - ☐ Production of paper records as either paper or ESI?
    - ☐ Proprietary or legacy data?
    - ☐ Attorney–client, work-product, or other privilege issues?
    - ☐ Sensitive confidential, personal, grand jury, classified, tax return, trade secret, or similar information?

- ☐ Whether email transmission is inappropriate for any categories of ESI discovery?
- ☐ Incarcerated defendant's access to discovery materials?
- ☐ ESI discovery volume for receiving party's planning purposes?
- ☐ Parties' software or hardware limitations?
- ☐ Production of ESI from third-party digital devices?
- ☐ Forensic images of ESI digital devices?
- ☐ Metadata in third-party ESI?
- ☐ Redactions?
- ☐ Reasonable schedule for producing party?
- ☐ Reasonable schedule for receiving party to give notice of issues?
- ☐ Appropriate security measures during transmission of ESI discovery, e.g., encryption?
- ☐ Adequate security measures to protect sensitive ESI against unauthorized access or disclosure?
- ☐ Need for protective orders, claw-back agreements, or similar orders or agreements?
- ☐ Collaboration on sharing costs or tasks?
- ☐ Need for receiving party's access to original ESI?
- ☐ Preserving a record of discovery produced?

☐ Have the parties memorialized their agreements and disagreements?

☐ Do the parties have a system for resolving disputes informally?

☐ Is there a need for a designated discovery coordinator for multiple defendants?

☐ Do the parties have a plan for managing/returning ESI at the conclusion of the case?

Appendix C
First Appearance e-Discovery Colloquy

Appendix C: First Appearance e-Discovery Colloquy

At the first appearance of a defendant and after appointment of counsel, engage parties in the following colloquy concerning e-discovery.

A. Ask the **prosecutor** about possible e-discovery in the case, and generally how the government will proceed:

1. Does the government intend to produce any discovery in electronic formats?
2. Does the volume or nature of the government's electronic discovery significantly increase the complexity of the case?
3. Are you familiar with the ESI Protocol?
4. Are you going to utilize the ESI Protocol?

B. Ask **defense counsel** about familiarity with managing e-discovery, and generally how the defense will proceed:

1. Are you familiar with the ESI Protocol?
2. Do you have a copy of the ESI Protocol to rely on as you work through the e-discovery? If not, the government can provide a copy.
3. What is your experience with complex e-discovery cases?
4. Are you familiar with various software products and e-discovery services that can be used to review and organize e-discovery? Have you used them before?
5. Have you worked with litigation support, paralegals, or IT staff before to review e-discovery?
6. Do you presently have litigation support, paralegals, or IT staff who can work with you to review and organize electronic evidence? If not, you may need to decide what type of expert or experts you will need. Do you know how to do that?

C. Engage **both parties** in a discussion of how they will cooperatively address complex e-discovery:

1. Are you utilizing the ESI Protocol?
2. Have you already had a meet-and-confer to address e-discovery issues? If so, do you have any agreements or a discovery plan? If not, what is your plan for addressing e-discovery issues?
3. Will the volume or nature of the e-discovery potentially affect:
    a. Speedy trial deadlines for this case?
    b. Scheduling pretrial motions?
    c. Scheduling trial?

D. Address **all attorneys** about what the court expects of them in managing a complex e-discovery criminal case:

1. I expect you already have, or will promptly gain, an adequate understanding of and adequate technical assistance in e-discovery matters.
2. I expect the lawyers on this case to manage electronic discovery effectively, efficiently, and responsibly, and to seek cost savings.
3. I also expect the lawyers on this case to determine what software programs and expert assistance you need to review the discovery. If you do not know what type of expert to retain or what software programs to use, you should consult with someone knowledgeable about e-discovery before making those decisions.
4. While the lawyers may, and should, employ litigation support, paralegals, and/or IT staff, ultimately, the *lawyers* are responsible for e-discovery decisions made in this case.
5. I encourage all parties to utilize a collaborative approach to e-discovery based upon the mutual

and interdependent responsibilities of the opposing parties. The ESI Protocol offers a model of such an approach.

6. An important part of the process is a meet-and-confer discussion about the e-discovery issues in this case. I encourage you to use the checklist at the end of the ESI Protocol during your meet-and-confer session. For scheduling purposes, some of the key steps to pay attention to are:
    a. The parties should discuss a reasonable e-discovery production schedule.
    b. Defense counsel should be proactive about testing the accessibility of the e-discovery production when it is received, and promptly notify the government of any problems in accessing the materials.
    c. If defense counsel determines that additional funds for expert assistance are needed, that needs to be brought to the court's attention promptly.
7. I expect that the parties will promptly notify the court of any e-discovery issues that might reasonably affect speedy trial deadlines, or the scheduling of pretrial motions or trial.

E. If there are **CJA attorneys** appointed to defend one or more defendants, address funding issues with them:

1. If you will be hiring expert assistance to organize and review the e-discovery, have them help you decide on a realistic estimation of the time that they will need to do so. If that exceeds the expert's costs "cap," file an ex parte, sealed motion asking to exceed the capped amount, explaining the work that would be done and how you or they arrived at that cost estimate.

F. If there are multiple defendants (so multiple defense counsel) in the case, the advisability of coordinating e-discovery among defendants should be raised at the first appearance. This gives counsel time to discuss and decide potential coordination before a meet-and-confer session.

1. I am *not* ordering you to do this, but you may want to consider whether to designate one defense attorney to manage e-discovery.

G. Advise **defense counsel** about the availability of resources to help guide them in managing complex e-discovery:

1. If you need advice and guidance about getting started, there are resources available to help you decide how to productively get the information you need from the e-discovery. The National Litigation Support Team, part of the Defender Services Office (DSO) of the Administrative Office of the U.S. Courts,[95] is available to provide guidance about how to efficiently, and cost-effectively, manage e-discovery. If you are not familiar with the technology and expert assistance you will need, you should contact them right away, well before the meet-and-confer session. They can also tell you about contracts they have secured for reduced prices on some of the software programs that may help you review and organize the evidence.

2. Another resource available to defender offices and CJA counsel is appointment of a coordinating discovery attorney. Those handling voluminous or complex e-discovery (especially when there are multiple defendants) can have an attorney expert in e-discovery appointed to work with defense counsel to help coordinate, organize, and process e-discovery. After exploring the nature and vol-

95 The National Litigation Support Team can be contacted at (510) 637-3500.

ume of e-discovery, and what it will take for defense counsel to review it, if you think this case needs a coordinating discovery attorney appointed, then file an ex parte sealed motion explaining why, and the court will consider it.

H. Finally, the court may decide to set a discovery status conference (giving parties enough time to secure expert assistance if needed, and to hold a meaningful meet-and-confer session) to verify that e-discovery is moving smoothly, cooperatively, and effectively. Inform **all parties**:

1. I am going to schedule a discovery status conference to follow up on the progress the parties are making with the e-discovery, and ensure that any problems with it are resolved early.
2. I encourage you to conduct your meet-and-confer session well before the discovery status conference so that you can address and resolve any issues.

Appendix D
Discovery Status Conference e-Discovery Colloquy

Appendix D: Discovery Status Conference e-Discovery Colloquy

Having already addressed e-discovery issues at the first appearance, the court may schedule a discovery status conference to confirm whether e-discovery is being addressed by parties intelligently, efficiently, and cost-effectively. At a discovery status conference, engage parties in the following colloquy concerning the status of their e-discovery.

A. In cases with multiple defendants, the court would have asked parties to consider whether one defense attorney should be responsible for receiving, distributing, and possibly coordinating work on e-discovery for all defense teams. The court can follow up on that by asking **all multiple-defense counsel**:

   1. Is this a case where management of the e-discovery would benefit from having either:

      a. A single defense attorney receiving e-discovery from the government for all defendants and being responsible for disseminating it to all defendants; or

      b. A coordinating discovery attorney appointed by the court?

   2. If one of you will manage the discovery for all defendants, have you already selected that attorney? If you want to use a coordinating discovery attorney, have you contacted the National Litigation Support Team to ensure that doing so is appropriate for this case?

B. The court can then check on the parties' success in trying to decide and resolve e-discovery issues. To that end, it should address **both parties**:

   1. Did the parties conduct a meet-and-confer session?

   2. Did you utilize the ESI Protocol?

   3. Did you have litigation support specialists (if needed) to help you decide how to manage the ESI dis-

covery? Did you have your litigation support specialists with you at the meet-and-confer session?

4. Were the parties able to reach decisions as to when, how, and in what format the e-discovery will be produced?
5. Were the parties able to reach decisions on other e-discovery issues (such as those listed in the checklist of the ESI Protocol)?

C. Verify with the **government** whether there is an e-discovery production schedule agreed upon:

1. Do you have an e-discovery production schedule?
   a. What is it?
   b. Have you started producing e-discovery to the defense?
   c. Do you anticipate a "rolling" production of e-discovery?

D. The court can also verify with the defense whether it has performed an initial review of any disclosures to ascertain that it can access and utilize the ESI. Then the court should inquire of **defense counsel** whether the defense has an e-discovery production schedule that was agreed upon:

1. Do you have a schedule as to when you will do a summary initial review of the e-discovery (to ascertain that you can open and use it as produced)?
   a. What is it?
   b. If production has started, have you performed a review of the e-discovery to verify that you can access and use it?
2. You may have e-discovery to disclose to the government. Did you already discuss any defense e-discovery in the meet-and-confer session?
3. Do you have an e-discovery production schedule?

a. What is it?

b. Have you started producing e-discovery to the government?

c. Do you anticipate a "rolling" production of discovery?

E. If the parties did not accomplish all that was necessary, the court may want to reiterate to all parties some of its advisements about expectations and resources from the First Appearance e-Discovery Colloquy, sections D–G, contained in Appendix C.

F. The court may decide to inquire about any unresolved discovery issues or disputes. If so, it could ask **both parties**:

1. Were all e-discovery issues resolved by the meet-and-confer session? Were there any e-discovery issues that were not resolved?

G. If there are unresolved issues, the court may want to set another discovery status conference to settle those matters.

The Federal Judicial Center

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The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

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Guidance for the Provision of ESI to Detainees

Joint Electronic Technology Working Group
October 25, 2016

Contents

Guidance

I. An Approach to Providing e-Discovery to Federal Pretrial Detainees

After the publication of the 2012 JETWG Recommendations for ESI Discovery in Federal Criminal Cases, the Joint Electronic Technology Working Group turned to specific challenges regarding the delivery of discovery in digital format ("e-discovery" or "ESI"—electronically stored information) to indigent pretrial detainees.[1] Most information is now created, stored, and processed electronically, and most discovery in federal criminal cases is now in digital format. But most facilities that house federal pretrial detainees remain structured to enable detainees to review paper discovery, not digital discovery. With proper safeguards, we believe that the provision of e-discovery to pretrial detainees—inevitable in any event—will also result in greater efficiency, reduced delay, and cost savings for the entire criminal justice system. We believe that facilities must necessarily transition to enabling pretrial detainees to review e-discovery, but we also recognize systemic institutional reasons, often influenced by limited resources, why this evolution from paper-based review to e-discovery review will take time to implement. In the meantime, we have developed some practical guidance for jurisdictions to address the specific challenges in delivering e-discovery in digital format. This Guidance reflects the observations of Government and defense attorneys, litigation support experts, Bureau of Prisons and U.S. Marshal officials, and United States Magistrate Judges, who participated in the project. [2] As with the JETWG Recommendations, this Guidance is intended to be practical, and is not intended to create or define any legal rights. Baseline understandings for the provision of ESI in criminal discovery remain the 2012 JETWG Recommendations. Comments and developments from the field relating to this Guidance may be freely sent to the national points of contact listed later.

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[1] While this project was initiated with concern for the provision of ESI to indigent detainees, much of what is said here will also be applicable to detainees with retained counsel, because the main limitations on provision of ESI to detainees are not likely to derive from the cost of equipment, but rather from constraints within the facility on the management and use of equipment. At the opposite end of the spectrum, detained defendants who have refused counsel will present additional issues we have not attempted to address in this first edition of this Guidance. That being stated, all stakeholders must recognize their obligations to provide to all pretrial detainees access to their criminal electronic discovery.

[2] Members of the JETWG subcommittee addressing the provision of ESI to detainees include U.S. Magistrate Judges Laurel Beeler (N.D. Cal.) and Jonathan W. Feldman (W.D.N.Y.); Administrative Office of the U.S. Courts, Defender Services Office, National Litigation Support Administrator Sean Broderick; Federal Defender Donna Elm, (M.D.Fla.); Bureau of Prisons Assistant General Counsels Corinne Nastro and Monya Phillip; U.S. Marshals Service Prisoner Operations Division Assistant Chief Heather Lowry; Associate Deputy Attorney General and National Criminal Discovery Coordinator Andrew Goldsmith, Assistant U.S. Attorneys John Haried, Criminal eDiscovery Coordinator at the Executive Office for U.S. Attorneys; John McEnany (S.D.N.Y.); Fred Sheppard (S.D. Cal.); David Joyce (D.Me.); and U.S. Attorney's Office Litigation Support Manager Craig Bowman (W.D.N.Y.).

The U.S. Marshals Service ("USMS") has general responsibility for the custody of federal pretrial detainees. The USMS safeguards approximately 10,000 detainees in Federal Bureau of Prisons ("BOP") facilities; another 10,000 detainees in private facilities under contract to the USMS; and more than 31,000 detainees in approximately 1,800 state and local facilities under USMS contract.[3] Discovery review computers with a standardized configuration are available in most BOP facilities, but there is currently no single standard for ESI review equipment in the state, local and private USMS contract facilities. We do not now foresee development of a single protocol for the provision of ESI to pretrial detainees, given the multitude of facilities; the variety in file format and volume of ESI; the equipment available within, or acceptable to, a given facility; inventory control and technical support staffing within the facility; and other considerations, such as prisoner separations and protective orders. On the other hand, growing experience shows that as long as due regard is given at the local level to the accommodations needed to introduce ESI into a given facility, workable procedures can be developed to handle the common run of e-discovery. This Guidance is intended to aid those necessary accommodations by identifying the specific concerns of each of the various stakeholders, as well as the areas where each stakeholder may need to accept specific responsibilities, to ensure that detained defendants get adequate access to e-discovery in a workable and collaborative manner. This Guidance will also introduce some of the technical aspects of providing ESI to detainees, for example, how, with commonly available software, and some expertise, a PC[4] laptop can be configured to permit review of the most common types of criminal e-discovery.

II. Special Concerns in the Delivery of ESI to Detainees

In preparing this Guidance, we identified the following special concerns in the delivery of ESI to detainees:

A. Defense Concerns

To mount an effective defense, a represented defendant who is detained pending trial must generally have the opportunity to personally review some or all of the discovery and disclosure, which is now commonly in ESI format. The defendant may need to review it in discussion with his counsel or expert as well. But defense counsel may not have the equipment or personnel to do

[3] *See* United States Marshals Service Fact Sheet, Prisoner Operations 2016 and Facts & Figures 2016, available at https://www.usmarshals.gov/duties/factsheets. (Note that the Department of Justice is phasing out the use of private facilities. *See* https://assets.documentcloud.org/documents/3027877/Justice-Department-memo-announcing-announcing.pdf.)

[4] Because the Department of Justice (including the Bureau of Prisons), like most other government agencies, uses PC machines with Windows operating systems, defense teams are encouraged to use PC devices to manage e-discovery. PC devices are typically less expensive than Apple devices; conversion and compatibility issues will be lessened; and problems will be easier to troubleshoot if all parties use PC/Windows devices.

so, and the client who can afford counsel may not be able to additionally pay counsel to bring discovery for him or her to review.

B. CJA and FDO Budgeting Concerns

Criminal Justice Act ("CJA") administrators, including the Court, which administers the CJA panel in many jurisdictions, and Federal Defender Organizations ("FDOs") (including both Federal Public Defender Organizations and Community Defender Organizations that provide indigent defense representation services), have an interest in avoiding the expenses incurred when an attorney or other member of the defense team must travel to lengthy legal visits merely to permit a detained client to review ESI on a defense team device. Subject to facility concerns discussed below, an investment in devices for use within a facility can result in substantial savings in this regard.

C. Court Concerns

The Court has an overriding interest in the delivery of e-discovery to detainees, among other reasons to avoid delays in cases resulting from the inability of detainees to access and review discovery necessary to participate in their defense. The Court also has an interest in minimizing discovery costs and discovery litigation and in avoiding collateral issues, such as motions for new counsel by detainees complaining about delays in reviewing discovery.

D. Facility Concerns

Constraints on detention facilities—the original bricks-and-mortar institutions—will probably pose the greatest challenges. These include most notably:

Personnel. The management of inmate movement, separation, and monitoring is personnel intensive and subject to strict scheduling. Maintaining and tracking devices and media; loading (and updating) discovery data; re-charging portable devices, etc., make intensive demands on IT personnel. But facilities may have little or no flexibility with available personnel.

Security. Weaponization of optical disk shards and other equipment, is a concern. Also, writable media may be used to pass messages to another inmate. Wireless and Internet capabilities have to be removed from devices used by detainees. (The BOP has a national policy against Internet and WiFi access for inmates.) Counsel (principally the Government) will need to screen ESI for disruptive contraband, such as pornography.

Sudden Change. Facilities' procedures can be changed to meet new needs. But attempts to suddenly impose new procedures to handle special circumstances may result in unintended breaches of standard security procedures, to potential great risk.

Space. It is optimal to allow inmates time and space to view their electronic discovery, and facilities should designate an area for discovery review. Consistent with the need to maintain security in a facility (to include, where appropriate, visual monitoring), efforts should be made to enable detainees to review their electronic discovery individually.

E. U.S. Marshals Service Concerns

At the national level, the USMS contracts with facilities to house pretrial detainees. At the local level, the USMS transports and safekeeps detainees. Transportation may be to and from court, or involve transferring a detainee from one facility to another. An occasionally used alternative to in-institution review of ESI is transporting inmates to locations that can accommodate discovery review. But that option has significant drawbacks of concern to the USMS. Specifically, given personnel and other restrictions, the Marshal has little capacity to transport detainees to, and safeguard detainees at, special facilities for the review of ESI. (In some jurisdictions, transportation time to and from the facility will render that impossible in any event.) Further, a detainee may not be placed in a facility that has superior ESI review resources if that facility does not fit the security designation of the detainee. For the USMS, providing a means of reviewing e-discovery within the detaining facility is optimal.

F. Government Concerns

The provision of e-discovery to detainees, although well under way in many districts, remains a process in development nationally. The Government's main concern is that the provision of e-discovery to detainees, which involves both technical challenges and new security challenges including unauthorized dissemination of discovery materials within and outside of the institution, should not be viewed as something the Government can make happen by pushing a digital button. Instead, these Guidelines reflect the multiple considerations that must be taken into account in preparing and providing ESI to detention facilities. In addition—it scarcely bears noting—different United States Attorney's Offices ("USAOs") have at this time varying capabilities to process and troubleshoot the production of e-discovery.

III. Practical Steps

A. Government, Defense, Facility and Judicial Points of Contact/Working Group

Points of Contact ("POCs") and a Working Group. Identifying POCs at the institutions listed below is our most important recommendation. Through informal meetings and direct dealings on individual cases POCs will develop an understanding of what devices are most readily acceptable to or available at a facility, what file formats are most readily reviewable by a detainee, and what particular obstacles may need to be addressed. The court should establish a Working Group, consisting at the least of judicial, CJA, FDO, DOJ, BOP, and U.S. Marshal representatives, to stimulate that process and to provide a forum for periodic reporting on developments and issuing useful local guidance.

USAO and facility POCs, as representatives of two government entities, will likely have the most frequent and direct communication. Ideally the contacts should include senior IT or litigation support specialists directly involved in the preparation and delivery, and receipt and mounting, of ESI for detainees. Within facilities, an appropriate POC may be someone involved in making the ESI available to inmates, such as unit managers or correctional counselors. There should also be USAO and facility POCs at the management level who can address policy issues and requests for exceptions (e.g., wardens, associate wardens, agency counsel).

A USMS POC can be helpful in arranging for POCs to be designated in contract facilities and in suggesting other methods for the delivery of ESI.

Public Defenders and their IT or litigation support specialists, and knowledgeable CJA attorneys, are likely to be productive POCs who can help other defense counsel in their jurisdiction. Defense POCs will be especially knowledgeable about exactly what electronic media the defense team may bring to a given facility for client review, the practical issues attendant thereto, and detainee experiences with the process.

Within the judiciary, CJA Supervisory Attorneys or other CJA administrators may have an overview of how discovery ESI has been handled, and can be cognizant of measures, such as the provision of laptops for a given case, that may engender substantial savings. Even more significantly, a judicial POC will be helpful in convening project status meetings, evaluating local CJA issues, and serving as a conduit for the expression of concerns to and from the court. As noted above, we specifically recommend that the court convene a Working Group to share issues, developments and solutions in the area.

On a national level, the following POCs may help with unique questions, or just getting an inmate e-discovery review program started: the Department of Justice's National Criminal Discovery Coordinator, Associate Deputy Attorney General Andrew Goldsmith (Andrew.Goldsmith@usdoj.gov); Criminal eDiscovery Coordinator John Haried (John.Haried@usdoj.gov); Associate U.S. Attorney (SDNY) John McEnany (John.McEnany@usdoj.gov); Administrative Office of the U.S. Courts National Litigation Support Administrator Sean Broderick (sean_broderick@fd.org); Federal Public Defender (Tampa, Florida) Donna Lee Elm (donna_elm@fd.org); Bureau of Prisons Assistant General Counsels Corinne Nastro (cnastro@bop.gov) and Monya Phillip (maphillip@bop.gov); U.S. Marshals Service Prisoner Operations Division's Heather Lowry (Heather.Lowry@usdoj.gov).

B. Identify Facility e-Discovery Capabilities

Recognizing that any inventory will be imperfect and subject to unexpected change, a working compilation by the POCs of the following information can be very useful:

a. How facilities allow detainees to review discovery: how do they determine who needs to review discovery; how much time do they typically provide detainees to review discovery; where do they allow detainees to review discovery (cell, law library, etc.); do detainees review discovery alone or in a group; if devices are used, do detainees share devices?

b. Facility devices: inventory facility equipment, broken out by pertinent inmate housing unit. This would include specifications of devices available; specification of installed software (including version); location of devices; number of devices; management of inmate access to devices; and hours of availability.

c. Facility Internet access, WiFi coverage, and policies, applicable both to detainees and to attorney visits.

d. Facility device limitations: e.g., hardware or other limits on installing specialized reviewing software; inability of facility devices to handle hardware-encrypted drives or

software-encrypted media; read/write restrictions (affecting not only a detainee's ability to tag items, but also a device's ability to handle viewing software that requires write-access to function).

e. Inmate-permitted media and devices: identify devices and media that the facility will generally accept for an inmate to use in a given case: e.g., CDs, DVDs, thumb drives, hard drives, .mp3 players, laptops.

    (i) Identify facility restrictions on devices for inmates: e.g., software restrictions (no games); hardware restrictions (no wireless); no built-in camera; no built-in microphone; no capability of connecting to an Ethernet network connection.

    (ii) See the comment on laptops under Special Responsibilities of Facilities.

f. The method that the facility uses to secure and inventory devices and storage media: the manner of storage, checkout, and checkin of storage media; and which personnel are trained and available to handle these tasks.

g. The methodology (if any) the facility can follow to update discovery provided on a rolling basis. For example, is the facility able and willing to use USAfx (a secure Dropbox-like file sharing platform) to accept ESI for inmates? (Note that supplementing, updating, or replacing storage media in a case where ESI has already been made available to a detainee may be difficult.)

h. Attorney devices: identify devices and media the facility will generally permit defense teams to bring for client visit, and practicalities attendant thereto.

C. Starting Up

Districts that are just beginning to consider provision of ESI to detainees may profitably begin considering: first, the types of ESI that are most voluminous and yet come in the most easily readable formats (such as wiretap intercepts in common audio formats and .pdfs of documents); second, the devices that the facilities have or will accept for review of that ESI; third, if devices need to be procured, how that will be done (e.g., by CJA funds for a given detainee in a given case); fourth, how procured devices will be configured for security and viewing; and fifth, how the devices will be loaded with ESI.

IV. Special Responsibilities of Participants

As noted above, this Guidance is not intended to create or define any legal rights. This section is intended only to articulate what we see as the practical division of labor in the collaborative venture of providing ESI to pretrial detainees.

A. Special Responsibilities of the Government

Early ESI Case Assessment. As an investigation begins and develops, an AUSA will have an increasingly refined idea of what types of ESI will be gathered, what platforms will be used to manage, review and produce the ESI; and which defendants may be detained in which facilities. Using available information and consulting with POCs as appropriate, the Government should identify anticipated e-discovery issues and prepare—even before arrest—a plan for speedy and

efficient provision of e-discovery to anticipated detainees. This will include ESI expected to be gathered at the time of arrest, such as cellphone data and other search warrant material. The Government will then be in a position to make a considered proposal to the defense and the court regarding provision of e-discovery. (For such planning purposes, we note again that rolling discovery may be difficult for facilities to manage.)

Provision of Trusted-Source and Screened Media. To provide assurance to the facility, ESI media and devices may have to be prepared (although not necessarily purchased) by the Government, and delivered by the Government to the facility. The Government should also screen out or redact material that may be disruptive to the institution (e.g., victim information, PII, CI information, obscene images, trade secrets, etc.) before production of the material to the pretrial detainee. (Screening out images such as cellphone pictures from an initial production of ESI to detainees may also substantially reduce the volume of data that needs to be produced.)

B. Special Responsibilities of the Defense

In keeping with the ESI Protocol, we anticipate that the defense will be a knowledgeable and constructive participant in discussions and meet-and-confers on this subject. In cases where difficulties derive from the volume of or unusual technical issues concerning ESI, the defense will prioritize what materials (whether select portions or all of the discovery) it provides to its client. Given software tools that can search and review voluminous discovery, the defense may be able to identify key documentation for the defendant's review.

In cases where the defense has selected key documentation for the defendant to review, it may be necessary for the defense to deliver the selected e-discovery to the facility and facility staff directly, without going through the government, in order to avoid revealing its work-product selection to the Government. The same may be true where the defense investigation has generated its own ESI. Some BOP facilities allow a defense attorney to mail in ESI directly to inmates via the special mail process upon submission of a form certification that the material on the media is in fact discovery related to the federal criminal proceeding and has not been altered in any way. Similar arrangements, perhaps endorsed by a court order, or involving a mutually trusted vendor, may be possible to satisfy security concerns at other facilities.

C. Special Responsibilities of the Court

The Court will consider the need of counsel and detainees to have adequate opportunity to review discovery in setting a trial schedule. Recognizing that the detention facility is not a party to the criminal litigation, and that both facility management and ESI discovery involve inherent limitations, the Court should generally afford the Government attorney an adequate opportunity to investigate and respond to asserted discovery review problems (including an opportunity to confer with facility and USMS representatives) before entering an order imposing specific procedures to govern the delivery and review of detainee ESI discovery. In cases presenting unusual technical or logistical issues, the court may also need to mediate the practical difficulties in providing discovery and the defendant's need to adequately assist counsel. Judicial participation in the Working Group referenced above will help judges stay abreast of developments in this area.

D. Special Responsibilities of the Facility

The facility must recognize its obligation to provide a reasonable opportunity for detainees to review ESI discovery. The need to provide ESI to detainees should be emphasized in USMS contracts with state, local and private facilities. Because laptops are inexpensive, have substantial storage, and can be configured to permit review of a wide variety of file formats, all USMS contract facilities should undertake to allow laptops as a routine method of providing ESI to detainees. (Many BOP facilities have standalone computers for inmate use that have been specially configured to handle most forms of e-discovery which should make consideration of laptops at BOP facilities unnecessary except in the most unusual of cases. Other BOP facilities have allowed the use of portable hard drives depending on the type of case and the volume of discovery.)

E. Special Responsibilities of the U.S. Marshals Service

At a national level, and with a view to eventually developing standards, the U.S. Marshals Service should begin to consider inmate e-discovery access in selecting and contracting with detention providers. At the local level the U.S. Marshals Service should, consistent with its resources and primary duties, assist in proposing solutions to e-discovery challenges.

V. Technical Considerations for the Non-Specialist

Obviously, most of those involved in the provision of ESI to detainees are not technology specialists. But following are some of the more technical points that non-technical personnel involved in the process will need to understand. The Technical Appendices contain other more detailed information gathered during preparation of these Guidelines that may also be useful for those approaching the subject.

A. Devices and Device Configuration

When a facility is willing to acquire, or to accept a laptop from the Government and/or the defense, either as part of its inventory,[5] or for a particular defendant in a particular case, the laptop will need to be configured to meet security concerns as well as to serve as an effective ESI review platform. The appendix contains suggested hardware specifications and application configurations that may provide a starting point in this regard. Facilities interested in obtaining their own ESI review devices may explore kiosks (housing for a publicly-used computer) designed specifically for the prison environment. (In 2016, kiosks priced at about $2200.)

MP3 players, iPods, DVD players, etc., can be inexpensive, Internet-free devices for reviewing common audio, video, and some document formats. However, smart phones and tablets (with WiFi and Internet capabilities) are largely pushing such media out of the market place. Note that it is not easy to modify devices to eliminate wireless capabilities, which may be required by a facility. Where iPads or other tablets do seem advisable, secure mounting of such devices may be an option to consider. *See, e.g.*, http://www.imageholders.com/collections/ipad-kiosks-tablet-enclosures-

[5] Note that the BOP, because of the anti-supplementation principle of federal appropriations, cannot itself take ownership of a device from an outside source.

wall-mounted; http://www.lilitab.com/blogs/news/13361673-the-ultimate-guide-to-configuring-your-ipad-for-kiosk-use.

As frequently discussed herein, portable hard drives are inexpensive and may be an excellent choice for producing ESI to facilities where detainees have access to computers.

B. Common File Types and Review Possibilities

General Viewers and Players. ESI discovery can involve an almost overwhelming number of potential file formats. The list of file formats (see the appendix) compiled by the BOP for its July 2014 RFI for inmate electronic discovery support services, hardware, and software is daunting. On the positive side, it is encouraging how many file formats commercial viewers and players can support. By way of example, the files supported by Quick View Plus 13 Professional, and Windows Media Player 12, are also listed in the appendix.

Forensic Image Viewers. Seized media is often forensically imaged via AccessData's Forensic Toolkit® (FTK®) or Guidance Software's EnCase Forensic, both of which provide viewers that can be loaded onto a laptop to view forensic images contained in an attached hard drive. These viewers are not very simple to use, and it may be most effective to provide extracted user files. Extracted files may also be necessary where the underlying forensic image contains inappropriate material, such as pornography or hacker tools.

Native or Proprietary Formats. The extent to which user files must be viewable via native software; the existence of files in proprietary format; the significance of hyperlinks; and other matters not here imagined, will create additional issues. Application of this Guidance and of the 2012 JET-WG Recommendations will assist in bringing things down to manageable elements.

Litigation Support Databases. Databases such as Concordance, iPRO Eclipse SE, and Relativity (all commonly used by the Government) as well as CaseMap and Summation (commonly used by the Defense) may present a greater level of complexity. Concordance and iPRO Eclipse SE are desktop-based and can (subject to volume) be loaded onto a laptop. Relativity can export data for use on standalone devices. If an Internet (remote access)-based platform is used, the ability to export relevant portions to a laptop- or iPad-viewable format will have to be considered.

Read-Write Access. Some review platforms and programs, such as video players, require read-write access to the computer to function, for example to write .tmp files. This may require workarounds when write access to devices available to detainees is restricted.

Note-Taking by Detainees. Because many facilities, including BOP facilities, will not allow users write-access to discovery review devices for security and device-maintenance reasons, detainees will not be able to flag or tag documents electronically. Counsel should anticipate developing paper-based charts or forms that will facilitate flagging items of interest.

Remote (Web- or Cloud-Based) Data. Although data and electronic devices are increasingly configured to store and access data and software remotely—in the cloud—limitations or prohibitions on Internet access within facilities will largely preclude their use in providing e-discovery to detainees, at least in the foreseeable future. Accordingly, in selecting platforms for

attorney review, the ability to download data to standalone devices in a useable format for detainee review will remain key.

C. Encryption

In all instances a determination must be made whether the ESI can be produced in encrypted format (the Government default) and still be effectively reviewed; whether encrypted hard drives (e.g. Addonics) will be suitable; or whether data must be produced in unencrypted format, and any additional security measures that may entail.

Technical Appendices

I. Identification of Installed Software

A useful tool for the identification of software (and version) installed on a facility computer may be the Windows Management Instrumentation Command, e.g., running **`wmic product list brief`** at the command line.

II. E-Discovery Review Laptop Configuration Suggestions

A. General Suggestions

Where laptops are available for ESI review, following are some configuration suggestions:

- Hardware modifications—remove or disable
  - RJ-45 network jack for standard network cable
  - Wi-Fi cards/antennas. (Even if there is no WiFi in the facility, someone could possibly smuggle in a WiFi hotspot.
  - Phone modems (usually found only on older equipment).

- Processing and storage specifications
  - Processor: 1 gigahertz (GHz) or faster.
  - RAM: 1 gigabyte (GB) (32-bit) or 2 GB (64-bit)
  - Minimum Hard Drive Size: 250+GB, or even a partitioned drive with 500 GB D: drive.
  - Graphics card: Microsoft DirectX 9 graphics device with WDDM driver

- Operating System
  - Windows 10, which will soon be the standard in many federal agencies, and will not soon need to be upgraded.
    - Contains Windows Media Player (verify)

- Security Software, to reduce the possibilities for unauthorized use and to reset the laptop during reboot to its previous-state configuration, as set by the administrator.

  - Lockdown software, to inhibit users from making changes. For example,
    -Mirabyte http://www.mirabyte.com/en/products/frontface-lockdown-tool/features.html
    -Inteset Systems http://shop.inteset.com/lock-down-windows-with-inteset-secure-lockdown

  - Restore software, to reset the laptop during reboot to its previous-state configuration. For example:
    -Deep Freeze, http://www.faronics.com/products/deep-freeze/enterprise/
    -Reboot Restore RX (free, but additional testing required): http://www.horizondatasys.com/en/products_and_solutions.aspx?ProductId=18#Benefits

- Reviewing Software
    - Eclipse SE Data format. Where the Government has ESI in Eclipse SE format, the Government is licensed to use Eclipse Publish to create a stand-alone version of selected data to load onto a laptop. Commencing in summer 2016, the Government has been licensed to make Oracle's Outside In Viewer (which is used in Eclipse) available for viewing databases created via Eclipse Publish. The Outside In Viewer can handle hundreds of file formats, similar to Quick View Plus, whose supported file formats are listed below.
    - Custom video surveillance software, where it is easier to install a custom program, rather than to convert non-standard video files into a format viewable by standard Windows Media Player.
    - (This list is expected to change and grow.)

B. BOP July 2015 Specifications

For information only, to help guide thinking, the following is taken from BOP's February 2015 specifications for detainee discovery viewing devices inside BOP facilities:

1. Operating System and Software Security Features

a. Operating system

Windows 7 Professional

b. Third-Party Software

Romaco Timer (Free Commercial) is a utility used to set a time limit on the user usage. It is currently set to logoff the current user in two hours. Prior to being logged out the user will receive a prompt indicating that they have five minutes remaining before the system automatically logs them off. This mechanism was put in place to ensure that the needs of a large inmate population; needing the use of discovery workstations with a limited supply, are met. If no other inmate needs to use the workstation, a given inmate can log back in and use it. A new Timer created in Visual Basic (VB) may replace the Romaco Timer and help support future operating systems.

Reboot RX Free takes a snapshot of the pc environment.

Quick View Plus 12 (BOP Licensed) is a file viewer for a variety of different file formats.

VLC Player (Free Commercial) is a media player for playing a variety of different media formats not supported by Windows Media Player.

For The Record (FTR) software to support proprietary video.

2. Security Features

The security/lockdown of the e-discovery pc comes from Group Policies built into Windows 7. A Local Group Policy was created that is assigned to the "Users" group.[6] The policy is located in in the C:\Windows\system32\GroupPolicyUsers\ folder. Security features configured in the LGPO (Local Group Policy Object) for the inmate environment are:

- The C:\ drive is not visible to the user under Windows Explorer
- Disabled the use of programs that could be used to generate scripts and environment configuration changes such as Control Panel, cmd.exe, powershell.exe, notepad.exe, taskmanager.exe etc.
- Disabled writing to USB drives
- Disabled writing to CDR's
- Desktop right click disabled
- CTRL+ALT+DEL does not display any options such as Task Manager.
- Start Menu only shows "Log Off" option. "Log Off" option is tied to a batch file that forces the system to restart. This forces the system back to the original snapshot of the system in Reboot Restore RX.
- Profile folders such as My Documents, Picture, and Video etc. are accessible to the user. They can write to these locations. This helps support encrypted files that need to be extracted and written to the local drive.
- Desktop icons available are the My Computer, VLC Player, Windows Media Player, Quick View Plus 12 icons
- Drives available in the user environment are the local CDROM drive and any USB external drives plugged into the system.
- Added a visual security feature. Two distinct wallpapers were created to specify whether the current environment is a "Users" or an "Administrator". This will ensure the inmate is logged into the appropriate locked down environment.

[6] BOP's detailed list of Windows GPO settings is not reproduced here.

III. Common File Types and Review Applications

A. File Types Listed in the BOP July 2014 Electronic Discovery RFI

The following is taken from the July 7, 2014, BOP RFI for support services, hardware and software for inmate electronic discovery.,
https://www.fbo.gov/index?s=opportunity&mode=form&id=fa1f57c38041cf651e1297aeb33f295c&tab=core&_cview=1

The following introduction to the BOP RFI is a useful presentation of BOP thought and restrictions in this area.

> The Federal Bureau of Prisons (BOP), Information Technology Planning and Development Branch has created a Request for Information to seek information related to support services, hardware, and software for inmate electronic discovery (eDiscovery). The goal of this RFI is to obtain detailed information for a secure computing device which can be used by inmates to view discovery materials related to their criminal defense against federal prosecution or their civil litigation against a federal entity. The BOP seeks information on available solutions for an eDiscovery system that incorporates actual hardware, any necessary software to view litigation material, and support services for BOP IT staff to troubleshoot issues or seek repair of equipment. Interested parties shall not be reimbursed for any costs related to the development and submission of information in response to this RFI.
> . . . .
> These will be stand-alone read-only devices used to view as many different types of data as possible. The device should have the ability to receive updates to read additional types of data as needed. The task of updating the devices to include more capabilities could be done by the vendor or the vendor could provide a simple update for local staff to perform. These devices WILL NOT have internet connectivity.

Word Processing Formats
Adobe FrameMaker (MIF) 6.0, text only
Corel WordPerfect for Windows through X4
Lotus WordPro 96 – Millennium Edition 9.6, text only
Lotus Symphony Documents 1.2
Microsoft Windows Works through 4.0
Microsoft Word for Windows and Mac through 2010
Microsoft WordPad
Open Office Writer 2.0, 3.0
StarOffice Writer 5.2 - 9
ANSI Text 7 & 8 bit
ASCII Text 7 & 8 bit
EBCDIC all
HTML through 3.0
IBM Revisable Form Text all
Microsoft Rich Text Format (RTF)
Unicode Text all
WML 1.2
XML
MacWrite II 1.1
DOS Word Processors
DisplayWrite 2 & 3 (TXT) all
DisplayWrite 4 & 5 through Release 2.0
Professional Write through 2.1

Spreadsheet Formats
Corel QuattroPro for Windows through X4
Lotus 1-2-3 (DOS & Windows) through 5.0
Lotus 1-2-3 (OS/2) through 2.0
Lotus 1-2-3 for SmartSuite 97 – Millennium Edition 9.6
Lotus Symphony 1.0, 1.1 and 2.0

Microsoft Excel for Windows or Mac through 2010
Microsoft Works through 4.0
OpenOffice Calc 2.0 and 3
StarOffice Calc 5.2, 6.x, 7.x - 9

Database Formats
Access through 2010
dBASE through 5.0
Microsoft Works through 4.0

Presentation Formats
Corel Presentations 3.0 – X4
Harvard Graphics for Windows
Lotus Symphony Presentations 1.2
Microsoft PowerPoint through 2010
OpenOffice Impress 1.1 - 3
StarOffice Impress 6 – 9

Graphic Formats
Adobe Acrobat (PDF) 6.0 – 10.0
Adobe Illustrator 7.0, 9.0
AutoCad Interchange & Native Drawing Formats (DXF & DWG) 2.5 – 2.6, 9.0 – 14.0, 2000i, 2002, 2005 - 2010
Bitmap (BMP, RLE, ICO, CUR, OS/2 DIB & WARP) all
Corel Clipart (CMX) 5 – 6
Corel Draw (CDR) 6.0 – 8.0
Corel Draw (CDR with TIFF header) 2.0 – 9.0
DCX (multipage PCX) Microsoft Fax
Encapsulated PostScript (EPS) TIFF header only
Graphics Interchange Format (GIF)
Hewlett Packard Graphics Language (HPGL) 2
JPEG all
MacPaint (PNTG)
OpenOffice Draw 3
Portable Network Graphics (PNG) 1.0
Star Office Draw 9
TIFF through 6
TIFF CCITT Group 3 & 4 through 6
WordPerfect Graphics 7 and 10 (WPG & WPG2)

Video Formats
MPEG-1/2
DIVX (1/2/3)
MPEG-4 ASP, DivX 4/5/6, XviD, 3ivX D4
H.263 / H.263i
H.264 / MPEG-4 AVC
Cinepak
Theora
MJPEG (A/B)
WMV-9 / VC-1 1
Quicktime
DV (Digital Video)
Indeo Video 4/5 (IV41, IV51)
Real Video ¾

Audio Formats
MPEG Layer 1/2
MP3 (MPEG Layer 3)
AAC - MPEG-4 part3
Vorbis
WMA 1/2
WMA 3 1
FLAC
ATRAC 3
Wavpack
APE (Monkey Audio)
Real Audio 2
AMR (3GPP)
MIDI 3
DV Audio
QDM2/QDMC (QuickTime)

B. Quick View Plus 13 Professional, Supported File Formats

This gives an idea of the variety of file formats one commercially available viewing platform can present. See Quick View Plus 13 Professional, Fact Sheet and Supported File Formats, available at http://avantstar.com/metro/reference?path=A1x478ex1y1x4794x1x66y1x4a6fx1x65y8x656bx8x1.

WORD PROCESSING VERSIONS

GENERIC TEXT
ANSI Text—7 & 8 bit
ASCII Text—7 & 8 bit
EBCDIC—all
HTML—through 3.0 (with limitations)
IBM FFT—all
IBM Revisable Form Text—all
Microsoft Rich Text Format (RTF) —all
Trillian text
Unicode Text —all
WML —1.2
XML

DOS WORD PROCESSORS
DEC WPS Plus (DX)—through 4.0
DEC WPS Plus (WPL)—through 4.1
DisplayWrite 2 & 3 (TXT)—all
DisplayWrite 4 & 5—through Release 2.0
Enable—3.0, 4.0 and 4.5
First Choice—through 3.0
Framework—3.0
IBM Writing Assistant—1.01
Lotus Manuscript—2.0
MASS11—through 8.0
Microsoft Word—through 6.0
Microsoft Works—through 2.0
MultiMate—through 4.0
Navy DIF—all
Nota Bene—3.0
Office Writer—4.0 – 6.0
PC-File Letter—through 5.0
PC-File+ Letter—through 3.0
PFS:Write—A, B and C
Professional Write—through 2.1
Q&A —2.0
Samna Word—through Samna Word IV+
SmartWare II—1.02
Sprint—through 1.0
Total Word—1.2
Volkswriter 3 & 4—through 1.0
Wang PC (IWP)—through 2.6
WordMARC—through Composer Plus
WordPerfect—through 6.1
WordStar—through 7.0
WordStar 2000—through 3.0
XyWrite—through III Plus

WINDOWS WORD PROCESSORS
Adobe FrameMaker (MIF)—6.0, text only
AMI/AMI Professional—through 3.1
Corel/Novell WordPerfect
for Windows—through X5
Hangul—97, 2002, 2010
JustSystems Ichitaro
—5.0, 6.0, 8.0 – 13.0, 2004, 2010
JustWrite —through 3.0
Kingsoft WPS Office Writer—2010
Legacy —through 1.1
Lotus WordPro
—96 – Millennium Edition 9.6, 9.8 (text only)
Lotus Symphony Documents—1.2
Microsoft Windows Works—through 4.0
Microsoft Windows Write—through 3.0
Microsoft Word for Windows—through 2013
Microsoft WordPad—all
Novell Perfect Works—2.0
OpenOffice Writer—1.1 – 3.0
Oracle Open Office Writer—3.0
Professional Write Plus—1.0
Q&A Write for Windows—3.0
StarOffice Writer—5.2 – 9.0
WordStar for Windows—1.0

MACINTOSH WORD PROCESSORS
MacWrite II—1.1
Microsoft Word
—3.0, 4.0, 98, 2001, v.X, 2004, 2008
Microsoft Works—through 2.0
Novell WordPerfect—1.02 – 3.0

SPREADSHEETS VERSIONS
Corel QuattroPro for Windows
—through X5
Enable—3.0, 4.0 and 4.5
First Choice—through 3.0
Framework—3.0
KingSoft WPS Office Spreadsheet—2010
Lotus 1-2-3 (DOS & Windows)—through 5.0
Lotus 1-2-3 Charts (DOS & Windows)
—through 5.0
Lotus 1-2-3 (OS/2) —through 2.0
Lotus 1-2-3 Charts (OS/2)—through 2.0
Lotus 1-2-3 for SmartSuite
—97 – Millennium Edition 9.6, 9.8
Lotus Symphony—1.0 – 1.2 & 2.0
Microsoft Excel Charts—2.x – 7.0
Microsoft Excel for Macintosh
—3.0 – 4.0, 98, 2001, v.X, 2004, 2008
Microsoft Excel for Windows
—2.2 through 2013
Microsoft Multiplan—4.0
Microsoft Windows Works—through 4.0
Microsoft Works (DOS)—through 2.0
Microsoft Works (Mac)—through 2.0
Mosaic Twin—2.5
Novell Perfect Works—2.0
OpenOffice Calc—1.1, 2.0 (text only), 3.0
Oracle Open Office Calc—3.0
Quattro Pro for DOS—through 5.0
PFS:Professional Plan—1.0
SmartWare II—1.02
StarOffice Calc—5.2, 6.x, 7.x, – 9.0
SuperCalc 5—4.0
VP Planner 3D—1.0

DATABASES VERSIONS
Access—through 2.0, 95-2000
dBASE—through 5.0
DataEase—4.x
dBXL—1.3
Enable—3.0, 4.0 and 4.5
First Choice—through 3.0
FoxBase—2.1
Framework—3.0
Microsoft Windows Works—through 4.0
Microsoft Works (DOS)—through 2.0
Microsoft Works (Mac)—through 2.0
Paradox (DOS)—through 4.0
Paradox (Windows)—through 1.0

Personal R:BASE—1.0
Q & A—through 2.0
R:BASE 5000—through 3.1
R:BASE System V—1.0
Reflex—2.0
SmartWare II—1.02

PRESENTATIONS VERSIONS
Corel/Novell Presentations—3.0 – X5
Freelance for Windows
—through Millennium Edition 9.6, 9.8
Freelance for OS/2—through 2.0
Harvard Graphics for DOS—2.x & 3.x
Harvard Graphics for Windows
KingSoft WPS Office Presentation—2010
Lotus Symphony Presentations—1.2
Microsoft PowerPoint for Macintosh
—3.0 – 4.0, 98, 2001, v.X, 2004, 2008
Microsoft PowerPoint for Windows
—3.0 through 2013
OpenOffice Impress—1.1 – 3.0
Oracle Open Office Impress—3.0
StarOffice Impress —5.2 (text only), 6.0 – 9.0

COMPRESSED VERSIONS
7z
GZIP
JAR
LZA Self Extracting Compress
LZH Compress
Microsoft Binder—7.0 – 97
MIME (Text Mail)
RAR
UNIX Compress
UNIX TAR
UUEncode
ZIP—PKWare through 2.04g

OTHER VERSIONS
Apple iWork 09 Keynote
Apple iWork 09 Numbers
Apple iWork 09 Pages
Executable (EXE, DLL)
Executable for Windows NT

Lotus Notes DXL
Microsoft Outlook
Express (EML)—97 – 2003
MBOX
Microsoft Cabinet
Microsoft Live Messenger—10
Microsoft Office 2003 XML (text only)
Microsoft OneNote 2007-2010 (text only)
Microsoft Outlook Folder (PST)—97 – 2003
Microsoft Outlook Forms Template (OFT)
Microsoft Outlook Offline Folder (OST)
—97 – 2003
Microsoft Outlook Message (MSG)
Microsoft Project—98, 2000, 2002,
2003, 2007, 2010 (Gantt chart view)
vCard—2.1

GRAPHIC VERSIONS

Adobe Acrobat (PDF)—2.1, 3.0 – X
Adobe PDF Package
Adobe PDF Portfolio
Apple Mail Message—2.0
Adobe Illustrator—7.0, 9.0, CS5, CS6
Adobe Photoshop (PSD)—4.0, CS5, CS6
AmiDraw (SDW)—all
AutoCad Interchange & Native
Drawing Formats (DXF & DWG)
—2.5 – 2.6, 9.0 – 14.0, 2000i,
2002, 2005 – 2012
Autoshade Rendering (RND)—2.0
Binary Group 3 Fax
—‘2005 - 2007 (with limitations)
Bitmap (BMP, RLE, ICO,
CUR, OS/2 DIB & WARP)—all
CALS Raster—Type I and Type II
Computer Graphics Metafile (CGM)
—ANSI, CALS NIST 3.0
Corel Clipart (CMX)—5 – 6
Corel Draw (CDR)—6.0 – 8.0
Corel Draw (CDR with TIFF header)
—2.0 – 9.0
DCX (multipage PCX)—Microsoft Fax
GEM Paint (IMG)
Graphics Interchange Format (GIF)
Hewlett Packard
Graphics Language (HPGL)—2
JFIF (JPEG not in TIFF format)—all
JPEG—all
Kodak Flash Pix (FPX)—all
Kodak Photo CD (PCD)—1.0
Lotus 1-2-3 Picture File Format (PIC)—all
Lotus Snapshot—all
Macintosh PICT1 & 2—Bitmap only
MacPaint (PNTG)
Micrografx Draw (DRW)—through 4
Micrografx Designer (DSF)—Windows 95,
6.0
Novell PerfectWorks (Draw)—2.0
OpenOffice Draw—3.0
Oracle Open Office Draw—3.0
Paint Shop Pro (PSP)—5.0 – 7.04
PC Paintbrush (PCX & DCX)—all
Portable Bitmap (PBM)
Portable Graymap (PGM)
Portable Network Graphics (PNG)—1.0
Portable Pixmap (PPM)
Progressive JPEG
Star Office Draw—9.0
Sun Raster (SRS)
SVG (XML display only. Content will be
rendered as an XML file, not a multimedia
file.)
TIFF—through 6
TIFF CCITT Group 3 & 4—through 6
Truevision TGA (TARGA)—2
Visio—4 (preview only), 5, 2000, 2002,
2003
WBMP
Windows Enhanced Metafile (EMF)
Windows Metafile (WMF)
WordPerfect Graphics
—through 2.0, 7 and 10 (WPG & WPG2)
X-Windows Bitmap (XBM)—x10
compatible
X-Windows Dump (XDM)—x10
compatible
X-Windows Pixmap (XPM)—x10
compatible

C. Windows Media Player 12

Following is a list of audio and video files supported by Windows Media Player 12. *See* https://support.microsoft.com/en-us/kb/316992

Windows Media formats (.asf, .wma, .wmv, .wm)
Windows Media Metafiles (.asx, .wax, .wvx, .wmx)
Windows Media Metafiles (.wpl)
Microsoft Digital Video Recording (.dvr-ms)
Windows Media Download Package (.wmd)
Audio Visual Interleave (.avi)
Moving Pictures Experts Group (.mpg, .mpeg, .m1v, .mp2, .mp3, .mpa, .mpe, .m3u)
Musical Instrument Digital Interface (.mid, .midi, .rmi)
Audio Interchange File Format (.aif, .aifc, .aiff)
Sun Microsystems and NeXT (.au, .snd)
Audio for Windows (.wav)
CD Audio Track (.cda)
Indeo Video Technology (.ivf)
Windows Media Player Skins (.wmz, .wms)
QuickTime Movie file (.mov)
MP4 Audio file (.m4a)
MP4 Video file (.mp4, .m4v, .mp4v, .3g2, .3gp2, .3gp, .3gpp)
Windows audio file (.aac, .adt, .adts)
MPEG-2 TS Video file (.m2ts)

D. Litigation Support Database Applications

Concordance
iPRO
iPRO Eclipse SE
Relativity
Access Data – Summation
Intella
Nuix
Epiq
CaseLogistics
Masterfile
iConnect
Lateral Data

* * *

Federal Adaptation of *NLADA's Performance Guidelines*
***For Criminal Defense Representations*[1]**

Note: These standards are intended as a guide to help ensure that people entitled to representation under the Criminal Justice Act are afforded qualified representation. The standards should be used to assist appointed counsel in providing services that are consistent with the generally accepted practices of the legal profession. These standards are not all inclusive; effectiveness is not the minimum; zealous, quality representation is the goal.[2]

Guideline 1.1 Role of Defense Counsel

(a) The paramount obligation of counsel is to provide zealous, conflict-free, high quality representation to the client at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and to act in accordance with the rules of the court. Effectiveness is required. Zealous, conflict free, high quality representation is the goal.

Related Statutes, Standards, and Federal Rules:

ABA Ten Principles of a Public Defense Delivery System, (ABA Principle), 1, 4, 5, and 6.

American Bar Association Criminal Justice Section Standards (ABA Standard), 4-1, Defense Function.

Missouri v. Frye, 132 S. Ct. 1399 (2012)

Guideline 1.2 Education, Training and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the substantive criminal law, the Criminal Justice Act (18 U.S.C. §§ 3006A, *et seq*.), and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Counsel should be familiar with the practices of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have, and the local CJA Plan should require, sufficient experience or training to provide quality representation.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. 3006A

Title 18, Crimes and Criminal Procedure

[1] *NLADA's Performance Guidelines for Criminal Defense Representation* are copyrighted by the National Legal Aid and Defender Association (1995).
[2] Counsel should always consult the local rules of the district court as well as any jury instructions adopted by the circuit court of the jurisdiction.

Federal Rules of Criminal Procedure

Federal Rules of Evidence

ABA Principles 6 and 9; ABA Standard 4-1.12, Training Programs

Strickland v. Washington, 466 U.S. 668 (1984)

Guideline 1.3 General Duties of Defense Counsel

(a) Before accepting appointment by a court, counsel has an obligation to ensure he or she has available sufficient time, resources, knowledge and experience to offer high quality representation to a defendant in a particular matter. If it later appears that counsel is unable to provide effective representation in the case, counsel should move to withdraw.

(b) Counsel must be alert to all potential and actual conflicts of interest that would impair counsel's ability to represent a client. Where appropriate, counsel may be obliged to investigate potential conflicts of interest or seek an advisory opinion on any potential conflicts.

(c) Counsel has the obligation to keep the client informed of the progress of the case.

Related Statutes, Standards, and Federal Rules:

ABA Principles 4, 5, and 6

ABA Standard 4-1.2, Functions and Duties of Defense Counsel; 4-1.3, Continuing Duties of Defense Counsel; 4-1.4, Defense Counsel's Tempered Duty of Candor; 4-1.5, Preserving the Record; 4-1.6, Improper Bias Prohibited; 4-1.7, Conflicts of Interest; 4-1.8, Appropriate Workload; 4-1.9, Diligence, Promptness and Punctuality; 4-1.10, Relationship with Media; 4-3.7, Prompt and Thorough Actions to Protect the Client

Guideline 2.1 General Obligations of Counsel Regarding Pretrial Release

The attorney has an obligation to attempt to secure the pretrial release of the client *See generally*, 18 U.S.C. §§ 3141-3150.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§ 3142, 3143

Fed. R. Crim. Pro. 32.1, 46

ABA Standard 4-3.2, seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions

Guideline 2.2 Initial Interview

(a) Preparation:

Prior to conducting the initial interview the attorney should, if possible:

(1) be familiar with the elements of the offense and the potential punishment;

(2) obtain copies of any relevant documents, including copies of any charging documents, recommendations and reports concerning pretrial release, and law enforcement reports;

(3) be familiar with the legal criteria for determining pretrial release and the procedures that will be followed in setting those conditions;

(4) be familiar with the different types of pretrial release conditions the court may set and whether private or public agencies are available to act as a custodian for the client's release;

(5) be familiar with any procedures available for reviewing the bail determination;

(6) be familiar with risk assessment instruments used by Probation;

(b) The Interview:

(1) The purpose of the initial interview is to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.

(2) Information that should be acquired includes, but is not limited to:

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history,

(B) the client's physical and mental health, and educational records;

(C) the client's history of service in the armed forces, including periods of active duty status, deployments, and separation from service;

(D) the client's immediate medical and institutional needs, including special security concerns;

(E) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses, and prior record of court appearances or failure to appear in court, counsel should determine whether the client has any pending charges, whether he or she is on probation or parole, and past or present performance under supervision;

(F) the ability of the client to meet any financial conditions of release;

(G) the names of individuals or other sources that counsel can contact to verify the information provided by the client. Counsel should obtain the permission of the client before contacting these individuals;

(H) a preliminary assessment of whether the client has any impediments potentially limiting ability to understand what is happening and to make decisions in his or her best interest. Impediments include language, literacy, intellectual disability, mental illness and emotional disorders, as well as external factors such as needs of dependents and domination by others. Throughout the representation, counsel should be attentive to clues that such limitations exist but are not obvious due to acquired coping mechanisms;

(I) obtain client's signature on appropriate release forms for the defense team.

(3) Information to be provided the client includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation why the client should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney.

(D) the charges and the potential penalties;

(E) a general procedural overview of the progression of the case, where possible.

(c) Supplemental Information:

Counsel should consider using the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(l) the facts surrounding the charges against the client;

(2) any evidence of improper police investigative practices or prosecutorial conduct that affects the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved;

(5) evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Related Statutes, Standards, and Federal Rules:

ABA Principle 4

ABA Standards 4-2.2, Confidential Defense Communication with Detained Persons; 4-3.1, Establishing and Maintaining an Effective Client Relationship; 4-3.3, Interviewing the Client; 4-3.9, Duty to Keep Client Informed and Advised About the Representation

Guideline 2.3 Pretrial Release Proceedings

(a) Counsel should be familiar with the law pertaining to pretrial release including Fed. R. Crim. P. Rule 46, and the Bail Reform Act codified in18 U.S.C. §§3142 and 3143.

(b) Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, if appropriate, to make a proposal concerning conditions of release.

(c) If the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

(d) If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should ensure the client understands the available options and the procedures for posting such assets. If appropriate, counsel should advise the client and others acting in his or her behalf how to post such assets.

(e) If the client is incarcerated and unable to obtain pretrial release, counsel should alert the court to any special medical, psychiatric, or security needs of the client and request the

court direct the appropriate officials to take steps to meet such special needs, and counsel should contact the place of confinement directly to alert them to the client's special needs.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§ 3142, 3143

Fed. R. Crim. Pro. 46

ABA Standard 4-3.2, Seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions

Stack v. Boyle, 342 U.S. 1 (1951)

United States v. Salerno, 481 U.S. 739 (1987)

Guideline 3.1 Initial Appearance

The attorney should protect the client's rights during an initial appearance by:

(a) preserving the client's right to enter an appropriate plea;

(b) preserving the client's right to challenge the charge(s) through preliminary hearing or other grounds for dismissal;

(c) requesting the client's release from custody, or in the alternative, a timely bail hearing.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §3142

Fed. R. Crim. Pro. 5(c); 32.1(a)

ABA Standard 4-2.3, Right to Counsel at First and Subsequent Judicial Appearances

See, Rothgery v. Gillespie County, 554 U.S. 191 (2008) (Sixth Amendment right to counsel attaches at first appearance)

Guideline 3.2 Preliminary Hearing

(a) When the client is entitled to a preliminary hearing, the attorney should ensure the hearing is conducted within the requisite time limits, unless there are sound reasons for waiving the time limits or hearing.

(b) In preparing for the preliminary hearing, the attorney should become familiar with:

(l) the elements of each of the offenses alleged;

(2) the law of the jurisdiction for establishing probable cause; and

(3) factual information bearing on probable cause.

(c) If the client is held to answer and required to enter a plea, counsel should enter a plea of not guilty on the client's behalf, unless the nature of the charges warrant recommending the client decline to enter a plea.

(d) Counsel should consider the consequences of exercising the right to a detention hearing coincident with a preliminary hearing or ancillary to arraignment.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 5.1, 17, 26.2, 32.1

ABA Standard 4-2.3, Right to Counsel at First and Subsequent Judicial Appearances

Gerstein v. Pugh, 420 U.S. 103 (1975)

Guideline 3.3 Bail and Detention Hearing

(a) Counsel should be familiar with the provisions of the Bail Reform Act of 1984, as amended, 18 U.S.C. §§ 3141 – 3150, Federal Rules of Criminal Procedure Rule 46, and current case law.

(b) In preparing for the detention hearing, counsel should consult with the client and develop a pretrial release plan unique to the client's financial circumstances, housing needs, support network, health conditions, and employment status.

(c) After consultation with the client, counsel should contact potential witnesses, notify them of the detention hearing, and secure their attendance if possible.

(d) Where the client has been charged with an offense that gives rise to a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the client and the safety of any other person and the community, counsel must be prepared to rebut the presumptions of dangerous and flight risk.

(e) Counsel should consider requesting deferment of the detention hearing if there is no practical benefit to conducting the hearing during the initial stages of the litigation. Counsel should promptly request a detention hearing in the event changed circumstances warrant a hearing.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§3141 et. seq.

Fed. R. Crim. Pro. 46

Fed. R. App. P. 9(b)

ABA Standard 4-3.2, Seeking a Detained Client's Release from Custody, or Reduction in Custodial Conditions

Stack v. Boyle, 342 U.S. 1 (1951)

Carbo v. United States, 82 S. Ct. 662 (1962)

United States v. Salerno, 481 U.S. 739 (1987)

Guideline 3.4 Prosecution Requests for Non-Testimonial Evidence

Counsel should be familiar with the law governing the prosecution's power to require the client to provide non-testimonial evidence (such as handwriting exemplars and physical specimens), the circumstances in which a client may refuse to do so, requiring an objection by counsel, the extent to which counsel may participate in the proceedings, the record of the proceedings required to be maintained, and counsel's ability to access any record made of the proceedings.

Related Statutes, Standards, and Federal Rules:

Fifth Amendment

Fed. R. Crim. Pro. 16

ABA Standard 4-4.5, Compliance with Discovery Procedures; 4-4.7, Handling Physical Evidence With Incriminating Implications

Gilbert v. California, 388 U.S. 263 (1967)

United States v. Mara, 410 U.S. 19 (1973)

Guideline 4.1 Investigation

(a) Counsel has a duty to conduct an independent investigation into the facts and circumstances of the allegations. The investigation should be conducted as promptly as possible and may include investigation at pre-indictment and pre-trial stages of the case, as well as in support of sentencing mitigation.

(b) Sources of investigative information may include the following:

(1) Charging documents - Copies of all charging documents should be obtained and examined to determine the specific charges that have been brought against the client. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the client is charged;

(B) the defenses, ordinary and affirmative, that may be available; and

(C) any defects in the charging documents, constitutional or otherwise, such as statute of limitations or double jeopardy.

(2) The client - An in-depth interview of the client should be conducted as soon as possible and appropriate. The interview with the client should be used to:

(A) seek information concerning the incident or events giving rise to the charge(s) or improper police investigative practices or prosecutorial conduct affecting the client's rights;

(B) explore the existence of other potential sources of information relating to the offense;

(C) collect information relevant to sentencing, such as school, medical, mental health, employment, military, Social Security, prior criminal and immigration records.

(3) Potential witnesses who may provide information relevant to the offense, the client's history, or mitigation - Counsel should consider whether to interview the potential witnesses, including any complaining witnesses and others adverse to the client. If counsel conducts such interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness. Alternatively, counsel should have an investigator conduct such interviews.

(4) The police and prosecution - Counsel should make efforts, including through the use of investigators and paralegals, to secure information in the possession of the prosecution or law enforcement authorities, including police reports. If necessary, counsel should pursue such efforts through formal and informal discovery. If appropriate, counsel should ask the court to enter an order preserving evidence that is not readily turned over or that is at risk of destruction (*i.e.*, in-car police video of a traffic stop).

(5) Physical evidence - If appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or to sentencing. All evidence should be physically examined by the

investigator and/or attorney. If appropriate, counsel should ask the court to enter an order preserving evidence that is not readily turned over or that is at risk of destruction (i.e., traffic camera, bank, or private party video recording, in-car police video of a traffic stop).

(6) The scene - Counsel should consider seeking access to the scene as soon as possible, accompanied by appropriate personnel to assist in documenting conditions. Counsel should consider seeking access to the scene under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions), if different from the initial view of the scene.

(7) Expert assistance - Counsel should secure the assistance of experts necessary or appropriate to:

(A) the preparation of the defense and sentencing mitigation;

(B) adequate understanding of the prosecution's case;

(C) rebut the prosecution's case.

(8) The press – Media, social media, and third party sources – Counsel should initiate efforts to:

(A) gather all written, audio and video available on case,

(B) review material and subpoena any additional media available from public or private sources,

(C) interview any witnesses learned through media who may have a bearing on the case.

(D) compare all audio and written statements with the official reports for discrepancies.

Related Statutes, Standards, and Federal Rules:

5 U.S.C. §552, Freedom of Information Act

5 U.S.C. §301 & 28 C.F.R. §16.21 (*Touhy* regulations)

Fed. R. Crim. Pro. 17

ABA Standards 4-3.7, Prompt and Thorough Actions to Protect the Client; 4- 4.1, Duty to Investigate and Engage Investigators; 4- 4.2, Illegal and Unethical Investigation Prohibited

Strickland v. Washington, 466 U.S. 668 (1984)

Guideline 4.2 Formal and Informal Discovery

(a) As soon as practicable counsel should pursue the discovery procedures provided by the rules of the jurisdiction and informal discovery methods available to supplement the factual investigation of the case. In considering discovery requests, counsel should consider such requests may trigger reciprocal discovery obligations. Counsel should be aware of and familiar with the most recent "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" ("Recommendations").[3] These protocols were recommended by the Department of Justice/Administrative Office Joint Electronic Technology Working Group (JETWG) to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the Government and defendants charged in federal criminal cases.

(b) Counsel should consider seeking discovery of the following items:

(1) potential exculpatory information;

(2) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;

(3) all oral and/or written statements by the client, and the details of the circumstances under which the statements were made;

(4) the prior criminal record of the client and any evidence of other misconduct the government may intend to use against the client;

(5) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

(6) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof, and

(7) statements of co-defendants;

(8) identity of confidential informant

[3] The Recommendations can be found at http://www.fd.org/docs/litigation-support/final-esi-protocol.pdf.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §3500 *Jencks Act*

18 U.S.C. §2518(8)(b)

Fed. R. Crim. Pro. 6(e)(3)(E)(ii), 7(f), 15, 16, 26.2

ABA Standard 4- 4.5, Compliance with Discovery Procedures; 4-4.1 Duty to Investigate and Engage Investigators

Jencks v United States, 353 U.S. 657 (1957)

Brady v. Maryland, 373 U.S. 83 (1963)

Bruton v. United States, 391 U.S. 123 (1968)

Giglio v. United States, 405 U.S. 150 (1972)

United States v. Agurs, 427 US 97 (1976)

United States v. Bagley, 473 US 667 (1985)

United States v. Presser, 844 F.2d 1275 (6th Cir. 1988)

United States v. Banks, 151 Fed. Appx. 418 (6th Cir. 2005)

Guideline 4.3 Theory of the Case

During investigation and trial preparation, counsel should develop and continually reassess a theory of the case. In determining a theory of the case, counsel should consider available statutory and affirmative defenses. Counsel should review sources of jury instructions including Kevin F. O'Malley, Jay E. Grenig, Hon. William C. Lee, *Federal Jury Practice and Instructions - Criminal*, Circuit Pattern Instructions, case law, and historical instructions given by the presiding judge.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 12.1, 12.2, 12.3, 26.1

ABA Standard 4-1.3, Continuing Duties of Defense Counsel; 4-3.7, Prompt and Thorough Actions to Protect the Client; 4-5.2, Control and Direction of the Case

Guideline 5.1 The Decision to File Pretrial Motions

(a) Counsel should consider filing an appropriate motion whenever there is a good-faith reason to believe the applicable law may entitle the defendant client to relief which the court has discretion to grant.

(b) The decision to file pretrial motions should be made after thorough investigation, and after considering the applicable law in light of the circumstances of each case.

(c) Among the issues that counsel should consider addressing in a pretrial motion are:

(1) the pretrial custody of the client;

(2) the Constitutionality of the implicated statute or statutes;

(3) the potential defects in the charging process and the consequences of failing to raise such defects;

(4) the sufficiency of the charging document;

(5) the propriety and prejudice of any joinder of charges or defendants in the charging document;

(6) the discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;

(7) the suppression of evidence gathered as the result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding or additional state constitutional provisions, including;

(A) the fruits of illegal searches or seizures;

(B) involuntary statements or confessions;

(C) statements or confessions obtained in violation of the accused's client's right to counsel, or privilege against self-incrimination;

(D) unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification.

(8) suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;

(9) seeking resources for experts or other services;

(10) the client's right to a speedy trial;

(11) the client's right to a continuance in order to adequately prepare his or her case;

(12) matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;

(13) matters of trial or courtroom procedure;

(14) additional peremptory challenges.

(d) Counsel should withdraw or decide not to file refrain from filing a motion only after careful consideration, and only after determining whether the filing of a motion may be necessary to protect the defendant's client's rights against later claims of waiver or procedural default. In making this decision, counsel should remember that a motion

may have many objectives in addition to the ultimate relief requested by the motion. Counsel thus should consider whether:

(1) the time deadline for filing pretrial motions warrants filing a motion to preserve the client's rights, pending the results of further investigation;

(2) changes in the governing law might occur after the filing deadline which could enhance the likelihood that relief ought to be granted;

(3) later changes in the strategic and tactical posture of the defense case may occur that could which affect the significance of potential pretrial motions.

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §§1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro 12(b)

ABA Standards 4-3.7 Prompt and Thorough Actions to Protect the Client; 4-5.2, Control and Direction of the Case

Guideline 5.2 Filing and Arguing Pretrial Motions

(a) Motions should be filed in a timely manner, should comport with the formal requirements of the court rules, and should succinctly inform the court of the relevant authority relied upon. In filing a pretrial motion, Counsel should be aware of the effect the filing a pretrial motion might have upon the defendant's speedy trial rights.

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery and research relevant to the claim advanced;

(2) the subpoenaing of all helpful evidence and the subpoenaing and preparation of all helpful witnesses; the use of process to secure the production of relevant evidence and the attendance of witnesses;

(3) the appropriate preparation of witnesses and production of exhibits and demonstrative aids;

(4) full understanding of the burdens of proof, evidentiary principles and trial court procedures applying to the hearing, including the benefits and costs risks of having the client testify;

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §§1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro 12, 17

ABA Standards 4-1.5, Preserving the Record; 4-4.6. Preparation for Court Proceedings, and Recording and Transmitting Information

Guideline 5.3 Subsequent Filing of Pretrial Motions

Counsel should be prepared to raise any issue that is appropriately raised pretrial, but that could not have been raised because the facts supporting the motion were unknown or not reasonably available. Counsel should be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §§1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro 12

ABA Standards 4-1.5, Preserving the Record; 4-8.1, Post-Trial Motions

Guideline 6.1 The Plea Negotiation Process and the Duties of Counsel

(a) Counsel should explore with the client the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to a trial. Counsel should explain fully the rights that would be waived by a decision to enter a plea of guilty and not to proceed to trial.

(b) Ordinarily counsel should obtain the consent of the client before entering into any plea negotiation unless a compelling reason makes it impracticable to do so.

(c) Counsel must keep the client fully informed of any continued plea discussion and negotiations and convey any offers made by the prosecution for a negotiated settlement.

(d) Counsel must not accept any plea agreement without the client's express authorization.

(e) The existence of ongoing tentative plea negotiations with the prosecution should not prevent counsel from taking steps necessary to preserve a defense.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. 3553

Fed. R. Crim. Pro. 11, 35

Fed. R. Evid. 410

United States Sentencing Guidelines, http://www.ussc.gov/guidelines-manual/guidelines-manual

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Missouri v. Frye, 132 S. Ct 1399 (2012)

United States v. Davila, 133 S. Ct 2139 (2013)

Guideline 6.2 The Contents of the Negotiations

(a) In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of:

(1) the maximum term of imprisonment, the fine, mandatory special assessment, and restitution that may be ordered, any mandatory punishment, and the federal sentencing system, including the impact of the advisory sentencing guidelines on the determination of the sentence;

(2) the possibility of forfeiture of assets;

(3) consequences of conviction, including deportation, sex offender registration, possible civil commitment, and civil disabilities;

(4) any possible and likely sentence enhancements or parole consequences;

(5) consequences including probation, supervised release, or parole revocation in the same or other jurisdictions;

(6) the possible and likely place and manner of confinement;

(7) the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds.

(8) the possibility of concurrent or consecutive sentences with any undischarged state sentence and the impact of primary custody on any resulting sentence.

(b) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions the client might offer the prosecution as part of a negotiated settlement, including, but not limited to:

(A) not to proceed to trial on the merits of the charges;

(B) to decline from asserting or litigating any particular pretrial motions;

(C) an agreement to fulfill specified restitution conditions and/or participation in community work or service programs, or in rehabilitation or other programs.

(D) providing the prosecution with assistance in prosecuting or investigating the present case or other alleged criminal activity.

(2) benefits the client might obtain from a negotiated settlement, including, but not limited to an agreement:

(A) the client will receive acceptance of responsibility;

(B) the prosecution will recommend the low end of the guideline range;

(C) certain potential enhancements will not apply:

(D) the prosecution will not oppose the client's release on bail pending sentencing or appeal;

(E) the defendant may enter a conditional plea to preserve the right to litigate and contest certain issues affecting the validity of a conviction;

(F) to dismiss or reduce one or more of the charged offenses either immediately, or upon completion of a deferred prosecution agreement;

(G) the defendant will not be subject to further investigation or prosecution for uncharged alleged criminal conduct;

(H) the defendant will receive, with the agreement of the court, a specified sentence or sanction, or a sentence or sanction within a specified range;

(I) the prosecution will take, or refrain from taking, at the time of sentencing and/or in communications with the preparer of the official presentence report, a specified position with respect to the sanction to be imposed on the client by the court;

(J) the prosecution will not present certain information or evidence, at the time of sentencing and/or in communications with the preparer of the official presentence report;

(K) the defendant will receive, or the prosecution will recommend, specific benefits concerning the accused's place and/or manner of confinement.

(c) In conducting plea negotiations, counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including a plea of guilty, a plea of nolo contendere, a conditional plea of guilty, a Rule 11(c)(1)(C) plea, a diversion agreement, and a plea in which the defendant is not required to personally acknowledge his or her guilt (Alford plea);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case;

(3) whether the plea agreement is binding on the Court, the probation office, the prison and the parole authorities.

(d) In conducting plea negotiations, counsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which that may affect the content and likely results of negotiated plea bargains.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. 3553

Fed. R. Crim. Pro. 11, 35

Fed. R. Evid. 410

U.S.S.G. 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Guideline 6.3 Client Cooperation and the Duties of Counsel

(a) Counsel should communicate to the client any opportunity for cooperation. Counsel should explain the potential benefits, as well as the possible negative consequences of cooperation.

(b) Before the client cooperates, counsel should seek an offer of immunity (*i.e.*, a *Kastigar* letter) from the government. Counsel should review the impact of any offer of immunity with the client, including ensuring that the client understands he or she may be required to provide active cooperation, grand jury testimony, or trial testimony to receive the full benefit of cooperation.

(c) Counsel should ensure the client understands the potential impact of cooperation on his or her sentence is dependent on the government's determination the cooperation was "substantial", based on the value, quantity, and quality of the cooperation. The client should also understand that the judge has the ultimate discretion to grant in whole, in part, or to reject, any sentence recommendation made by the government.

(d) If a client decides to cooperate, counsel should prepare the client prior to any proffer. Unless there is a compelling reason not to do so, counsel should attend any meetings between the client and the government.

(e) Counsel should maintain awareness of a client's continuing cooperation and should document all cooperation.

(f) Counsel should secure a cooperation clause in a plea agreement or cooperation agreement as part of plea negotiations.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. 3553

Fed. R. Crim. Pro. 11, 35

Fed. R. Evid. 410

U.S.S.G. 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Guideline 6.4 The Decision to Enter a Plea of Guilty

(a) Counsel should inform the client of any tentative negotiated agreement with the prosecution. Counsel should explain to the client the full content of the agreement, its advantages and disadvantages, and the potential consequences of the agreement.

(b) The decision to enter a plea of guilty rests solely with the client. Counsel should not attempt to unduly influence that the client's decision.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 11, 35

U.S.S.G. 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences

Guideline 6.5 Entry of the Plea before the Court

(a) Prior to the entry of the plea, counsel should:

(1) make certain that the client understands the rights he or she will waive by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

(2) make certain that the client fully and completely understands the conditions and limits of the plea agreement, the maximum punishment, and the sanctions and other consequences to which the client will be exposed by entering a plea;

(3) explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions of the judge and providing a statement concerning the offense.

(b) When entering the plea, counsel should make sure the full content and conditions of the plea agreement are placed on the record before the court.

(c) After entry of the plea, counsel should be prepared to address the issue of release pending sentencing. If the client has been released pretrial, counsel should be prepared to argue and persuade the court that the client's continued release is warranted and appropriate. If the client is in custody prior to the entry of the plea, counsel should, if

practicable, advocate for and present to the court all reasons warranting the client's release on bail pending sentencing.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. 3553

Fed. R. Crim. Pro. 11

U.S.S.G. 5K1.1

ABA Standards 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-5.4, Consideration of Collateral Consequences; 4-5.5, Special Attention to Immigration Status and Consequences; 4-6.1, Duty to Explore Disposition Without Trial; 4-6.2, Negotiated Disposition Discussions; 4-6.3, Plea Agreements and Other Negotiated Dispositions; 4-6.4, Opposing Waiver of Rights in Disposition Agreements

Guideline 7.1 General Trial Preparation

(a) The decision to proceed to trial and whether to waive a jury rests solely with the client. Counsel should discuss the relevant strategic considerations of this decision with the client.

(b) Counsel should have the following materials available at the time of trial:

(1) copies of all relevant documents filed in the case;

(2) relevant documents prepared by investigators;

(3) voir dire questions for submission by the Court or, if permitted, for use by counsel;

(4) outline or draft of opening statement;

(5) cross-examination plans for all possible prosecution witnesses;

(6) direct examination plans for all prospective defense witnesses;

(7) copies of defense subpoenas;

(8) prior statements of all prosecution witnesses (e.g., transcripts, police reports);

(9) prior statements of all defense witnesses;

(10) reports from defense experts;

(11) a list of all defense exhibits, and the witnesses through whom they will be introduced;

(12) originals and copies of all documentary exhibits;

(13) proposed jury instructions with supporting case citations;

(14) copies of all relevant statutes and cases;

(15) outline or draft of closing argument;

(16) outline of Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29 (a).

(c) Counsel should be fully informed as to the Rules of Evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

(d) Counsel should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial (e.g., use of prior convictions to impeach the defendant) and, where appropriate, counsel should prepare motions and memoranda for such advance rulings.

(e) Counsel should provide advance notice of defenses as required in Fed. R. Crim. Pro. 12.1 (Notice of an Alibi Defense), 12.2 (Notice of an Insanity Defense), and 12.3 (Notice of a Public-Authority Defense).

(f) Throughout the trial process counsel should endeavor to establish a proper record for appellate review. As part of this effort, counsel should request that all trial proceedings be recorded, including voir dire, bench and chambers conferences, jury instruction conferences, the jury instructions read to the jury, and the verdict.

(g) Counsel should advise the client as to suitable courtroom dress and demeanor. If the client is incarcerated, counsel should be alert to the possible prejudicial effects of the client appearing before the jury in jail or other inappropriate clothing, and provide appropriate clothing. Counsel should mitigate the impact of the client's custodial status.

(h) Counsel should plan the most convenient system for conferring with the client throughout the trial. Counsel should consider seeking a court order to have the client available for conferences to ensure a meaningful opportunity for effective communication. If the client suffers from physical, mental, or emotional conditions impairing his or her ability to concentrate, counsel should request an amendment to the trial schedule to accommodate the client's legitimate needs.

(i) Counsel should consider the potential effects that particular actions may have upon sentencing if there is a finding of guilt.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 12.1 Notice of Alibi Defense

Fed. R. Crim. Pro. 12.2 Notice of Insanity Defense

Fed. R. Crim. Pro. 12.3 Notice of Public-Authority Defense

Fed. R. Crim. Pro. 23 Jury or Nonjury Trial

Fed. R. Crim. Pro. 29 Motion for a Judgment of Acquittal

Fed. R. Crim. Pro. 51 (a) Preserving a Claim of Error

ABA Standards 4-4.3, Relationship with Witnesses; 4-4.4, Relationship with Expert Witnesses; 4-5.1, Advising the Client; 4-5.2, Control and Direction of the Case; 4-7.1, Scheduling Court Hearings; 4-7.2 Civility with Courts, Prosecutors, and others

Guideline 7.2 Voir Dire and Jury Selection

(a) Preparation

(1) Counsel should be familiar with the venire selection procedures in the particular jurisdiction and should be alert to any potential legal challenges to the composition or selection of the venire.

(2) Counsel should be familiar with the local practices and the individual trial judge's procedures for selecting a jury from a panel of the venire, and should be alert to any potential legal challenges to these procedures.

(3) Prior to jury selection, counsel should seek to obtain a prospective juror list and any questionnaires.

(4) Counsel should develop voir dire questions in advance of trial. Counsel should tailor voir dire questions to the specific case. Among the purposes voir dire questions should be designed to serve are the following:

(A) to elicit information about the attitudes of individual jurors, which will inform about peremptory strikes and challenges for cause;

(B) to convey to the panel certain legal principles which are critical to the defense case;

(C) to preview the case for the jurors so as to lessen the impact of damaging information which is likely to come to their attention during the trial;

(D) to present the client and the defense case in a favorable light, without prematurely disclosing information about the defense case to the prosecutor.

(E) to establish a relationship with the jury, if voir dire is conducted by an attorney.

(5) Counsel should be familiar with the law concerning mandatory and discretionary voir dire inquiries so as to be able to defend any request to ask particular questions of prospective jurors.

(6) Counsel should be familiar with the law concerning challenges for cause and peremptory strikes. Counsel should also be aware of any local rules concerning whether peremptory challenges need to be exhausted in order to preserve for appeal any challenges for cause which have been denied.

(7) Counsel should consider whether to seek expert assistance in the jury selection process.

(8) Counsel should consider whether the use of juror questionnaire, distributed to the venire panel, would facilitate an initial screening of the jury pool, streamline individual voir dire, or serve a specific case-related purpose. If so, counsel should submit a proposed questionnaire for the Court's consideration. If counsel's request is denied, the issue should be preserved for review on appeal through an appropriate record.

(b) Examining the Prospective Jurors

(1) Counsel should consider seeking permission to personally voir dire the panel. If the court conducts voir dire, counsel should consider submitting proposed questions to be incorporated into the court's voir dire.

(2) Counsel should take all steps necessary to protect the voir dire record for appeal, including, where appropriate, filing a copy of the proposed voir dire questions or reading proposed questions into the record.

(3) If the voir dire questions may elicit sensitive answers, counsel should consider requesting that questioning be conducted outside the presence of the remaining jurors and that the court, rather than counsel, conduct the voir dire as to those sensitive questions.

(4) In a group voir dire, counsel should avoid asking questions which may elicit responses which are likely to prejudice other prospective jurors.

(c) Challenges

(1) Counsel should consider challenging for cause all persons about whom a legitimate argument can be made for actual prejudice or bias relevant to the case when it is likely to benefit the client.

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §§1861 et. seq., Jury Selection and Service Act

Fed. R. Crim. Pro. 23, 24

ABA Principles for Juries and Jury Trials

ABA Standards 4-7.3, Selection of Jurors; 4-7.4, Relationship with Jurors

Batson v. Kentucky, 476 U.S. 79 (1986)

Guideline 7.3 Opening Statement

(a) Prior to delivering an opening statement, counsel should ask for sequestration of witnesses, unless a strategic reason exists for not doing so.

(b) Counsel should be familiar with the law of the jurisdiction and the individual trial judge's rules regarding the permissible content of an opening statement.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement and of deferring the opening statement until the beginning of the defense case.

(d) Counsel's objective in making an opening statement may include the following:

(1) to provide an overview of the defense case;

(2) to identify the weaknesses of the prosecution's case;

(3) to emphasize the prosecution's burden of proof;

(4) to summarize the testimony of witnesses, and the role of each in relationship to the entire case;

(5) to describe the exhibits which will be introduced and the role of each in relationship to the entire case;

(6) to clarify the jurors' responsibilities;

(7) to state the inferences counsel wishes the jury to draw.

(e) Counsel should consider incorporating the promises of proof the prosecutor makes to the jury during opening statement in the defense summation.

(f) If the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecutor's error;

(2) the possibility that an objection might enhance the significance of the information in the jury's mind;

(3) whether there are any rules made by the judge against objecting during the other attorney's opening argument.

Related Statutes, Standards, and Federal Rules:

ABA Standard 4-7.5, Opening Statement at Trial; 4-7.9, Facts Outside the Record

Guideline 7.4 Confronting the Prosecution's Case

(a) Counsel should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motions for judgment of acquittal.

(b) Counsel should be aware of each of the specific elements that the government must prove beyond a reasonable doubt.

(c) In preparing for cross-examination, counsel should be familiar with the applicable law and procedures concerning cross-examinations and impeachment of witnesses. In order to develop material for impeachment or to discover documents subject to disclosure, counsel should be prepared to question witnesses as to the existence of prior statements which they may have made or adopted.

(d) In preparing for cross-examination, counsel should:

(1) maintain a consistent focus on the theory of the defense and closing argument when deciding the need to cross-examine a witness;

(2) consider whether cross-examination of each individual witness is likely to generate helpful information;

(3) anticipate those witnesses the prosecutor might call in its case-in-chief or in rebuttal;

(4) consider a cross-examination plan for each of the anticipated witnesses;

(5) be alert to inconsistencies in a witness's testimony;

(6) be alert to possible variations in a witness's testimony;

(7) review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;

(8) review relevant statutes and local law enforcement regulations for possible use in cross- examining law enforcement witnesses;

(9) be alert to issues relating to witness credibility, including bias and motive for testifying.

(e) Counsel should consider conducting a voir dire examination of potential prosecution witnesses, including expert, who may not be competent to give particular testimony. Counsel should be aware of the applicable law of the jurisdiction concerning competency of witnesses in general and admission of expert testimony in particular in order to be able to raise appropriate objections.

(f) Before beginning cross-examination, counsel should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If counsel does not receive prior statements of prosecution witnesses until they have completed direct examination, counsel should request adequate time to review these documents before commencing cross-examination.

(g) At the close of the prosecution's case and out of the presence of the jury, counsel should move for a judgment of acquittal on each count charged. Counsel should request, when

necessary, that the court immediately rule on the motion, in order that counsel may make an informed decision about whether to present a defense case.

Related Statutes, Standards, and Federal Rules:

Federal Rules of Evidence

Fed. R. Crim. Pro. 26.2, 26.3, 29

ABA Standard 4-7.7, Examination of Witnesses in Court

Guideline 7.5 Presenting the Defense Case

(a) Counsel should develop, in consultation with the client, an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case, and instead relying on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

(b) Counsel should discuss with the client all of the considerations relevant to the client's decision to testify.

(c) Counsel should be aware of the elements of any affirmative defense and know whether the client bears a burden of persuasion or a burden of production.

(d) In preparing for presentation of a defense case, counsel should:

(1) develop a plan for direct examination of each potential defense witness;

(2) determine the implications that the order of witnesses may have on the defense case;

(3) consider the possible use of character witnesses;

(4) consider the need for expert witnesses.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for a rebuttal by the prosecutor.

(f) Counsel should prepare all witnesses for direct and possible cross-examination. Counsel should also advise witnesses of suitable courtroom dress and demeanor.

(g) Counsel should conduct redirect examination as appropriate.

(h) At the close of the defense case, counsel should renew the motion for judgment of acquittal on each charged count.

Related Statutes, Standards, and Federal Rules:

Federal Rules of Evidence

ABA Standard 4-7.6, Presentation of Evidence

Guideline 7.6 Closing Argument

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation.

(b) Counsel should be familiar with the local rules and the individual judge's practice concerning time limits and objections during closing argument, and provisions for rebuttal argument by the prosecution.

(c) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

(1) highlighting weaknesses in the prosecution's case;

(2) describing favorable inferences to be drawn from the evidence;

(3) incorporating into the argument.

(A) helpful testimony from direct and cross-examinations;

(B) verbatim instructions drawn from the jury charge;

(C) responses to anticipated prosecution arguments;

(4) the effects of the defense argument on the prosecutor's rebuttal argument.

(d) If the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions unless tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

(1) whether counsel believes that the case will result in a favorable verdict for the client;
(2) the need to preserve the objection for a double jeopardy motion;

(3) the possibility that an objection might enhance the significance of the information in the jury's mind.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 29.1, 30(b)

ABA Standard 4-7.8, Closing Argument to the Trier of Fact; 4-7.9, Facts Outside the Record

Guideline 7.7 Jury Instructions

(a) Counsel should be familiar with the local rules and the individual judges' practices concerning ruling on proposed instructions, charging the jury, use of standard charges and preserving objections to the instructions.

(b) Counsel should submit modifications of the standard jury instructions in light of the particular circumstances of the case, including the desirability of seeking a verdict on a lesser included offense. If at all possible, counsel should provide case law in support of the proposed instructions.

(c) Where appropriate, counsel should object to and argue against improper instructions proposed by the prosecution.

(d) If the court refuses to adopt instructions requested by counsel, or gives instructions over counsel's objection, counsel should take all steps necessary to preserve the record, including, where appropriate, filing a copy of proposed instructions or reading proposed instructions into the record.

(e) During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions, object to deviations unfavorable to the client, and, if necessary, request additional or curative instructions.

(f) If the court proposes giving supplemental instructions to the jury, either upon request of the jurors or upon their failure to reach a verdict, counsel should request the judge disclose the proposed supplemental charge to counsel before it is delivered to the jury and afford counsel the opportunity to object and make a record on the instruction.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 30

ABA Standard 4-1.5, Preserving the Record

Guideline 8.1 Obligations of Counsel in Sentencing

(a) Among counsel's obligations in the sentencing process are:

(1) to be aware of the pertinent advisory sentencing guidelines and relevant sentencing factors pursuant to 18 U.S.C. §3553(a);

(2) if the client pleads guilty, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;

(3) to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;

(4) to ensure all reasonably available mitigating and favorable information, likely to benefit the client, is presented to the court;

(5) to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report.

(6) to consider the need for sentencing mitigations experts, and to seek the assistance of such specialists when warranted.

Related Statutes, Standards, and Federal Rules:

18 U.S.C.§§3551 et. seq. General Provisions; §§ 3561 et. seq. Probation; §§ 3571 et. seq. Fines; §§3581 et. seq. Imprisonment; §§3361 et. seq. Miscellaneous Sentencing Provisions

Fed. R. Crim. Pro. 32

United States Sentencing Guidelines, http://www.ussc.gov/guidelines-manual/guidelines-manual

ABA Standard 4-1.3(f) Continuing Duties of Defense Counsel; 4-6.3 Plea Agreements and Other Negotiated Dispositions; 4-6.4(b), Opposing Waivers of Rights in Disposition Agreements; 4-8.3 Sentencing

Williams v. Taylor, 529 U.S. 362 (2000)

United States v. Mellies, 496 F. Supp.2d 930 (M.D. Tenn., 2007)(bond pending sentencing for exceptional circumstances)

United States v. Christman, 596 F.3d 870 (2010)(same)

Guideline 8.2 Sentencing Options, Consequences and Procedures

(a) Counsel should be familiar with the sentencing provisions and options applicable to the case, including, but not limited to:

(1) the advisory United States Sentencing Guideline calculation, including grounds for departures and variances;

(2) deferred sentence, judgment without a finding, and diversionary programs (including pretrial diversion);

(3) supervised release and required and permissible conditions of supervised release;

(4) availability of probationary sentences and required and permissible conditions of probation;

(5) restitution;

(6) fines;

(7) court costs;

(8) imprisonment including any mandatory minimum requirements;

(9) facilities appropriate to address the client's mental, physical, or emotional conditions,

(10) forfeiture.

(b) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:

(1) credit for pre-trial detention;

(2) possibility of concurrent or consecutive sentence with any undischarged or unimposed state sentence and an understanding of primary and secondary custody;

(3) effect of good-time credits on the client's release date and how those credits are earned and calculated;

(4) place of confinement and level of security and classification;

(5) self-surrender to place of custody;

(6) eligibility for correctional programs and furloughs;

(7) available drug rehabilitation programs, psychiatric treatment, and health care;

(8) consequences of criminal conviction for non-citizen clients including possibility of deportation;

(9) use of the conviction for sentence enhancement in future proceedings;

(10) loss of civil rights and possible restoration of the rights;

(11) impact of a fine or restitution and any resulting civil liability;

(12) restrictions on or loss of license.

(13) need to register as a state or federal sex offender.

(14) consequences of violating probation or supervised release, including modifications and revocations.

(c) Counsel should be familiar with the sentencing procedures, including:

(1) the impact and limitations of the plea bargaining process on the court and the sentencing guideline system;

(2) the practices of the officials who prepare the presentence report and the defendant's rights in that process;

(3) the access to the presentence report by counsel and the defendant;

(4) the prosecution's practice in preparing a memorandum on punishment;

(5) the use of a sentencing memorandum by the defense;

(6) the opportunity to challenge information presented to the court for sentencing purposes;

(7) the availability of an evidentiary hearing to challenge information and the applicable rules of evidence and burdens of proof at such a hearing;

(8) the participation that victims and prosecution or defense witnesses may have in the sentencing proceedings.

Related Statutes, Standards, and Federal Rules:

18 U.S.C.§3551 et. seq. General Provisions; § 3561 et. seq. Probation; § 3571 et. seq. Fines; §3581 et. seq. Imprisonment; §3361 et. seq. Miscellaneous Sentencing Provisions; §3771 et seq. Crime Victims' Rights

Fed. R. Crim. Pro. 32

United States Sentencing Guidelines, http://www.ussc.gov/guidelines-manual/guidelines-manual

ABA Standard 4-6.3 Plea Agreements and Other Negotiated Dispositions; 4-6.4(b), Opposing Waivers of Rights in Disposition Agreements; 4-8.3 Sentencing

Padilla v. Kentucky, 130 S.Ct. 1473 (2010)

Guideline 8.3 Preparation for Sentencing

(a) In preparing for sentencing, counsel should consider the need to:

(1) prepare the client to be interviewed by the official preparing the presentence report;

(2) inform the client of the applicable sentencing requirements, options, and alternatives, and the likely and possible consequences of the sentencing alternatives;

(3) maintain regular contact with the client prior to the sentencing hearing, and inform the client of the steps being taken in preparation for sentencing;

(4) obtain from the client relevant information concerning such subjects as his or her background and personal history, prior criminal record, employment history and skills, education, medical history and condition, and financial status, and obtain from the client sources through which the information provided can be corroborated;

(5) ensure the client has adequate time to examine the presentence report;

(6) inform the client of his or her right to speak at the sentencing proceeding and assist the client in preparing the statement, if any, to be made to the court, considering the possible consequences that any admission of guilt may have upon an appeal,

subsequent retrial or trial on other offenses;

(7) inform the client of the effects that admissions and other statements may have upon an appeal, retrial, parole proceedings, or other judicial proceedings, such as forfeiture or restitution proceedings;

(8) inform the client of the sentence or range of sentences counsel will ask the court to consider; if the client and counsel disagree as to the sentence or sentences to be urged upon the court, counsel shall inform the client of his or her right to speak personally for a particular sentence or sentences;

(9) collect documents and affidavits to support the defense position and prepare witnesses to testify at the sentencing hearing; if required by local rule, counsel should preserve the client's opportunity to present tangible and testimonial evidence.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §3143(a), Release Pending Sentencing

18 U.S.C.§3551 et. seq. General Provisions; §3561 et. seq. Probation; §3571 et. seq. Fines; §3581 et. seq. Imprisonment; §3361 et. seq. Miscellaneous Sentencing Provisions; §3771 et seq. Crime Victims' Rights

Fed. R. Crim. Pro 32

ABA Standard 4-5.2(b) Control and Direction of the Case, 4-8.2 Reassessment of Options After Trial; 4-8.3 Sentencing

Taylor v. United States, 495 U.S. 575 (1990)

Apprendi v. New Jersey, 530 US 466 (2000)

Blakely v. Washington, 542 US 296 (2004)

Shepard v. United States, 544 U.S. 13 (2005)

United States v. Booker, 543 US 220 (2005)

Rita v. United States, 551 U.S. 338 (2007)

Gall v. United States, 552 U.S. 38 (2007)

Kimbrough v. United States, 552 U.S. 85 (2007)

Begay v. United States, 553 U.S. 137 (2008)

Chambers v. United States, 555 U.S. 122 (2009)

United States v. Ford, 2009 WL 691023 (6th Cir., March 18, 2009)

Spears v. United States, 555 U.S. 261 (2009)

Pepper v. United States, 562 U.S. 476 (2011)

Descamps v. United States, 133 S. Ct. 2276 (2013)

Alleyne v. United States, 133 S. Ct. 2151 (2013)

Paroline v. United States, 134 S. Ct. 1720 (2014)

Johnson v. United States, 135 S. Ct. 2551 (2015)

Guideline 8.4 The Official Presentence Report

(a) Counsel should be familiar with the procedures concerning the preparation, submission, and verification of the presentence investigation report or similar document. In addition, counsel should:

(1) be present for the interview and provide relevant information favorable to the client, including, the client's version of the offense or preserve the client's fifth Amendment rights;

(2) review the completed report and then review the report with the client;

(3) take appropriate steps to ensure that erroneous or misleading information is deleted from the report;

(4) take steps to preserve all appropriate defense challenges and objections to the factual accuracy of the presentence report and the manner in which sentence was imposed including:

(A) the court's refusal to hold a hearing on a disputed allegation adverse to the defendant;

(B) the prosecution's failure to prove an allegation or abide by the terms of the plea agreement;

(C) the court's abuse of discretion in finding as fact an allegation not proven.

(5) Counsel should request that a new report be prepared with the challenged or unproved information deleted before the report or memorandum is distributed to the United States Bureau of Prisons.

(6) Counsel should request permission to see final copies of the report to be distributed to be sure the disputed information has been removed from all portions of the report.

(7) Be familiar with how the Bureau of Prisons will use the information contained in the report.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§ 3552, 3153(c)(2)(c)

Fed. R. Crim. Pro. 32(c)-(f)

ABA Standard 4-8.3, Sentencing

Guideline 8.5 The Prosecution's Sentencing Position

(a) Counsel should attempt to determine whether the prosecution will advocate that a particular type or length of sentence be imposed.
(b) Counsel should attempt to determine whether the Office of Probation and Pretrial Services will advocate for a particular type or length of sentence.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 32(d)-(h)

ABA Standard 4-8.3, Sentencing

Guideline 8.6 The Defense Sentencing Memorandum

(a) Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Know when the court requires the filing of a memorandum. The memorandum should be submitted to the court with adequate time for the court to review the memorandum prior to the sentencing hearing. Among the topics counsel may wish to include in the memorandum are:

(1) challenges to incorrect or incomplete information and sentencing guidelines calculations in the official presentence report and any prosecution sentencing memorandum;

(2) challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum;

(3) information contrary to that before the court which is supported by affidavits, letters, and public records;

(4) information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status;

(5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime;

(6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(7) presentation of a sentencing proposal;

(8) facts and law supporting grounds for downward departures and/or variances.

Related Statutes, Standards, and Federal Rules:

18 U.S.C.§3553(a)

Fed. R. Crim. Pro. 32

ABA Standard 4-8.3, Sentencing

Taylor v. United States, 495 U.S. 575 (1990)

Apprendi v. New Jersey, 530 US 466 (2000)

Blakely v. Washington, 542 US 296 (2004)

Shepard v. United States, 544 U.S. 13 (2005)

United States v. Booker, 543 US 220 (2005)

Rita v. United States, 551 U.S. 338 (2007)

Gall v. United States, 552 U.S. 38 (2007)

Kimbrough v. United States, 552 U.S. 85 (2007)

Begay v. United States, 553 U.S. 137 (2008)

Chambers v. United States, 555 U.S. 122 (2009)

United States v. Ford, 2009 WL 691023 (6th Cir., March 18, 2009)

Spears v. United States, 555 U.S. 261 (2009)

Pepper v. United States, 562 U.S. 476 (2011)

Descamps v. United States, 133 S. Ct. 2276 (2013)

Alleyne v. United States, 133 S. Ct. 2151 (2013)

Paroline v. United States, 134 S. Ct. 1720 (2014)

Johnson v. United States, 135 S. Ct. 2551 (2015)

Guideline 8.7 The Sentencing Process

(a) Counsel should be prepared at the sentencing proceeding to take the steps necessary to advocate fully for the requested sentence and to protect the client's interest.

(b) Counsel should be familiar with the procedures available for obtaining an evidentiary hearing before the court in connection with the imposition of sentence.

(c) In the event there will be disputed facts before the court at sentencing, counsel should consider requesting an evidentiary hearing. If a sentencing hearing will be held, counsel should ascertain who has the burden of proving a fact unfavorable to the client, be prepared to object if the burden is placed on the defense, and be prepared to present evidence, including testimony of witnesses, to contradict erroneous or misleading information unfavorable to the defendant.

(d) Where information favorable to the client will be disputed or challenged, counsel should be prepared to present supporting evidence, including testimony of witnesses, to establish the facts favorable to the defendant.

(e) Where the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement, the client's need for treatment for physical, mental, emotional conditions, or substance abuse, and permission for the client to self- surrender directly to the place of confinement.

(f) Counsel should prepare the client to personally address the court;

(g) Make appropriate objections to preserve sentencing issues for appeal

Related Statutes, Standards, and Federal Rules:

18 U.S.C.§3551 et. seq. General Provisions; § 3561 et. seq. Probation; § 3571 et. seq. Fines; §3581 et. seq. Imprisonment; §3361 et. seq. Miscellaneous Sentencing Provisions; §3771 et seq. Crime Victims' Rights

Fed. R. Crim. Pro. 32

United States Sentencing Guidelines, http://www.ussc.gov/guidelines-manual/guidelines-manual

ABA Standard 4-8.3, Sentencing

United States v. Bostic, 371 F.3d 865 (6th Cir. 2004).

Guideline 9.1 Motion for a New Trial

(a) Counsel should be familiar with the procedures available to request a new trial including the time period for filing such a motion, the effect it has upon the time to file a notice of appeal, and the grounds that can be raised.

(b) When a judgment of guilt has been entered against the client after trial, counsel should consider whether it is appropriate to file a motion for a new trial with the trial court. In deciding whether to file such a motion, the factors counsel should consider include:

(1) The likelihood of success of the motion, given the nature of the error or errors that can be raised;

(2) A motion for new trial is neither a jurisdictional nor a procedural prerequisite to a direct appeal of a conviction or an order disposing of a post-conviction pleading in federal court. It is not necessary to preserve a client's right to appeal. Filing such a motion may have the effect of tolling the deadline for filing a notice of appeal.

Related Statutes, Standards, and Federal Rules:

Fed. R. Crim. Pro. 33, 34, 35, 58(f)

ABA Standard 4-8.1, Post-Trial Motions

Guideline 9.2 Right to Appeal

(a) Counsel should inform the client of his or her right to appeal the judgment of the court and the action that must be taken to perfect an appeal. Counsel appointed under the Criminal Justice Act must file a notice of appeal if the client indicates a desire to appeal. Counsel must perfect the record on appeal for the client, including obtaining any necessary transcripts at public expense. If counsel requests leave to withdraw at the Circuit, counsel must request the appointment of substitute counsel or must advise the Circuit if the client is asserting his or her right to proceed in pro se. Unless permitted to withdraw, counsel must submit a brief on all arguable issues. If counsel believes the appeal is meritless, counsel must determine the Circuit's requirements regarding the filing of a brief in conformity with *Anders v. California*, 386 U.S. 738 (1967); See also local rules and case law from the circuit in question.

(b) If the appeal is decided adversely to the client, counsel must inform the client of his or her rights to petition for rehearing and/or rehearing en banc and the applicable time limits. Counsel must advise the client of the standards governing each petition and must advise the client if there are any grounds on which to base such a petition. *See,* Federal Rules of Appellate Procedure and local rules for the circuit.

(c) Counsel must advise the client of his or her right to petition the United States Supreme Court for review through a petition for writ of certiorari and the time limit for the petition. Counsel should be aware of district or circuit rules governing the obligation to file. If counsel was allowed to withdraw based on the Circuit's determination the appeal was meritless, counsel should advise the client of his or her right to petition the Supreme Court for certiorari, the time limit for the filing of the petition, and provide any documents or information requested to assist the client in submitting the petition.

(d) Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilt and the right to appeal the sentence imposed by the court. In the event the plea agreement contains a waiver of the client's right to appeal or to collaterally challenge the conviction or sentence, counsel is still obligated to file a notice of appeal, perfect the appeal, and file a brief if directed to do so. Counsel should consult the Circuit's rules to determine whether notice of the appeal waiver must be provided by counsel for the defendant and if, so, advise the client of that fact.

(e) If allowed to withdraw from the appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court.

Related Statutes, Standards, and Federal Rules:

28 U.S.C. §1291; 18 U.S.C. §3557, 3742

Fed. R. Crim. Pro. 32(j), 58(g)

Fed. R. App. Pro. 3, 4(b)

ABA Standard 4-9.1, Preparing to Appeal; 4-9.2, Counsel on Appeal; 4-9.3, Conduct of Appeal

Evitts v. Lucey, 469 U.S. 387 (1985)

Guideline 9.3 Bail Pending Appeal

If the client indicates a desire to appeal the judgment and/or sentence of the court, counsel should advise the client of the applicable standards for obtaining release pending appeal. Counsel should seek the client's release on conditions in the appropriate court. *See* 18 U.S.C. § 3143(b).

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§3141(b), 3143(b)

Fed. R. Crim. Pro. 38

ABA Standard 4-8.2, Reassessment of Options After Trial

Carbo v. United States, 82 S. Ct. 662 (1962)

United States v. DiSomma, 951 F.2d 494 (2nd Cir. 1991)

United States v. Goforth, 546 F.3d 712 4th Cir. 2008)

United States v. Roth, 642 F. Supp.2d 796 (E.D. Tenn., 2009)

United States v. Williams, 903 F. Supp.2d 292 (M.D. Penn., 2012)

United States v. DiMattina, 885 F. Supp.2d 572 (E.D.N.Y. 2012)

Guideline 9.4 Self-Surrender

Where a custodial sentence has been imposed, counsel should consider requesting a stay of execution of the judgment to permit the client to report directly to the place of confinement.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §§3143(b), 3146

Fed. R. Crim. Pro. 34

Guideline 9.5 Sentence Reduction

Counsel should inform the client of the limited procedures available for requesting a reduction in the sentence imposed by the court. Counsel should advise the client of the consequences of any waivers, if any, contained in the plea agreement that may restrict requests for relief based on developments in the law or revisions to sentencing procedures.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. § 3582(c)

Fed. R. Crim. Pro. 35(b)

Guideline 9.6 Expunging or Sealing of Record

Counsel should inform the client of any procedures available for requesting that the record of conviction be expunged or sealed.

Related Statutes, Standards, and Federal Rules:

18 U.S.C. §3607

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United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee
v.
Brandon LAUREYS, Appellant

No. 15-3032
|
Argued May 9, 2017
|
Decided August 8, 2017

Appeal from the United States District Court for the District of Columbia (No. 1:09-cr-00106-1)

Attorneys and Law Firms

S. Rebecca Brodey, Washington, DC appointed by the court, argued the cause for appellant. With her on the briefs was L. Barrett Boss, Washington, DC appointed by the court.

James A. Ewing, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief was Elizabeth Trosman, Assistant U.S. Attorney. Suzanne G. Curt, Assistant U.S. Attorney, entered an appearance.

Before: Rogers, Tatel and Pillard, Circuit Judges.

Opinion

Rogers, Circuit Judge

***1** Brandon Laureys was convicted by a jury of attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct, arising from an online encounter with an undercover detective with whom Laureys enthusiastically envisioned sexual encounters with a nine year-old girl. This court rejected Laureys' challenge to his convictions on the ground that there was insufficient evidence of intent but remanded his claim of ineffective assistance of counsel to the district court. *United States v. Laureys*, 653 F.3d 27, 35 (D.C. Cir. 2011). Laureys now appeals the denial of that claim. Because we conclude that trial counsel's failure to obtain expert mental health testimony was constitutionally deficient, we reverse the judgment of conviction and remand for a new trial.

I.

The evidence underlying Laureys' convictions is set forth in *Laureys*, 653 F.3d at 29–31. That evidence, and the evidence presented on remand, is summarized here as relevant to trial counsel's attempt to obtain an expert mental health witness.

A.

Briefly, the evidence at trial showed that on November 14, 2008, Laureys initiated an online chat with "DaughterLover_Maryland," a user of the website IncestTaboo.com who introduced himself as a 38 year-old man named "Jim." In reality, "Jim" was D.C. Metropolitan Police Detective Timothy Palchak. After some discussion of their predilection for young girls, Palchak told Laureys he had a sexual relationship with his girlfriend's nine year-old daughter. Laureys expressed interest in joining them both for sex ("you gotta invite me over ... let me help with the little girl ... train the little gir[l, man] ... make her into a good little whore"). Chat Transcript at 2.

Palchak asked Laureys how close he was to D.C., and Laureys responded that he was "real close" and could come to "hang out and perv out together." *Id.* In response to Palchak's stated desire to be safe "before we play," Laureys suggested "let her meet me and everything first ... make sure she wants to do it haha ... could start with just letting me watch her an[d you] ... til she feels more comfortable." *Id.* at 2–3. Palchak offered to "get a beer first to make su[re we] are comfortable then have fun at my place," *id.* at 4, but Laureys instead suggested meeting at a park as it would be cheaper. Palchak then emailed Laureys a picture of a young girl, to which Laureys responded "you fucking NEED to let me hang out with her man," *id.* at 5. After exchanging information about their physical characteristics, Laureys warned that he could not stay long because his girlfriend was coming into town.

Palchak and Laureys thereafter communicated twice by phone, and according to Palchak, they again exchanged information about their own physical characteristics and

Laureys described the car he would be driving. When that car arrived at Palchak's location, Laureys was arrested and later indicted for one count of attempted coercion and enticement of a minor, in violation of 18 U.S.C. § 2422(b), and one count of travel with intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b).

B.

***2** In June 2009, Laureys' trial counsel contacted Dr. Fred Berlin, a specialist in sexual disorders at Johns Hopkins University School of Medicine, about potentially serving as an expert witness at Laureys' trial. In a letter of July 7, 2009, to the trial judge seeking court funding for Dr. Berlin's services, trial counsel hinted at what would become the basis of Laureys' defense at trial—that Laureys was merely fantasizing about sex with the minor in his chat and wanted to meet with Palchak to continue fantasizing offline, stating that "[t]he basic question we are addressing [with Dr. Berlin] is the actual (subjective) intent of my client when he engaged in on-line dialogue and subsequently traveled to the District from Maryland...." Soon after, trial counsel conducted online research into sexual compulsion, internet addiction, and chat room deviance. In subsequent queries to other potential experts, trial counsel raised the possibility of a diminished capacity defense based on Laureys' purported inability to form the specific intent to entice a child because he suffered from "cybersex addiction." This diminished capacity defense would differ from the fantasy defense in one key aspect, because the latter posited that Laureys lacked the requisite intent while the former posited that his cybersex addiction and sexual compulsivity prevented him from forming the requisite intent.

After two potential expert witnesses either declined to participate or failed to respond, trial counsel focused exclusively on Dr. Berlin and his ability to support the diminished capacity defense, despite having no sense of what Dr. Berlin's ultimate diagnosis of Laureys might be. Communication between trial counsel and Dr. Berlin was sparse. For instance, a month after Dr. Berlin examined Laureys at the D.C. Central Detention Facility, trial counsel notified Dr. Berlin that trial was scheduled to start in less than two weeks, despite his having known of that schedule for more than a month prior to the examination. Dr. Berlin's office responded that he would be unprepared to testify so soon. Trial counsel sent additional background material to Dr. Berlin the following day, but Dr. Berlin's office responded to ask whether a continuance had been granted because otherwise Dr. Berlin would not keep working on the case. Trial counsel responded "2/16/10 more later ..." but Dr. Berlin's office would eventually claim not to have received this email.

At an October 29, 2009, status conference at which Laureys' trial was continued until February, the trial judge expressed significant doubts about the diminished capacity defense envisioned by trial counsel. Suggesting that the defense was more relevant to sentencing than guilt or innocence, the judge offered a rather ominous warning that he had seen many cases in which a defense was prepared only to be abandoned at the last moment, leaving no defense at all. Trial counsel acknowledged uncertainty about whether Dr. Berlin might ultimately be helpful to his client, but he said his own "focus has been on exploring the issue of sexual compulsivity and Internet addiction" and how that might negate a showing of specific intent. 10/29/09 Tr. 6:1–19; *see also id.* at 3:10–13.

Trial counsel's next contact with Dr. Berlin was three months later, when he advised by email in January 2010 that trial was scheduled to begin in two weeks and was unlikely to be continued. Dr. Berlin's office responded that he could not possibly testify in February, having not previously been informed of the earlier continuance, and due to his having not received requested background material, Dr. Berlin had not been able to come to any conclusions about Laureys. When so informed, the trial judge again questioned whether trial counsel was "chasing the will of the wisp" with this strategy, 2/1/10 Tr. 3:25, but again continued trial. At that hearing, trial counsel indicated that a trial would occur with or without Dr. Berlin, because Laureys would still testify about his own mental state, but Dr. Berlin's testimony would make the defense that much stronger.

At a February 22, 2010, status conference, trial counsel sought a new trial date that would allow Dr. Berlin sufficient time to conclude his analysis. Dr. Berlin refused to offer a preliminary medical opinion about Laureys in time for the status conference, explaining that professional ethics forbade him from formulating any opinion about Laureys' mental condition before he had a chance to review all of Laureys' records. Yet trial counsel expressed his own hope that Dr. Berlin would testify that "Laureys

would be incapable of formulating the specific intent to do the acts which he's alleged to have done; that he's an Internet sexual compulsive and that he doesn't have a yes/no mechanism." 2/22/10 Tr. 3:25–4:24. For a third time, the trial judge expressed concern to trial counsel that Dr. Berlin "is not going to give you the result you want," *id.* at 9:22–24, but trial counsel insisted that the "Internet sexual compulsive" diagnosis exists, speculating that Dr. Berlin would offer a helpful opinion along those lines, *id.* at 11:1–23. Trial was then set for May 25, 2010.

***3** One week later, trial counsel informed Dr. Berlin of the new trial date, as well as an expert report deadline of April 7, 2010. On March 15, 2010, Dr. Berlin responded that given his other commitments he could not review the voluminous materials in time to prepare an opinion for Laureys' trial. At an April 7, 2010, status conference, the trial judge stated that he would continue trial until August 2010 if Dr. Berlin provided something in writing to confirm that "Internet sexual compulsive" is a recognized disorder, regardless of whether Dr. Berlin ultimately concluded that Laureys fit that diagnosis. 4/7/10 Tr. 2:16–4:6. Trial counsel advised Dr. Berlin of the judge's requirement by letter of same day, laying out the diminished capacity defense that trial counsel "believe[d] we are working towards"—Laureys suffers from "a sexual compulsivity disorder either triggered or aggravated by internet addiction, compromised impulse control, bi-polar disorder, or whatever appropriate medical terminology would describe such a mental state." In that letter trial counsel also informed Dr. Berlin that the trial judge was "dubious of [the] ultimate legal value [of the planned diminished capacity defense] in the trial setting." Dr. Berlin responded on April 12 that he agreed with the trial judge's doubts because it was very unlikely that a successful mental health defense existed in Laureys' case, and that with enough preparation time, Dr. Berlin might be able to offer useful information at a sentencing hearing.

The week before trial, trial counsel made a last-ditch attempt to secure a different psychiatric expert, Dr. Neil Blumberg, who advised he would be unable to offer any professional assistance, and in May 2010, Laureys proceeded to trial without any expert witness. Abandoning the diminished capacity defense altogether, trial counsel instead focused on establishing that Laureys was merely engaging in fantasy with Detective Palchak. The testimony offered by Laureys himself in support of this fantasy defense was "disturbing and graphic," *Laureys*, 653 F.3d at 37 (Henderson, J., concurring in part and dissenting in part), and Laureys now agrees that it constituted the most damning evidence against him, *see* Appellant Br. 28–29. Despite some indication that the nine year-old girl would not be present at the encounter with Palchak—leading the trial judge to suggest his own reasonable doubt as to the travel count under Section 2423(b)—the jury found Laureys guilty on both counts, and he was sentenced to twenty years' imprisonment.

C.

On remand following Laureys' unsuccessful initial appeal of his convictions, Dr. Berlin testified to his belief that trial counsel wanted him to come to a particular diagnosis, as reflected in both trial counsel's correspondence and statements to the trial judge, that Laureys lacked the capacity to form the specific intent to entice a minor due to some combination of sexual compulsivity disorder, internet addiction, bipolar disorder, or lack of impulse control. He also testified that although he could not testify to Laureys' inability to form specific intent, he could have provided information for the jury about the prevalence of fantasy in internet chat rooms, how the internet facilitates sexual behaviors for vulnerable persons, Laureys' mental health issues and how they affect his behavior, and the meaning of certain internet slang terms used to describe sexual activity. In particular, Dr. Berlin observed that online fantasizing can seem very real, but a layperson would not necessarily know that, and that a person could be aroused by talking about child sex without then proceeding to seek sex with children.

Dr. Berlin also rebutted certain quasi-expert assertions made at trial by Detective Palchak, such as that there are only three categories of chat participants who engage in child-sex fantasy: (1) those who masturbate while chatting online, (2) those who want to go offline for phone sex, and (3) those who actually want to meet and engage in sex with a child. If those three categories were exhaustive, Laureys would fall into the third, because he left his house and drove to the District of Columbia for a sexual encounter. But Dr. Berlin would have testified that Palchak's list of categories was not exhaustive, and that significant numbers of chat participants are interested in meeting one another to have adult sex while fantasizing about children. And, whereas Palchak testified that people interested only in fantasy chat will reveal that right up front, Dr. Berlin

would have testified that, in fact, it can be very difficult to distinguish chats in which adults are arranging for sex with children from chats in which adults are arranging to meet one another and pretending that a child will join them. Finally, Dr. Berlin testified that Laureys' history of promiscuity with adult men, as well as a series of Laureys' prior chat transcripts in which a discussion of child sex was followed by an invitation to meet the other adult male participant, led Dr. Berlin to conclude there was a high likelihood that Laureys was interested in having sex with Palchak while fantasizing about children. All of that testimony would have bolstered Laureys' testimony that he sought to meet with Palchak to "engage in homosexual activity while indulging in [taboo] fantasies." 5/26/10 Tr. 302:5–11.

***4** Trial counsel testified that he always believed a mental health expert was necessary to Laureys' defense, but claimed that he did not seek any particular diagnosis or conclusion from Dr. Berlin or intend to limit his potential testimony in any way. Counsel acknowledged that many of the mental health topics addressed at trial by Laureys' own testimony would have been better addressed by an expert witness.

The district court denied Laureys' claim of ineffective assistance, concluding that "any 'failure' to obtain Dr. Berlin's testimony as to Laureys' mental condition was not for lack of effort ..., but rather was due to a combination of mutual misunderstandings and Dr. Berlin's exceptionally busy schedule." *United States v. Laureys*, 103 F. Supp. 3d 69, 75 (D.D.C. 2015). [1] The district court rejected Laureys' argument that trial counsel unreasonably failed to secure a substitute expert in Dr. Berlin's place because Dr. Berlin left trial counsel with little opportunity after declining to participate only seven weeks before trial, and, in any event, trial counsel did make an unsuccessful attempt to secure a substitute a week before trial. *Id.* at 77 & n.7. Finally, the district court concluded that Laureys also failed to establish prejudice resulting from the lack of a mental health expert, pointing to a lack of evidence that Laureys would have declined to testify if Dr. Berlin had done so instead. *Id.* at 77. Laureys appeals.

II.

To establish a denial of effective assistance of counsel, Laureys had to show both that trial counsel's performance "fell below an objective standard of reasonableness" and thus "was not within the range of competence demanded of attorneys in criminal cases," *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (internal quotation marks omitted); and that he suffered prejudice because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. This court reviews *de novo* the district court's determination that Laureys was not denied his Sixth Amendment right to the effective assistance of counsel. *United States v. Abney*, 812 F.3d 1079, 1086–87 (D.C. Cir. 2016) (discussing, *inter alia*, *Strickland*, 466 U.S. at 698–700; *Payne v. Stansberry*, 760 F.3d 10, 13 (D.C. Cir. 2014); *United States v. Rodriguez*, 676 F.3d 183, 189–92 (D.C. Cir. 2012), and the decisions of our sister circuits). The district court's factual findings are reviewed for clear error. *Payne*, 760 F.3d at 13.

A.

"[P]sychiatry has come to play [a pivotal role] in criminal proceedings," such that in cases turning on the defendant's mental state, "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake v. Oklahoma*, 470 U.S. 68, 79–80 (1985). Congress has similarly provided that indigent defendants are entitled to the assistance of a mental health expert if "necessary for adequate representation." *See* 18 U.S.C. § **3006A**(e). Unsurprisingly then, courts have found ineffective assistance arising from counsel's failure to offer expert mental health testimony where it was necessary to an adequate defense. *See, e.g.*, *Gray v. Branker*, 529 F.3d 220, 229–32 (4th Cir. 2008); *Dando v. Yukins*, 461 F.3d 791, 798–800 & n.3 (6th Cir. 2006); *Ainsworth v. Woodford*, 268 F.3d 868, 875–76 (9th Cir. 2001); *Mauldin v. Wainwright*, 723 F.2d 799, 800–01 (11th Cir. 1984).

***5** Here, trial counsel recognized from his very first meeting with Laureys that a mental health expert would be necessary to his defense, and rightly so. Laureys has steadfastly maintained his innocence, despite the existence of a chat transcript in which he discussed child sex in graphic detail, because he insists that he was only engaging in fantasy and that his actual intent was to engage in an adult sexual encounter while fantasizing about a child. Such a defense might seem unimaginable to the average juror absent a clinical presentation regarding, for instance,

the prevalence of fantasy in internet chat rooms, or the use of fantasy chat as a coping mechanism to deal with inappropriate or unlawful sexual urges. Therefore, with trial counsel having correctly identified the need for a mental health expert, the question is whether his failure to provide that expert at trial "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 687–88.

The district court held it did not because, due to a combination of mutual misunderstandings and Dr. Berlin's busy schedule, Dr. Berlin was simply unavailable to testify. *Laureys*, 103 F. Supp. 3d at 75; *see also Laureys*, 653 F.3d at 36 (Henderson, J., concurring in part and dissenting in part). Given the trial judge's willingness to accommodate Dr. Berlin's schedule, however, the finding that Dr. Berlin was unavailable was clearly erroneous. The trial judge made clear that he was prepared to once again continue Laureys' trial if Dr. Berlin would submit a written statement confirming that "Internet sexual compulsive" is a recognized psychiatric diagnosis, regardless whether Dr. Berlin ultimately determined Laureys fit that diagnosis. Dr. Berlin declined to do so, informing trial counsel by letter of April 12, 2010, that there was likely not a viable mental health defense for Laureys *even with enough time to prepare for trial*. Timing or lack of preparation was not the deal breaker for Dr. Berlin, but rather his own doubt that he could provide what trial counsel was seeking.

The record amply demonstrates that what trial counsel was seeking was an internet compulsivity diagnosis that trial counsel had arrived at through his own online research, which would support a defense of diminished capacity. As Laureys contends, and as Dr. Berlin testified on remand, trial counsel led Dr. Berlin to believe that counsel was interested in establishing only this diminished capacity defense. When Dr. Berlin did not "come ... to the conclusion that the trial counsel had hoped [he] would come to," 12/16/14 Tr. 13:11–13, Dr. Berlin bowed out of the proceeding altogether, leaving Laureys without the benefit of the clinical testimony that Dr. Berlin could have offered, which, as trial counsel acknowledged on remand, would have informed the jury's assessment of the fantasy-only defense and helped buttress Laureys' own testimony. The government insists that if there had been a valid diminished capacity defense as envisioned by trial counsel, it would have been "much more powerful than the credibility-based 'fantasy' defense" ultimately relied upon at trial. Appellee Br. 47. Even assuming the government is correct, it somewhat misses the point. Trial counsel focused Dr. Berlin on an *invalid* diminished capacity defense *to the exclusion of all other possible defenses*.

Trial counsel's denial that he directed Dr. Berlin to come to any particular diagnosis or conclusion, instead mentioning diminished capacity as only one possible defense theory, is belied by all of his communications with Dr. Berlin and the trial judge on this topic. Trial counsel implied at one point in his testimony that it was up to Dr. Berlin to come to whatever helpful conclusion he could, inasmuch as Dr. Berlin was more experienced than trial counsel and was familiar with the court process and what lawyers are seeking. From the perspective of Dr. Berlin and the trial judge, however, trial counsel's communications were far too specific to be understood as seeking any clinical testimony that would benefit his client. Indeed, when afforded the opportunity on remand, trial counsel could point to no evidence that he had sought from Dr. Berlin any such beneficial testimony, rather than testimony on diminished capacity. Even if it was not actually trial counsel's intent to limit Dr. Berlin's inquiry, his single-minded pursuit of a particular diagnosis had the effect of denying his client Dr. Berlin's services.

***6** Furthermore, trial counsel also unreasonably failed to secure a different mental health expert when it became doubtful that Dr. Berlin would testify. Just as trial counsel placed all of his hopes on a particular defense, he placed all of his hopes on obtaining expert testimony from Dr. Berlin, despite Dr. Berlin's continued scheduling conflicts, his persistent refusal to speculate about the requested diminished capacity diagnosis, and the trial judge's repeated skepticism that Dr. Berlin would come through as trial counsel envisioned. In rejecting this part of Laureys' ineffectiveness claim, the district court placed dispositive weight on the fact that Dr. Berlin dropped out only seven weeks before trial, leaving trial counsel little opportunity to replace him. *Laureys*, 103 F. Supp. 3d at 77. But that assumes it was reasonable to rely solely on Dr. Berlin in the first place. Had Dr. Berlin opined, even tentatively, that trial counsel's planned defense could be viable, it might have been reasonable to focus on him to the exclusion of all other experts. Just weeks before trial, however—due to his own apparently exclusive and erroneous focus on expert testimony about Laureys' diminished capacity—trial counsel still had no

idea whether Dr. Berlin would be available to testify or what his opinion might turn out to be. In these circumstances, a prudent attorney would at a minimum have sought an alternative source.

Trial counsel acknowledged that he had initially identified another potential expert, Dr. David Greenfield, and even submitted a request for court funding for his expert services, but counsel did not further explore Dr. Greenfield's availability after deciding to rely on Dr. Berlin. Trial counsel did not reach out again to Dr. Greenfield after Dr. Berlin first tentatively and then definitively bowed out, and although he did make an unsuccessful "last stab attempt" to secure Dr. Neil Blumberg a week before trial, 12/16/14 Tr. 141:17–22, nothing in the record suggests that he requested another continuance to allow him to secure a different expert when that failed. Instead, counsel took the case to trial with only Laureys, who suffers from a serious mental illness, left to explain his own intent.

The record does attest to aspects of trial counsel's representation of Laureys that were undeniably conscientious, such as securing court approval for expert witness funding and arranging for Dr. Berlin to interview Laureys at the D.C. Jail. It confirms as well that trial counsel had contacted other potential expert witnesses. This is not a case, then, where trial counsel did not attempt to obtain a mental health expert. Rather, trial counsel's grievously misguided effort to employ a mental health expert in his client's defense was so flawed as to be "the sort of serious blunder that will singlehandedly support a *Strickland* claim." *United States v. Hurt*, 527 F.3d 1347, 1356 (D.C. Cir. 2008). The record shows that in pursuing his own idea of a diminished capacity defense, trial counsel lost sight of how Dr. Berlin could have placed his client's conduct in a clinical context and mitigated the effects of evidence offered by the government and by Laureys himself. Indeed, there was some indication that trial counsel failed altogether to appreciate the benefits of the relevant and appropriate mental health testimony explaining pedophilic fantasy, which could have bolstered Laureys' fantasy defense. *See United States v. Hite*, 769 F.3d 1154, 1170 (D.C. Cir. 2014). On remand, trial counsel acknowledged that he never asked Dr. Berlin whether he could explain pedophilia to the jury, and he was unable to show that he had asked Dr. Berlin to explain the internet fantasy-chat subculture. Counsel admitted that he had never handled an insanity defense, and yet he appears to have considered himself qualified, as a layperson, to effectively diagnose his client as an "Internet sexual compulsive" and pursue confirmation of a diminished capacity diagnosis with potential experts. Nothing in the record even confirms that "Internet sexual compulsive" is a mental disorder recognized by the American Psychiatric Association.

The government's response that Dr. Berlin's testimony would have "actively *harmed*" Laureys, Appellee Br. 46, not only overlooks how clinical testimony would have provided information to help the jury place Laureys' conduct in context, it ignores altogether how Dr. Berlin could have rebutted Detective Palchak's quasi-expert opinions and effectively limited the harmful effect of much of Laureys' testimony. Trial counsel's failure to secure expert testimony cannot properly be excused as a "reasonable, calculated choice," *but see* Appellee Br. 48 (quoting *United States v. Mohammed*, 693 F.3d 192, 204 (D.C. Cir. 2012)), and even trial counsel did not claim that it was.

***7** In sum, trial counsel's error led to the complete failure to provide expert mental health testimony that trial counsel himself recognized was necessary, thereby depriving Laureys of an adequate defense. This was a slow-moving train wreck, one set in motion long before Dr. Berlin's eventual exit; indeed, it played out as the trial judge had predicted seven months before trial. It was thus unreasonable for trial counsel, so warned, to have done so little to avert it.

B.

Turning to prejudice, there is no question that Laureys' defense, and his own testimony, would have been significantly bolstered by expert testimony regarding fantasy chat and, more specifically, the existence of a subculture of men who meet first online and then offline for sex with one another spurred on by child sex fantasies, such that a "reasonable probability" of a different outcome at trial exists. *Strickland*, 466 U.S. at 694.

The court recently determined *Strickland* prejudice was established where trial counsel failed to offer expert psychiatric testimony necessary to establish a duress defense. *United States v. Nwoye*, 824 F.3d 1129, 1139–

40 (D.C. Cir. 2016). In particular, expert testimony on the battered woman syndrome would have bolstered the defendant's testimony that she participated in an extortion scheme only at the direction of her abusive boyfriend, especially because a juror might otherwise question why she did not just leave her abuser instead. *Id.* Here, Laureys testified to his own intent in chatting with and traveling to meet Palchak, but without expert assistance, a juror could reasonably conclude that anyone who engaged in such frankly disturbing chat *must* have done so actually intending to have sex with a child. The government labels the notion that people engage in online sexual fantasy as "common knowledge," Appellee Br. 49, but the notion that people engage in graphic, very realistic fantasy about sex with children, both as a means of coping with such urges and as a prelude to adult homosexual encounters, can hardly be considered within the ken of the average juror. As this court has noted, Dr. Berlin's clinical testimony regarding internet sexual fantasy involving children "can shed light on what may be an unfamiliar topic to most jurors." *Hite*, 769 F.3d at 1169–70. And although the jury could still have reasonably concluded that Laureys was not merely fantasizing and planning for adult sex with Palchak, that is a different question than whether a reasonable probability exists that a jury so informed by expert testimony would have concluded otherwise. *See Nwoye*, 824 F.3d at 1140.

The lack of a mental health expert also prejudiced Laureys by leaving him unable to rebut dubious, quasi-expert testimony by Detective Palchak. The jury heard from Detective Palchak that only three categories of chat participants exist: those who only chat online, those who want to then have phone sex, and those who seek to meet in order to have sex with a child. This would lead the jury to believe that Laureys must have fallen into the third category because it was undisputed that Laureys did seek to meet with Palchak following their online chat. Dr. Berlin's testimony made clear that Detective Palchak's taxonomy was incomplete, in that another category is known to exist for participants who seek to meet to have an adult sexual encounter with one another. Similarly, Dr. Berlin could have rebutted Detective Palchak's damaging testimony that "[t]ypically people who are interested in fantasy tell you right up front, I'm into fantasy, not realtime," 5/26/10 Tr. 243:15–16, which suggested to the jury that Laureys must not have been interested in fantasy because he made no such up-front disclaimer.

***8** The government nonetheless maintains that Laureys suffered no prejudice because he would have offered his own lurid, confused testimony regardless of whether a mental health expert also testified. Appellee Br. 50 n.22; *see also Laureys*, 103 F. Supp. 3d at 77. Although the record does indicate that, according to trial counsel, Laureys would have testified either way, that is not the relevant question. Trial counsel conceded that many topics addressed by Laureys' testimony would have been better addressed by Dr. Berlin, such as the existence of an online fantasy subculture, phone sex, deviant sex fantasies, and Laureys' diagnosis of himself as a sex addict. It is thus reasonable to expect that trial counsel would have limited Laureys' damaging testimony to the extent Dr. Berlin had already testified on those topics. And even if through effective cross-examination the government were able to draw Laureys out on those topics, Dr. Berlin's detached, clinical perspective would have at least framed Laureys' testimony in a crucial way, allowing the jury to understand Laureys' condition as a doctor would, rather than as the "clearly quite disturbed" defendant understood himself. 12/16/14 Tr. 33:9–11; *see* Appellant Br. 43–44; Reply Br. 11. That difference in perspective might not have been dispositive, but in such a difficult, troubling case in which even the trial judge expressed doubt about Laureys' intent in traveling to D.C., *see also Laureys*, 653 F.3d at 43–44 (Brown, J., dissenting in part), the significance of Dr. Berlin's perspective cannot be underestimated.

Because we conclude that Laureys has met his burden to establish that he was denied his right to the effective assistance of counsel by trial counsel's failure to secure expert mental health testimony, the court has no need to address his additional claims of ineffective assistance. Accordingly, we reverse the judgment of conviction and remand this case for a new trial.

All Citations

--- F.3d ----, 2017 WL 3389267

Footnotes

1 The trial judge had retired by this time, and another district court judge was assigned to Laureys' case.

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545 F.Supp. 662
United States District Court, E. D. Virginia, Richmond Division.

Richard C. LOE, Petitioner,
v.
UNITED STATES of America, Respondent.

Crim. A. No. 75-344-A.
|
Civ. A. No. 79-907-AM.
|
June 29, 1982.

Petitioner, who had been convicted of bank robbery, instituted proceeding in which he challenged validity of conviction and sentence on ground that he was denied effective assistance of counsel. After remand, 639 F.2d 783, the District Court, Merhige, J., held that: (1) petitioner's appointed counsel's failure to request examination of petitioner by private psychiatrist as to petitioner's criminal responsibility was ineffective assistance of counsel, though there had been prior examination concerning both defendant's capacity to stand trial and his criminal responsibility, and (2) it would be ordered that private psychiatrist be appointed to examine petitioner to determine his mental state at time offense was committed, and, if the report indicated existence of substantial question of criminal responsibility and if counsel represented that he would rely on it on retrial, judgment of sentence would be vacated and new trial granted, or otherwise, the judgment would stand affirmed.

Ordered accordingly.

West Headnotes (12)

[1] **Criminal Law**
Right of Defendant to Counsel

Sixth Amendment guarantee of right to counsel includes right to effective assistance of counsel. U.S.C.A.Const.Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**
Deficient Representation in General

Test of effectiveness of counsel is whether attorney's representation has been within range of competence demanded of attorneys in criminal cases. U.S.C.A.Const.Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
Standard of Effective Assistance in General

Criminal Law
Deficient Representation in General

Effective representation does not require errorless representation, but, rather, it must be shown that any error by a defendant's attorney has been so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation. U.S.C.A.Const.Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
Deprivation or Allowance of Counsel

Criminal Law
Indigent's or Incompetent's Counsel and Public Defenders

Counsel should be promptly appointed for indigent defendant, counsel should be given reasonable opportunity to prepare to defend defendant, counsel must confer with defendant without undue delay and as often as necessary to advise him of his rights and elicit matters of defense or ascertain that potential defenses are unavailable and counsel must conduct appropriate factual and legal investigations to determine if certain defenses can be used. U.S.C.A.Const.Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**

Deficient Representation in General

Court may refer to state bar canons and American Bar Association Standards Relating to the Defense Function to gauge adequacy of counsel's representation. U.S.C.A.Const.Amend. 6.

Cases that cite this headnote

[6] **Criminal Law**

Capacity to Commit Crime;Insanity or Intoxication

Counsel has affirmative obligation to make further inquiry where the facts known and available to defense counsel, or with minimal diligence accessible, raise a reasonable doubt as to defendant's mental condition. U.S.C.A.Const.Amend. 6.

7 Cases that cite this headnote

[7] **Costs**

Medical or Psychiatric Witnesses or Assistance

Even if there has been an examination of defendant to determine his capacity to stand trial, there may be, and in some cases should be, an appointment of psychiatrist, under statute relating to indigent persons, to ascertain defendant's mental condition at time of offense, in light of the different natures of the two inquiries and the dissimilar perspectives of experts involved. 18 U.S.C.A. §§ 3006A(e), 4244.

Cases that cite this headnote

[8] **Criminal Law**

Insanity

Mental Health

Examination and Determination as to Mental Disorder

Examination for competence to stand trial is a limited inquiry into a defendant's present mental condition, while determination of possible lack of criminal responsibility at time of the offense involves complex evaluation of defendant's total personality at a previous point in time and requires that the expert have a "substantial opportunity" to observe the defendant. 18 U.S.C.A. §§ 3006A(e), 4244.

1 Cases that cite this headnote

[9] **Criminal Law**

Mental Condition or Capacity

Mental Health

Examination and Determination as to Mental Disorder

Expert, who examines defendant to determine his capacity to stand trial, is expected to be neutral and detached, but expert examining defendant in order to ascertain his mental condition at time of the offense can be a partisan witness for the defense. 18 U.S.C.A. §§ 3006A(e), 4244.

Cases that cite this headnote

[10] **Criminal Law**

Capacity to Commit Crime;Insanity or Intoxication

In proceeding in which there was reasonable doubt as to defendant's mental condition at time of charged offense, appointed defense counsel's failure to request examination by private psychiatrist as to defendant's criminal responsibility was ineffective assistance of counsel, in that, though there had been examination of defendant's capacity to stand trial and responsibility at time of offense and counsel concluded that further expert examination would be "fruitless," failure to obtain additional examination meant that defendant did not have examination from partisan point of view and that the only expert determination of mental condition at time of offense was the government's evidence. 18 U.S.C.A. §§ 3006A(e), 4244; U.S.C.A.Const.Amend. 6.

4 Cases that cite this headnote

[11] **Criminal Law**

Incompetency or Neglect of Counsel for Defense

Denial of effective assistance of counsel vitiates a conviction and entitles a defendant to a new trial unless state or government can establish lack of prejudice thereby. U.S.C.A.Const.Amend. 6.

Cases that cite this headnote

[12] Criminal Law

Mental Capacity

In proceeding in which petitioner challenged validity of his conviction and in which it was determined that, due to appointed counsel's ineffectiveness, petitioner was denied opportunity to determine with expert help whether he had insanity defense worth presenting, it would be ordered that psychiatrist be appointed, and if the report indicated existence of substantial question of criminal responsibility and if counsel represented that he would rely on it on retrial, judgment of conviction would be vacated and a new trial granted, or, otherwise, the judgment would stand affirmed. 28 U.S.C.A. § 2255; 18 U.S.C.A. §§ 3006A(e), 4244.

1 Cases that cite this headnote

Attorneys and Law Firms

***663** Gregory L. Murphy, Alexandria, Va., for petitioner.

Leonie M. Brinkema, Asst. U. S. Atty., Alexandria, Va., for respondent.

MEMORANDUM

MERHIGE, District Judge.

Petitioner Richard C. Loe ("Loe") brings this proceeding under 28 U.S.C. s 2255 challenging the validity of his federal conviction and sentence on the ground that he was denied the effective assistance of counsel at his trial.

On August 23, 1977, Loe was convicted by a jury of the October 22, 1975 robbery of the Annandale, Virginia office of the Clarendon Bank and Trust Company in violation of 18 U.S.C. s 2113(a). At this trial, Loe was represented by counsel who had been appointed at his March 11, 1977 rearraignment.

Loe's conviction was affirmed by the Court of Appeals for the Fourth Circuit in United States v. Loe, 586 F.2d 1015 (4th Cir. 1978), cert. denied, ***664** 440 U.S. 927, 99 S.Ct. 1260, 59 L.Ed.2d 482 (1979). He then brought this s 2255 proceeding, claiming that he was denied the effective assistance of counsel because of his attorney's failure adequately to investigate and prepare defenses of incompetency to stand trial and insanity. After the Court denied relief, the Court of Appeals vacated the judgment, remanding the case to this Court to inquire into Loe's counsel's reasons for declining to seek a psychiatric examination of the defendant to determine if such failure denied defendant effective assistance of counsel. United States v. Loe, 639 F.2d 783 (4th Cir. 1981) (per curiam ; unpublished).

On November 4, 1975, Loe was indicted by a grand jury for the Annandale robbery. He entered a guilty plea to this charge on November 28, 1975. On January 2, 1976, before sentence was imposed, Loe requested leave to withdraw his guilty plea. The Court denied the request and Loe appealed this decision.

While this appeal was pending, Loe was transferred to the custody of Virginia state authorities in connection with state charges arising out of the robbery of a Richmond branch of United Virginia Bank on October 6, 1975. The state authorities had Loe examined on April 6, 1976 by Dr. R. Finley Gayle, III, a professional psychiatrist, who concluded that Loe was not competent to stand trial. The state charges were dropped, and Loe was returned to federal custody.

The Court of Appeals for the Fourth Circuit then reversed the district court's refusal to allow Loe to withdraw his plea and remanded the case to permit him to enter a new plea to the Annandale charge. United States v. Loe, 551 F.2d 310 (4th Cir. 1977) (unpublished). On March 11, 1977, Loe was rearraigned. A new attorney was appointed to represent him after Loe's original court appointed attorney withdrew because of difficulties in working with him. Loe entered a plea of not guilty. Upon the government's motion, the Court, on March 15, 1977, ordered that Loe be given a psychiatric examination

pursuant to 18 U.S.C. s 4244 to determine his present sanity and ability to assist in his own defense.

Pursuant to the Court's order, Dr. Enrich Reinhardt examined Loe for about thirty minutes at the Alexandria city jail on March 22, 1977. Dr. Reinhardt concluded that Loe was not capable of assisting in his defense, but recommended that he be examined further over an extended period of time to ensure that he was not feigning insanity. Consequently, on May 14, 1977, Loe was transferred to the Federal Correctional Institution at Springfield, Missouri to undergo mental examination and evaluation. After five weeks of observation, a team of doctors at Springfield concluded that Loe was competent to stand trial, and that he was accountable for his actions on the day of the Annandale robbery. [1]

Loe, through his counsel, filed a formal notice of insanity defense with the Alexandria court on July 7, 1977. His counsel also obtained authorization in two separate requests under 18 U.S.C. s 3006A(e) for the expenditure of funds to have Dr. Reinhardt and Dr. Gayle testify at Loe's trial as to his mental condition. [2] These s 3006A(e) requests were designed to ensure the attendance of these two psychiatrists at Loe's trial, and did not entail any additional examination or treatment of Loe. Loe's counsel proceeded to trial without requesting further psychiatric examinations under s 3006A(e) concerning either Loe's present mental condition or his sanity at the time of the robbery.

***665** The first defense witnesses called by Loe's counsel at his August 23, 1977 trial were laypersons who testified about Loe's unusual past behavior. William Loe, the defendant's brother, related several episodes of erratic behavior [3] and described Loe's father's psychiatric problems, [4] Loe's twin brother's suicide and his sister's attempted suicide. [5] Joseph Bonucelli, a social worker who had been Superintendent of the Northern Virginia Detention Home in which Loe had been confined at one time, testified about Loe's attempted suicide at that institution through ingestion of aspirin. [6] Susan Cloud, Loe's girlfriend, related other instances of Loe's seemingly abnormal actions and stated that he was not under the influence of drugs or alcohol during all but one of the incidents. [7] Loe's friend, Thomas Van Walker, described a similar episode when the police were called, but could not be sure whether or not Loe was drinking at the time. [8]

Then, the defense raised the issue of Loe's competency to stand trial. [9] Out of the presence of the jury, Dr. Reinhardt testified to his belief that Loe was then unable to assist in his defense. This opinion rested on his thirty minute interview with Loe five months before, reports he had reviewed from Springfield and a state hospital, letters recently received from Loe, and his observation of Loe's courtroom demeanor. After cross-examination emphasized the brevity and staleness of Dr. Reinhardt's March examination, the Court concluded that Loe was competent to stand trial.

The jury was then returned to the courtroom and heard Loe's expert testimony regarding his insanity defense. Dr. Gayle stated that he interviewed Loe for only 30-45 minutes and that he simply recommended that he be further examined. The Court of Appeals for the Fourth Circuit concluded that "(a)s a practical matter, Dr. Gayle admitted that he had no opinion on Loe's present capacity or his sanity at the time of his offense." [10]

Testimony by Dr. Reinhardt, who had examined Loe in March of 1977 pursuant to the Court's order under 18 U.S.C. s 4244, followed. His examination was directed only at determining Loe's capacity to stand trial, and Dr. Reinhardt testified that his observation then had not been sufficient to reach a diagnostic impression or opinion as to Loe's mental condition at the time of the crime. He stated only that Loe was a victim of "preoccupied unstable mental condition with paranoid features" and that he was incompetent in March of 1977 and presently incompetent. [11] As the Court of Appeals concluded, there was no expert opinion presented by the defense on Loe's accountability for his actions at the time of the offense. [12]

The government presented several witnesses in rebuttal to this insanity defense. A Richmond police officer testified that Loe had made statements to him shortly after he met with Dr. Gayle that he had "fooled" the psychiatrist into thinking that he was insane. [13] Three lay witnesses testified that Loe had not appeared to be acting abnormally at the time of the bank robbery and just before the trial. Dr. Kunev, a member of the psychiatric staff at Springfield, testified that, based on the observation at

that *666 facility, Loe was both competent and sane in October, 1975.

The jury rejected Loe's insanity defense and returned a verdict of guilty. On January 9, 1978 Loe was sentenced to sixteen years imprisonment under 18 U.S.C. s 4205(b)(2), to run concurrently with an identical sentence imposed on that date for Loe's conviction on a federal charge arising out of the robbery of the Richmond bank.

[1] In its opinion remanding the case to this Court, the Court of Appeals stated that "the only real issue..." at Loe's trial was his sanity at the time of the robbery. Seeing a need for a private psychiatric examination directed at determining this issue, the Court concluded that Loe's counsel's decision in presenting an insanity defense to rely solely on Dr. Gayle's and Dr. Reinhardt's incomplete observations in the face of government evidence derived from nearly six weeks of observation required explanation. Thus, this Court was directed to inquire into "counsel's reasons for declining to seek further psychiatric examinations to the end that it may be determined if Loe received effective assistance of counsel." [14] Of course, the sixth amendment guarantee of the right to counsel includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); United States v. Fisher, 477 F.2d 300 (4th Cir. 1973).

[2] [3] [4] [5] In this jurisdiction, the test of the effectiveness of counsel is whether the attorney's representation "was within the range of competence demanded of attorneys in criminal cases." Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978), quoting from McMann v. Richardson, supra, at 770-71. Effective representation does not require errorless representation. To merit relief, Loe must show that any error by his attorney "was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." Marzullo v. Maryland, supra, at 544. See Via v. Superintendent, Powhatan Correctional Center, 643 F.2d 167, 171 (4th Cir. 1981). The standard is an objective description of the competency normally demanded of attorneys. It is a flexible test, but counsel must perform at least certain specifics, e.g., counsel should be promptly appointed for an indigent defendant, he should be given a reasonable opportunity to prepare to defend the defendant, he must confer with the defendant without undue delay and as often as necessary to advise him of his rights and elicit matters of defense or ascertain that potential defenses are unavailable, and he must conduct appropriate factual and legal investigations to determine if certain defenses can be used. Marzullo, supra; Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968). A court may also refer to state bar canons and the American Bar Association Standards Relating to the Defense Function to gauge the adequacy of counsel's representation. Marzullo, supra.

[6] Counsel has an affirmative obligation to make further inquiry where the facts known and available, or with minimal diligence accessible, to defense counsel raise a reasonable doubt as to the defendant's mental condition. "If reasonable grounds exist for questioning the sanity or competency of a defendant and counsel fails to explore the matter, the defendant has been denied effective assistance of counsel." Wood v. Zahradnick, 430 F.Supp. 107, 111 (E.D.Va.1977), affirmed, 578 F.2d 980 (4th Cir. 1978). See Kibert v. Peyton, 383 F.2d 566, 569 (4th Cir. 1967); Owsley v. Peyton, 368 F.2d 1002, 1003 (4th Cir. 1966); McLaughlin v. Royster, 346 F.Supp. 297 (E.D.Va.1972).

It is undisputed that the facts in this case did give rise to a reasonable doubt as to *667 Loe's mental condition and a correspondent duty on the part of his counsel to make further inquiry to determine if the defense of insanity should be raised, and if so, to develop the defense adequately. Loe's counsel did make this inquiry. He did his first research on Loe's possible insanity defenses on March 12, 1977, the day after his appointment. He visited Loe in jail on March 4, 1977 and discussed his case with the United States Attorney's office on March 15, 21 and 22, 1977. He discussed Dr. Reinhardt's report on his s 4244 examination of Loe with the United States Attorney on March 22, 23 and 25, and did further insanity research on March 23. Further visits to Loe followed. Loe's counsel requested the U.S. Attorney to have Loe evaluated as to his competency to stand trial and his state of mind at the time of his offense while at the Springfield facility. [15] Having received and reviewed the Springfield report on June 21, 1977, he attempted to contact Dr. Reinhardt on several occasions and did communicate

with all the social services and correctional institutions that had seen Loe in the past, requesting Loe's medical records. Counsel discussed the Springfield report and the aspects of Loe's case with Dr. Reinhardt on July 1, 1977. Further conversations were had with other attorneys experienced in the presentation of an insanity defense and the attorney who had represented Loe in the state proceedings which were dismissed on the strength of Dr. Gayle's finding of incompetency. More research on the defense took place on July 5 and 6. As noted above, Loe's counsel filed notice of the insanity defense on July 7, 1977, and obtained authorization under s 3006A(e) to compensate Dr. Reinhardt and Dr. Gayle for their presence at Loe's trial. From that time to the August 23 trial date, counsel had many discussions with Loe and interviews with witnesses, and received medical reports on Loe's mental history. [16]

Thus, this is not a case where counsel failed to pursue a possible insanity defense, for Loe's counsel invested substantial effort in developing the issue. Nor is this an instance of failure to raise the defense at trial to present the evidence of doubt as to Loe's mental condition to the court and the jury. Loe's counsel did produce at the trial the evidence and testimony he had, in the manner described above. The central issue in this proceeding, then, is whether counsel's failure to seek a private examination of Loe under s 3006A(e) rendered his presentation of the defense inadequate and his representation of Loe ineffective. Under Marzullo, Loe must establish that his counsel's failure to pursue this examination constituted an error "so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional, deliberation." Marzullo, supra, at 544.

[7] **[8]** **[9]** The Criminal Justice Act of 1964, 18 U.S.C. s 3006A, was enacted to "assure adequate representation in the Federal courts of accused persons with insufficient means." S.Rep.No. 346, 88th Cong., 1st Sess. 1, (1963). Psychiatric assistance is one of the expert services available to an indigent defendant under s 3006A(e), so that the accused may be afforded the reasonable opportunity to procure the services of a psychiatrist to aid him in his defense. Even if there has been a s 4244 examination of the defendant to determine his capacity to stand trial, there may be, and in some cases should be, an appointment of a psychiatrist under s 3006A(e) to ascertain the defendant's mental condition at the time of the offense, in light of the different natures of the two inquiries and the dissimilar perspectives of the experts involved. United States v. Reason, 549 F.2d 309, 311 (4th Cir. 1977). Examination for competence to stand trial is a limited inquiry into a defendant's present mental condition, while the determination of possible lack of criminal responsibility at the time of the offense involves a complex evaluation of the defendant's total personality at a previous point in time and requires that the expert ***668** have a "substantial opportunity" to observe the defendant. United States v. Walker, 537 F.2d 1192, 1195 (4th Cir. 1976). The s 4244 expert is expected to be neutral and detached, but the s 3006A(e) examiner can be a partisan witness for the defense. United States v. Reason, supra, at 311.

[10] In the instant case, Loe's counsel requested that the s 4244 examination consider both capacity to stand trial and responsibility at the time of the offense. The five weeks of evaluation at Springfield, based on Dr. Reinhardt's suggested need for further study, gave the doctors at that facility an extended observation of Loe and produced a report containing findings as to both present mental condition and state of mind at the time of the crime. Thus, the real harm, if any, to Loe by counsel's failure to request an examination of Loe by a private psychiatrist under s 3006A(e) would be that such failure deprived him of the partisan perspective of a s 3006A(e) examiner.

In Proffitt v. United States, 582 F.2d 854, 857 (4th Cir. 1978), cert. denied, 447 U.S. 910, 100 S.Ct. 2997, 64 L.Ed.2d 860 (1980), the Court of Appeals, after discussing the psychiatric services available to an indigent defendant under s 3006A(e), held that "the failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel." Quoting from United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976), the court ruled that the s 3006A(e) examination is required, and defense counsel has the duty to seek it, "whenever the services are 'necessary to the preparation and presentation of an adequate defense.' " Id. 582 F.2d at 857. The resolution of the instant proceeding, then, turns on whether the need for a s 3006A(e) examination was "apparent" and "necessary to the preparation and presentation of an adequate defense" in Loe's case, and whether Loe's counsel's reasons for not obtaining an exam were the result of informed deliberation or of neglect or ignorance.

The record reveals that Loe's counsel originally intended to seek authorization under s 3006A(e) for a private psychiatric examination of Loe to evaluate both his competence to stand trial and his mental condition at the time of the offense. At a hearing before the Court on June 27, 1977, after he had received the Springfield report, Loe's counsel requested the evaluation and indicated a "great possibility" that an insanity defense would be asserted, but suggested that the matter be brought up on a later motions day. The Court, seeing no reason for such delay, directed Loe's counsel to inform the Court of his preferred examiner and the order approving the appointment would be entered. The closing statements of the hearing reveal the following exchange:

> THE COURT: The defendant is remanded to the custody of the United States Marshal, and you will present that order to me, will you, sir?
>
> (LOE'S COUNSEL): Yes, I will. [17]

***669** The order, however, was never prepared. Counsel conferred with Dr. Reinhardt on July 1 to discuss the Springfield report. Dr. Reinhardt pointed out the necessary inconclusiveness of psychiatric findings of sanity, causing Loe's counsel to decide that the "appropriate strategy" in the case was to collect Loe's medical records, explore the use of lay testimony on Loe's mental condition around the time of the robbery, and to rely on "cross-examination of the Government's expert mental witnesses to sow doubt about the conclusiveness of their findings of sanity." [18] He planned to rely at trial on Dr. Reinhardt's and Dr. Gayle's expert testimony, along with that of lay witnesses, all of which "dated from times closer to ... the bank robbery than the psychiatric testimony to be offered by the Government." [19] Thus, to counter the prosecution's Springfield conclusion of sanity at the time of the offense, Loe's counsel intended to use Dr. Reinhardt and Dr. Gayle to show the defendant's "impaired mental judgment," contemporaneous observations of lay witnesses, and records of Loe's past psychiatric evaluations to show "evidence of behavorial distortions." [20] Counsel also hoped to disparage the conclusiveness of the Springfield findings, and to respond to the government's evidence that Loe had stated he had "fooled" Dr. Gayle by testimony by Dr. Gayle and Dr. Reinhardt that such statements did not necessarily indicate sanity. [21]

Loe's counsel now states that he decided not to have Loe examined by his own s 3006A(e) psychiatrist because he felt it would not produce results helpful to the defendant. Counsel felt that the findings of the Lewisburg reports and the other records were consistent with the Springfield evaluation, and that "any further evaluation of Mr. Loe's mental condition would be highly likely to confirm these psychiatric reports." Because of the evidence that Loe had stated that he had "fooled" Dr. Gayle, counsel concluded that additional expert examinations would be "fruitless." [22] In short, Loe's counsel did not follow through on his s 3006A(e) request because he concluded, based on all the psychiatric evidence at hand, that another examination would not strengthen his insanity defense. This, of course, was a tactical decision, and courts ***670** are reluctant to second guess the tactics of trial lawyers. Such a course is required here, however, if the tactical decision was so unreasonable in light of the need for the evidence that it amounted to a denial of the right to counsel within the range of competence demanded of attorneys in criminal cases. Goodson v. United States, 564 F.2d 1071, 1072 (4th Cir. 1977).

Other courts have addressed the question of whether a failure to obtain a psychiatric examination of a criminal defendant amounts to denial of effective assistance of counsel.

The indigent defendant in Proffitt v. United States, supra, was also charged with two separate bank robberies. After a conviction in the first trial despite a reasonable doubt defense, Proffitt's court-appointed counsel discussed with him the possibility of using an insanity defense at the second trial. The attorney reasoned that if he sought public funds under s 3006A(e) for a psychiatric examination of the defendant, the government would be alerted to the insanity defense and request its own exam. He felt that if the psychiatrist were retained with private funds, he could present the defense without giving notice to the prosecution. [23] Thus, he conditioned his investigation and presentation of an insanity defense on the defendant's provision of a $5,000.00 fee to retain him as defendant's private counsel and a $5,000.00 fee for a psychiatrist. When the defendant failed to produce the money, the attorney declined to investigate the insanity defense, never brought it to the court's attention and no such defense was raised at the defendant's second trial. The Court of Appeals ruled that by conditioning the investigation and presentation of an insanity defense

upon the payment of the fees, Proffitt's attorney failed to render adequate representation. The court rejected the government's argument based on the attorney's belief that the defendant was not so mentally ill that the defense would have succeeded on the grounds that the lawyer lacked the education and experience definitely to diagnose Proffitt's mental condition and instead had a duty to move for a psychiatric examination.

Wood v. Zahradnick, supra, also involved the failure to obtain an examination of an indigent defendant coupled with the omission to raise the insanity defense at trial. There, the defendant was convicted of the rape, robbery and brutal beating of a 67-year old woman whom he had known his entire life, and there was evidence that he may have been suffering from alcoholic pathological intoxication at the time of the crimes. Nonetheless, the defendant's attorney failed to investigate this possibility, relying instead on a defense consisting of the defendant's testimony on his heroin addiction and his inability to recall the events of the night in question. Apparently, the attorney declined to pursue the insanity defense because he did not think that the defendant was insane at the time of the crime. Ruling that the attorney's personal opinion carried little weight in light of his failure to seek an expert evaluation provided by Virginia law, [24] the district court held that counsel's failure to investigate or raise the defenses of insanity and incompetence amounted to a denial of effective assistance of counsel. [25] The Court of Appeals, emphasizing that counsel may not rely on his personal opinion and that insanity was the only defense available to the defendant, affirmed the lower court's decision. [26]

In United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974), the defendant was convicted by a jury of conspiracy to rob and robbery of a bank. His court-appointed counsel requested a s 3006A(e) appointment of a private psychiatrist to aid in the preparation of the defense, because of an earlier mental examination of the defendant and reports from his counsel in another criminal case. The court granted the request ***671** and appointed a psychiatrist to examine the defendant. Later, however, the doctor erroneously reported his finding that the defendant was sane at the time of the crime and competent to stand trial directly to the court, rather than to the defendant and his counsel alone, and the court incorrectly treated the matter as one coming under s 4244 and adjudicated the defendant competent to stand trial under that section. Edwards' counsel never again raised the insanity issue or objected to the court's mishandling of the request for expert assistance. On appeal, the court excused the district court's error on the ground that defendant's counsel never objected to the error, thus forcing the court to reach the ineffective assistance of counsel question. It held that the attorney's failure to pursue his successful s 3006A(e) motion and to object to the court's error deprived Edwards of effective counsel, and that by these inactions he was denied the full benefit of the statute. The court also reasoned that the attorney's doubts about the defendant's mental condition "could not have been so clearly resolved by the (psychiatrist's) report ... as to justify a complete abandonment of the s 3006A(e) motion." 488 F.2d at 1164.

The defendant in United States v. Fessel, supra, was charged with the possession with intent to distribute and the importation of marijuana. Arrested in July, 1973, the defendant was committed under 18 U.S.C. s 4246 by the court, after setting aside a guilty plea on incompetency grounds, until he was competent to stand trial. After months of observation and treatment by psychiatrists at two medical centers for federal prisoners, [27] Fessel was adjudicated competent and proceeded to trial in December, 1974. At trial, the only live expert testimony on the defendant's state of mind at the time of the offense was that of a psychiatrist who examined the defendant in October, 1974 at the court's request and concluded that he was mentally responsible at the time of the offense. The defendant was allowed to read from reports prepared by staff psychiatrists at the federal centers, but his court-appointed attorney failed to depose or subpoena a private psychiatrist who had seen the defendant shortly before the offense and never sought s 3006A(e) authorization for a private examination of the defendant. On appeal, the court held that counsel's failure to move for a s 3006A(e) appointment deprived the defendant of testimony necessary to prepare his defense and thus fell below the minimum level of representation guaranteed by the Sixth Amendment. The court felt that the appropriateness of an insanity defense was obvious because the evidence showing that defendant committed the crime was almost uncontested. Furthermore, the court concluded that the need for psychiatric assistance to prepare the defense was equally apparent, stating that "(i)n the absence of live psychiatric testimony favorable

to the defendant, the need for a s 3006A(e) motion was manifest." 531 F.2d at 1279.

Lastly, the Court notes a case in which the failure to seek a s 3006A(e) examination was held not to constitute a denial of the right to effective assistance of counsel. In United States v. Fratus, 530 F.2d 644 (5th Cir.), cert. denied, 429 U.S. 846, 97 S.Ct. 130, 50 L.Ed.2d 118 (1976), the defendant was indicted on charges of bank robbery with a dangerous weapon. After arrest, court-appointed defense counsel requested a s 4244 examination of the defendant on October 15, 1974. The s 4244 psychiatrist's report resulted in a court finding of incompetence to stand trial and an order committing the defendant to the Springfield, Missouri facility until he became able to aid in his defense. In February, 1975, upon motions by the defense and the government, the defendant was examined by a different psychiatrist, again found incompetent and was recommitted to Springfield. Finally, in June, 1975, defense counsel moved for another s 4244 examination, another psychiatrist was appointed, and defendant was found competent to stand trial. At trial, defense counsel, to support an insanity defense, ***672** presented the live testimony of the two psychiatrists appointed under the first two s 4244 motions, who had concluded both that the defendant was incompetent to stand trial and was not mentally responsible for his actions at the time of the offense. The jury, after hearing this testimony and that of a government psychiatrist that defendant was not legally insane at the time of the crime, rejected the insanity defense and returned a verdict of guilty. On appeal, the defendant argued that his attorney's failure to move for a s 3006A(e) appointment constituted ineffective assistance of counsel. The court disagreed, on the ground that the defendant's attorney had available to him, for the purpose of preparing his defense, the testimony of the two court-appointed psychiatrists who had found defendant to be legally insane.

The Court concludes that the instant case falls more closely to the Proffitt, Wood, Edwards and Fessel line of cases than it does to Fratus. Loe's counsel's failure to pursue his successful s 3006A(e) motion meant that there was only one expert determination of Loe's mental condition at the time of the offense-the government's Springfield evidence. It also meant that the only live psychiatric testimony at trial as to Loe's mental responsibility at the time of the crime was that of Dr. Kunev, a government witness. As in Edwards, the Springfield conclusions could not have so clearly resolved the issue as to justify the abandonment of a s 3006A(e) motion made here with those conclusions already in mind. As in Fessel, non-use of the s 3006A(e) option deprived the defendant of any live psychiatric testimony on his mental condition at the time of the offense. Unlike Fratus, counsel here did not have the expert testimony of two doctors who could say that the defendant was insane at the time of the crime. Loe's counsel planned to and did rely on testimony by Dr. Reinhardt and Dr. Gayle to show Loe's "mental impairment," but they could give no opinion on the key issue of insanity. Thus, the s 3006A(e) examination was necessary to the adequate preparation of an insanity defense.

As stated, Loe's counsel failed to follow up his s 3006A(e) request because he felt that any further examination of Loe would merely confirm the Springfield results. If this was a strategic, tactical decision, the Court concludes that it was an unreasonable one in light of the defendant's need for the results of the examination. The Court is mindful of the critical interrelation between expert psychiatric assistance and minimally effective representation of counsel. Fessel, supra, at 1279. Just as the lay opinion of an attorney as to his client's state of mind carries little weight, Proffitt, supra, Wood, supra, his speculation as to the outcome of an expert examination should be given little credence as well. In Loe's counsel's situation, facing the government's evidence based on nearly six weeks of observation, the need for the permissibly defense-oriented perspective of the s 3006A(e) expert was most acute. Sanctioning the abandonment of a s 3006A(e) motion because of a lay belief that its results would merely confirm the government's evidence would effectively vitiate the legislative purpose of providing the indigent defendant with his own expert. Counsel's failure to pursue his request thus denied Loe the full benefit of the statute and amounted to a denial of the minimum level of representation guaranteed by the sixth amendment.

[11] There remains only the question of the remedy to which Loe is entitled at this stage. This jurisdiction has long adhered to the rule that denial of the effective assistance of counsel vitiates a conviction and entitles a defendant to a new trial unless the state or the government can establish lack of prejudice thereby. See Coles v. Peyton, 389 F.2d 224 (4th Cir.) cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968), cf. United States v. Wood, 628 F.2d 554, 559 (D.C.Cir.1980) (burden

is on the defendant to show that counsel's substantial breach was likely to have resulted in prejudice to his case); United States v. DeCoster, 624 F.2d 196, 215 (D.C.Cir.1976) (defendant must demonstrate a likelihood of effect on the outcome). The Court of Appeals in ***673** Wood v. Zahradnick, supra, 578 F.2d at 982, after ruling that defense counsel's failure to seek a psychiatric examination of the defendant amounted to a denial of the effective assistance of counsel, remanded the cause to the district court in order to procure an examination of the defendant. This procedure was followed, said the court, to give the State of Virginia the opportunity to show that the attorney's failure to seek the examination was "harmless beyond a reasonable doubt," which would be demonstrated if the exam ordered by the Court resulted in a "competent determination..." that the defendant was not subject to a psychotic reaction to alcohol. 578 F.2d at 982.

[12] The Proffitt court indicated that similar relief should be ordered where it is "possible that a thorough examination would not have assisted defense counsel in preparing an insanity defense." 582 F.2d at 859. Since Loe, like Proffitt, was "denied not the opportunity to present a defense, but the opportunity to determine with expert help whether he had a defense worth presenting," 582 F.2d at 859, quoting United States v. Taylor, 437 F.2d 371, 379 (4th Cir. 1971), the Court will pattern its relief after that ordered in Proffitt. Accordingly, a private psychiatrist will be appointed to examine Loe to determine his mental state at the time the offense was committed. If his or her report "indicates the existence of a substantial question of criminal responsibility, ..." and if Loe's counsel represents that he would rely on it on retrial, [28] the Court's judgment will be vacated and a new trial granted. 582 F.2d at 859. Otherwise, Loe's judgment of conviction will stand affirmed. [29]

An appropriate order will issue.

All Citations

545 F.Supp. 662

Footnotes

1 On June 15, 1977, the Chief of Psychiatry at the Springfield Medical Center, Jack Eardly, M.D., wrote to Judge Albert V. Bryan, Jr. relating that the opinion of the Springfield staff was that Loe was "mentally competent to stand trial and was responsible at the time of the alleged offense." Dr. Eardly endorsed the reports of the staff, one of which was signed by Nicola V. Kunev, M.D., and the other by Dr. Eardly. Loe's trial counsel received these reports on June 21, 1977. See Affidavit by Loe's Counsel, at P 7 (February 19, 1981).

2 18 U.S.C. s 3006A(e) provides that counsel for an indigent person may obtain by ex parte application authorization for payment by the government for "investigative, expert, or other services necessary for an adequate defense...."

3 Tr. at 74-75.

4 Tr. at 69.

5 Tr. at 76.

6 Tr. at 84-85.

7 Tr. at 92-96.

8 Tr. at 96-100.

9 Loe's counsel stated that "(a)s a result of the Springfield report and in talking to Dr. Reinhardt recently, I just was surprised to find it was his continuing belief he is incompetent to stand trial." Tr. at 104.

10 United States v. Loe, 639 F.2d 783 (4th Cir. 1981) (unpublished), at 6.

11 Tr. at 137.

12 United States v. Loe, supra, 639 F.2d 783 note 10, at 6.

13 At the trial, Loe's counsel elicited from Dr. Gayle the latter's opinion that such statements by Loe "wouldn't necessarily make him sane or responsible...." Tr. at 133.

14 United States v. Loe, supra note 10, at 8.

15 Affidavit by Loe's Counsel, PP 5-6.

16 Id. at PP 7, 9-12.

17 Transcript of Proceedings, June 27, 1977, at 4. The relevant portion of the transcript at 3-4 is as follows:

THE COURT: I will set it for trial by jury. I will direct any motions to be filed, be filed within ten days. I will set those motions for July 22.
There has been a question concerning the defendant's competency. I have received the report on that.
Mr. (Loe's Counsel), do you want to be heard?
(LOE'S COUNSEL): I have seen those reports, Your Honor.
THE COURT: Do you want to be heard further on that issue?
(LOE'S COUNSEL): I didn't know it was proper at this time. I would request a private psychiatric evaluation from someone not affiliated with the Government.
I would think that would be brought up on motions day, Your Honor.
THE COURT: Well, I see no reason to wait for that. Are you contemplating asserting an insanity defense? I don't ask you to commit yourself one way or another, but if you think that it might be-.
(LOE'S COUNSEL): (Interposing) There is a great possibility, yes, sir.
THE COURT: I see no reason to wait until July 22 for that, because we are approaching the trial date.
(LOE'S COUNSEL): Yes, sir.
THE COURT: If you will let me know whom you would like and make sure that he can meet not only the July 22 hearing but the August 3 trial date, if necessary, then I will enter the order approving his appointment.
(LOE'S COUNSEL): Yes, your Honor.
THE COURT: The defendant is remanded to the custody of the United States Marshal, and you will present that order to me, will you, sir?
(LOE'S COUNSEL): Yes, I will.
THE COURT: Court will stand adjourned.

18 Affidavit of Loe's Counsel, at P 10.

19 Id.

20 Id. at P 12. These records resulted from stays at Eastern State Hospital in Williamsburg, Virginia, Western State Hospital in Staunton, Virginia, and Lewisburg Federal Penitentiary in Lewisburg, Pennsylvania. At age 15, Loe was admitted to Eastern State on March 3, 1966 by court order. The hospital's report (Exhibit K-1 to Affidavit of Loe's Counsel), sent to Loe's counsel on June 30, 1977, stated that Loe was of coherent thinking, normal feeling, good insight and “oriented in all spheres.” The institution's impression was that Loe suffered only from a transient situational personality disturbance as an adjustment reaction to adolescence. Loe was committed by court order to Western State Hospital on April 25, 1966 and discharged on June 28, 1966 as Not Mentally Ill. This record was sent to Loe's counsel on July 6, 1977. (Exhibit K-1 to Affidavit). Mickey Silver, M.D., a Lewisburg psychiatrist, examined Loe on December 20, 1976 and found “no evidence of a major mental illness.” (Exhibit L to Affidavit). The same conclusion was reached by Dr. Milton Schmidt, also a Lewisburg psychiatrist, in his May 11, 1976 report on Loe. (Exhibit M to Affidavit). Lastly, a May 19, 1976 report by Dr. Schmidt reveals that he had examined records from “a recent state trial in which doubts of Mr. Loe's competency were expressed by a psychiatrist, ...” but that his opinion remained unchanged. Though Loe was “quite uncooperative, vague, and evasive...,” he had shown “no signs of psychosis or major mental illness...” at the time of the Schmidt report (Exhibit N to Affidavit). Loe's counsel realized after reviewing these records that “in none of these situations had ... Loe ever been judged insane.” Affidavit at P 12.

21 Affidavit by Loe's Counsel, at P 12.

22 Id.

23 This case arose before the effective date of F.R.Crim.P.Rule 12.2.

24 Va.Code s 19.2-169.

25 430 F.Supp. at 112.

26 578 F.2d at 982.

27 The centers were located in El Reno, Oklahoma and Springfield, Missouri.

28 The Court notes that the government may elect to retry Loe despite the difficulty in determining his mental state at the time of the offense because of the passage of time. Wood v. Zahradnick, 611 F.2d 1383 (4th Cir. 1980).

29 During the pendency of the instant petition, the Court has been plagued with many pro se pleadings from Loe filed without consultation with or the knowledge of counsel appointed to aid him in this proceeding. One such pleading was a “Supplemental Brief” filed after the evidentiary hearing on the original petition was held, in which Loe argues that his trial counsel's failure to request during the trial that Loe be again examined under s 4244 to determine his competency to stand trial denied him the effective assistance of counsel. Loe relies on Dr. Reinhardt's trial testimony that he had

received certain records and letters directly from Loe on the day before trial which confirmed his impression that Loe was a paranoid schizophrenic and presently incompetent to stand trial. Tr. 106-109; 120-123. Loe contends that his counsel's failure, in light of this testimony and the fact that time had lapsed between his final evaluation at the Springfield facility under s 4244 on June 3, 1977 and his August 23, 1977 trial, to request a second examination under s 4244 was without the range of competence demanded of attorneys in criminal cases. Loe raised this argument in his original s 2255 petition filed with the Court on November 7, 1979. Loe appealed the Court's denial of any relief on this petition. Apparently the Court of Appeals for the Fourth Circuit similarly saw no merit in Loe's claim, for in its opinion it noted that “the only real issue at trial was Loe's sanity at the time of the robbery,” and the court remanded the case to this Court to determine counsel's reasons for failing to obtain a s 3006A(e) examination of Loe to assess his mental state at the time of the offense. The Court thus declines to reconsider the substance of Loe's s 4244 argument.

Indictment dismissed.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-2307
Non-Argument Calendar

D. C. Docket No. 3:96-CR-38/LAC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN EUGENE PELL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(April 15, 1998)

Before HATCHETT, Chief Judge, BARKETT, Circuit Judge, and CLARK, Senior Circuit Judge.

PER CURIAM:

Defendant-appellant Martin Eugene Pell appeals his conviction for providing marijuana to an inmate of a federal prison camp, based on the district court's denial of his motion for authorization to retain an expert witness. Because an expert witness could have provided testimony to rebut prosecution evidence or to establish an affirmative defense, we REVERSE and REMAND for further proceedings consistent with this opinion.

I. BACKGROUND

In October 1995, James Edward Pell ("James") was an inmate at the Eglin Air Force Base Federal Prison Camp.[1] Air Force Office of Special Investigations ("OSI") Special Agent David Clough received an anonymous telephone call advising him that James would be visited by his identical twin brother, defendant-appellant Martin Eugene Pell ("Martin"), at the prison on October 29, 1995.[2] The caller stated that Martin would be wearing shoes containing hidden drugs, and planned to switch shoes with James.[3]

Based on this information, the OSI and the prison planned a surveillance of James.[4] The OSI provided an ultraviolet dye kit to prison correctional officer Thomas Hornsby.[5] The dye kit contained several types of dyes, both in powder and liquid form, which were invisible to the naked eye, but were visible under a black

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[1] R4 at 30, 34, 64.

[2] R4 at 42-43. 93.

[3] Id.

[4] R4 at 43,93, 126.

[5] R4 at 91, 102.

light.[6] After experimenting with the dyes, Hornsby decided to use the liquid yellow dye because it gave off a distinctive yellow tint under black light.[7]

On October 27, 1995, Hornsby conducted a fire drill in James' inmate dormitory.[8] After everyone was out of the building, Hornsby applied the dye to the sides, front, and tongue of a pair of James' black tennis shoes.[9]

On October 29, 1995, Martin entered the prison wearing black high top tennis shoes to visit James.[10] Hornsby saw James before he visited with Martin, and James was wearing what appeared to be the same black tennis shoes on which the dye had been applied.[11] Martin and James were observed by correctional officers from about ten feet while they were visiting with other family members in the picnic area.[12] The correctional officers did not see Martin and James switch shoes.[13]

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[6] R4 at 91, 102-103, 105-106, 126.

[7] R4 at 105-106, 121-122.

[8] R4 at 102-103.

[9] R4 at 103-105.

[10] R4 at 46, 51-52, 8-81, 149-150. Although correctional officers Vivian Epperson and Michael Wagner testified that Martin's high-top tennis shoes were black, R4 at 47, 65, 81, Air Force security officer Robert Gray testified that Martin's shoes were black and teal. R4 at 145-146, 149.

[11] R4 at 108.

[12] R4 at 62-63, 75, 77-81.

[13] R4 at 68-69, 81.

After Martin left the visitors' area, James was searched for contraband.[14] Initially, the officers found no contraband on James and did not detect any glow from dye on the shoes.[15] After an officer smelled "crazy glue" on one of the shoes , the officer found marijuana hidden in a compartment cut into the sole of the shoe.[16]

Martin exited the prison, but agreed to return when asked by one of the officers.[17] Martin's shoes were examined by a black light, and glowed on the sides, and top.[18]

Martin was indicted for providing marijuana to an inmate of a federal prison camp,[19] and James was indicted for obtaining and possessing marijuana while an inmate at a federal prison camp.[20] Both Martin and James were determined to be indigent and counsel was appointed to represent them.[21] Trial was initially set for

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[14] R4 at 95.

[15] R4 at 195-196.

[16] R4 at 96-97.

[17] R4 at 129, 199-202.

[18] R4 at 130-131.

[19] 18 U.S.C. § 1791(a)(1).

[20] 18 U.S.C. § 1791(a)(2).

[21] R1-17, 18, 43 at 4.

December 2, 1996.[22] Jury selection was held on December 2, 1996. On December 9, 1996, James and by adoption, Martin, moved for authorization to retain an expert witness.[23] Following a hearing, the district court denied the motion finding there was nothing "an expert could offer . . . that would assist the jury under the circumstances of the case . . . ."[24] During the trial, Martin denied bringing drugs into the prison or switching shoes with James and stated that, contrary to the testimony of Hornsby and Clough, his shoes did not glow when examined under a black light.[25] The jury found both Martin and James guilty as charged.[26] Martin was sentenced to twelve months imprisonment, and two years supervised release.[27] Martin appealed.[28]

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[22] R1-19, 20.

[23] R1-49. James filed the motion on December 9, 1996. Id. Despite the government's argument to the contrary, Martin's attorney adopted the motion during the hearing, stating that the government was "precluding us from presenting an analysis of a major portion of their case . . . . I think just in the general annals of criminal justice we're allowed to have an expert to present our case." R3 at 5-6. Martin's attorney also adopted the motion during the trial, stating "it would be appropriate to renew our request for an expert in [fluorescent] area . . . ." R4 at 5.

[24] R3 at 11-12.

[25] R4 at 198, 200.

[26] R1-59 at 4, R5 at 294.

[27] R1-74. Martin was remanded into custody. Id.

[28] R1-75

II. DISCUSSION

Martin argues that the district court abused its discretion in denying his motion for authorization to retain an expert witness where the primary evidence was the use of a fluorescent dye. He contends that he was denied the basic tools of an adequate defense.

During the motion hearing, Martin argued that a "black light glow" expert or chemist was needed to testify about "the types of substances that can be applied, how much they glow, why they glow, other things that might glow"[29] or why a pair of shoes might not glow even after the dye had been applied.[30] The government did not call an expert witness on fluorescent dyes.[31]

This court reviews a district court's decision to grant or deny a motion for authorization for expert services at government expense for abuse of discretion.[32] Authorization for expert services is available under the Criminal Justice Act, which provides

(e) Services other than counsel.-

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[29] R3 at 3-4.

[30] R3 at 8.

[31] R3 at 6.

[32] United States v. Rinchack, 820 F.2d 1557, 1563 (11th Cir. 1987).

> (1) Upon request.-Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, . . . shall authorize counsel to obtain the services.[33]

The statute requires the district court to authorize such services when the defendant shows that (1) he is financially unable to provide the services, and (2) the services of the expert are "necessary for adequate representation."[34]

In requesting the appointment of an expert, a defendant must show a reasonable probability that the expert would be of assistance to the defense and how he would be useful, and that denial of the expert would result in a fundamentally unfair trial.[35] A defense attorney requesting an expert must inform himself about the specific scientific area in question and provide the court with as much information

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[33] 18 § 3006A(e)(1).

[34] Id.; Rinchak, 820 F.2d at 1557.

[35] Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987)(en banc). In Moore, the court noted that "An expert can assist can assist a criminal defendant . . . [by] providing testimony to rebut prosecution evidence or to establish an affirmative defense . . . ." Id. at 709. Also see Pedrero v. Wainwright, 590 F.2d 1383, 1391 n. 8 (5th Cir. 1979), cert. denied, 444 U.S. 943, 100 S.Ct. 299, 62 L.Ed.2d 310 (1979) (appointment of an expert is reviewed for whether the facts to which an expert could testify are "seriously in issue." [citation omitted]); United States v. Brewer, 783 F.2d 841, 843 (9th Cir. 1986), cert. denied, 479 U.S. 831, 107 S.Ct. 118, 93 L.Ed.2d 64 (1986) (affirming the denial of a motion for appointment where the defendant did not show that his cross examination of witness was any less effective without the services of an expert witness).

as possible about the usefulness of the requested expert to the defense.[36] Where the government's case is based on a theory most competently addressed by expert testimony, an indigent defendant must be afforded the assistance of an expert to prepare and present his defense.[37] Martin was indicted and convicted on the evidence that, because the shoes he had on when he left the prison glowed under a black light, they were James' shoes to which a flourescent substance had been applied, and which had been switched with Martin's shoes. Martin's attorney argued that an expert could explain other substances which might cause a glow under a black light, and why shoes that had been painted with a flourescent substance might not glow. Although the government did not call any experts to testify, it relied on the correctional officer's testimony as to the application of the flourescent substance. Based on the need for the jury to understand the use and application of these substances, an expert's testimony could have assisted Martin in "providing testimony to rebut prosecution evidence or to establish an affirmative defense." Because this

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[36] Id..

[37] United States v. Patterson, 724 F.2d 1128, 1130 (11th Cir. 1984); Bradford v. United States, 413 F.2d 467,474 (5th Cir. 1969) (district court erred in denying motion for appointment of an expert where the government's case "depended almost entirely upon testimony of . . . two experts").

was the only evidence in the case, it appears that the denial of an expert resulted in a fundamentally unfair trial.

III. CONCLUSION

For this reason, Martin Eugene Pell's conviction is REVERSED, and this matter is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____
_____ DIVISION

UNITED STATES OF AMERICA,

CASE NO.:
ELECTRONICALLY FILED

v.

EX PARTE

Defendant.
_____/

EX PARTE APPLICATION FOR AUTHORIZATION TO OBTAIN THE SERVICES OF ____, PRIVATE INVESTIGATIONS, PURSUANT TO 18 USC SECTION 3006A(e)(1)

COMES NOW the Defendant, _____, by and through his undersigned counsel, and respectfully moves this Honorable Court to enter its Order for the appointment and payment of _____, Private Investigations, LLC in the above-referenced cause, and as grounds therefor would state as follows:

1. The Defendant, _____, is charged with _____.
2. The Government seeks enhancement of the penalties for this offense to life imprisonment.
3. _____ is currently scheduled for trial on _____.
4. Undersigned counsel was appointed as CJA Counsel for _____ on _____.
5. Undersigned counsel has met with _____, who was diagnosed with ADHD 8 years ago (age 13), and suffered a well-documented head trauma injury two years ago (age 19) on multiple occasions.
6. Counsel has reviewed many aspects of the discovery including reports from the ____ Police Departments in _____ as well as well as information provided by _____.

7. That undersigned counsel has identified a number of potential witnesses for the defense who are located throughout the United States. However, in many instances, _____ is only able to recall the names but not addresses of these witnesses due to his limited mental capacities. Therefore, the services of a private investigator are necessary to determine the current addresses and whereabouts of these witnesses and to conduct interviews of said witnesses.
8. The evidentiary hearing on _____ motion to suppress is scheduled for _____. Counsel anticipates the need to call defense witnesses for this hearing.
9. Counsel has been in contact with _____, who is willing to provide investigative services for counsel if approved by the Court.
10. _____ has agreed to be compensated for her services at the rate of $___ per hour, plus mileage and out-of-pocket expenses, which is significantly less than her non-CJA rate of $ ____ per hour. A copy of ____ resume is attached hereto as Exhibit "A".
11. After consultation with _____, undersigned believes that her services will be needed for a total of ___ hours, and therefore the total cost would exceed the maximum amount permitted for counsel to hire her services without Court approval.
12. The undersigned seeks an Order authorizing counsel to retain the services of _____, at the rate of $__, not to exceed a total amount of $_____.

MEMORANDUM OF LAW

The request for authorization of funds to retain a defense expert is being made ex parte pursuant to the provisions of 18 U.S.C. Section 3006A(e)(1)(2007); United States vs. Abreu, 202 F.3d 386 (1st Cir. 2000).

It has long been recognized that indigent defendants should receive the same guarantee of fundamental fairness outlined in the Fifth Amendment to the Constitution as that guaranteed to accused citizens with adequate means to retain counsel and expert assistance. Ake vs. Oklahoma, 470 U.S. 68, 76 (1985). On more than one occasion, the United States Supreme Court has emphasized that indigent defendants are required to receive the "basic tools" and "raw materials integral to" the preparation of an adequate defense. Id. at 77 (quoting Britt vs. North Carolina, 404 U.S. 226, 227 (1971)).

The Defendant herein recognizes that he bears the burden of showing that the retention of expert services are necessary to the preparation of an adequate defense. United States vs. Greschner, 802 F.2d 373, 376 (10th Cir. 1986). It is respectfully submitted that the nature of the prosecution herein, which is complex and involves numerous witnesses in different parts of the country, and the severity of the sentence facing _____ , merits the hiring of a private investigator to assist in the identification and interviewing of witnesses for the Defendant whose testimony would be presented at the suppression hearing and/or trial herein.

The Criminal Justice Act (CJA) (18 USC Section 3006A(e)(1)) provides that counsel for an indigent defendant may make an ex parte request to obtain investigative, expert or other services necessary for the preparation of a defense. Abreu, supra. The CJA requires a district judge to authorize defense expert services when a reasonably competent attorney would engage such services for a client having independent financial means to pay for them. United States vs. Fields, 722 F.2d 549, 551 (9th Cir. 1983). It is an abuse of discretion to deny a request for an

expert under this provision where (1) reasonably competent counsel would have required the assistance of the requested expert for a paying client, and (2) the defendant was prejudiced by the lack of expert assistance. United States v. Rodriguez-Lara, 421 F. 3d 932 (9th Cir. 2005).

WHEREFORE, it is respectfully submitted that this Court enter an order authorizing counsel to retain the services of _____, at the rate of $__ per hour, not to exceed a total of $____ for the reasons and authorities cited above.

Respectfully submitted,

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AYESTAS, AKA ZELAYA COREA v. DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16–6795. Argued October 30, 2017—Decided March 21, 2018

Petitioner Ayestas was convicted of murder and sentenced to death in a Texas state court. He secured new counsel, but his conviction and sentence were affirmed on appeal. A third legal team sought, unsuccessfully, state habeas relief, claiming trial-level ineffective assistance of counsel but not counsel's failure to investigate petitioner's mental health and alcohol and drug abuse during the trial's penalty phase. His fourth set of attorneys did raise that failure in a federal habeas petition, but because the claim had never been raised in state court, the District Court held, it was barred by procedural default. That decision was vacated and remanded for reconsideration in light of Martinez v. Ryan, 566 U. S. 1—where this Court held that an Arizona prisoner seeking federal habeas relief could overcome the procedural default of a trial-level ineffective-assistance-of-counsel claim by showing that the claim is substantial and that state habeas counsel was also ineffective in failing to raise the claim in a state habeas proceeding—and Trevino v. Thaler, 569 U. S. 413—which extended that holding to Texas prisoners. Petitioner filed an ex parte motion asking the District Court for funding to develop his claim that both his trial and state habeas counsel were ineffective, relying on 18 U. S. C. §3599(f), which provides, in relevant part, that a district court "may authorize" funding for "investigative, expert, or other services . . . reasonably necessary for the representation of the defendant." The court found his claim precluded by procedural default and thus denied his funding request. The Fifth Circuit also rejected the funding claim under its precedent: that a §3599(f) funding applicant must show that he has a "substantial need" for investigative or other ser-

vices, and that funding may be denied when an applicant fails to present "a viable constitutional claim that is not procedurally barred." 817 F. 3d 888, 895–896.

Held:

1. The District Court's denial of petitioner's funding request was a judicial decision subject to appellate review under the standard jurisdictional provisions. Pp. 7–14.

(a) Title 28 U. S. C. §§1291, 2253, and 1254 confer jurisdiction to review decisions made by a district court in a judicial capacity. "Administrative" decisions—about, e.g., facilities, personnel, equipment, supplies, and rules of procedure—are "not subject to [this Court's] review," Hohn v. United States, 524 U. S. 236, 245, but the District Court's ruling here does not remotely resemble such decisions. Petitioner's request was made by motion in his federal habeas proceeding, which is indisputably a judicial proceeding. And resolution of the funding question requires the application of a legal standard—whether the funding is "reasonably necessary" for effective representation—that demands an evaluation of petitioner's prospects of obtaining habeas relief. Pp. 8–10.

(b) Respondent's arguments in support of her claim that §3599's funding requests are nonadversarial and administrative are unpersuasive. First, that the requests can be decided ex parte does not make the proceeding nonadversarial. The habeas proceeding here was clearly adversarial. And petitioner and respondent plainly have adverse interests on the funding question and have therefore squared off as adversaries. The mere fact that a §3599 funding request may sometimes be made ex parte is thus hardly dispositive. Second, nothing in §3599 even hints that the funding decisions may be revised by the Director of the Administrative Office of the Courts. Lower court cases that appear to have accepted Administrative Office review of certain Criminal Justice Act (CJA) payments, even if a proper interpretation of the CJA, are inapposite. Finally, the fact that §3599(g)(2) requires funding in excess of the generally applicable statutory cap to be approved by the circuit's chief judge or another designated circuit judge, instead of by a panel of three, does not make the proceeding administrative. If Congress wishes to make certain rulings reviewable by a single circuit judge, the Constitution does not stand in the way. Pp. 10–14.

2. The Fifth Circuit did not apply the correct legal standard in affirming the denial of petitioner's funding request. Section 3599 authorizes funding for the "reasonably necessary" services of experts, investigators, and the like. But the Fifth Circuit's requirement that applicants show a "substantial need" for the services is arguably a more demanding standard. Section 3599 appears to use the term

Syllabus

"necessary" to mean something less than essential. Because it makes little sense to refer to something as being "reasonably essential," the Court concludes that the statutory phrase calls for the district court to determine, in its discretion, whether a reasonable attorney would regard the services as sufficiently important, guided by considerations detailed in the opinion. The term "substantial" in the Fifth Circuit's test, however, suggests a heavier burden. And that court exacerbated the difference by also requiring a funding applicant to present "a viable constitutional claim that is not procedurally barred." That rule that is too restrictive after Trevino, see 569 U. S. at 429, because, in cases where funding stands a credible chance of enabling a habeas petitioner to overcome the procedural default obstacle, it may be error for a district court to refuse funding. That being said, district courts were given broad discretion in assessing funding requests when Congress changed the phrase "shall authorize" in §3599's predecessor statute, see 21 U. S. C. §848(q)(9), to "may authorize" in §3599(f). A funding applicant must not be expected to prove that he will be able to win relief if given the services, but the "reasonably necessary" test does require an assessment of the likely utility of the services requested.

Respondent's alternative ground for affirmance—that funding is never "reasonably necessary" where a habeas petitioner seeks to present a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state-court record—remains open for the Fifth Circuit to consider on remand. Pp. 14–19.

817 F. 3d 888, vacated and remanded.

ALITO, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which GINSBURG, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–6795

CARLOS MANUEL AYESTAS, AKA DENNIS ZELAYA COREA, PETITIONER v. LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 21, 2018]

JUSTICE ALITO delivered the opinion of the Court.

Petitioner Carlos Ayestas, who was convicted of murder and sentenced to death in a Texas court, argues that he was wrongfully denied funding for investigative services needed to prove his entitlement to federal habeas relief. Petitioner moved for funding under 18 U. S. C. §3599(f), which makes funds available if they are "reasonably necessary," but petitioner's motion was denied. We hold that the lower courts applied the wrong legal standard, and we therefore vacate the judgment below and remand for further proceedings.

I

A

In 1997, petitioner was convicted of capital murder in a Texas court. Evidence at trial showed that he and two accomplices invaded the home of a 67-year-old Houston woman, Santiaga Paneque, bound her with duct tape and electrical cord, beat and strangled her, and then made off with a stash of her belongings.

The jury also heard testimony from Henry Nuila regarding an incident that occurred about two weeks after the murder. Petitioner was drunk at the time, and he revealed to Nuila that he had recently murdered a woman in Houston. Petitioner then brandished an Uzi machinegun and threatened to murder Nuila if he did not help petitioner kill his two accomplices. Fortunately for Nuila, petitioner kept talking until he eventually passed out; Nuila then called the police, who arrested petitioner, still in possession of the gun.

After the jury found petitioner guilty, it was asked to determine whether he should be sentenced to death or to life in prison. In order to impose a death sentence, Texas law required the jury to answer the following three questions. First, would petitioner pose a continuing threat to society? Second, had he personally caused the death of the victim, intended to kill her, or anticipated that she would be killed? Third, in light of all the evidence surrounding the crime and petitioner's background, were there sufficient mitigating circumstances to warrant a sentence of life without parole instead of death? Tex. Code Crim. Proc. Ann., Art. 37.071, §§2(b), (e) (Vernon Cum. Supp. 2017). Only if the jury gave a unanimous yes to the first two questions, and a unanimous no to the third question, could a death sentence be imposed; otherwise, petitioner would receive a sentence of life without parole. See §§2(d)(2), (f)(2), (g).

In asking the jury to impose a death sentence, the prosecution supplemented the trial record with evidence of petitioner's criminal record and his encounter with a man named Candelario Martinez a few days after the murder. Martinez told the jury that he was standing in a hotel parking lot waiting for a friend when petitioner approached and began to make small talk. Before long, petitioner pulled out a machinegun and forced Martinez into a room where two of petitioner's compatriots were

holding Martinez's friend at knifepoint. Ordered to lie down on the bathroom floor and await his execution, Martinez begged for his life while petitioner and his cohorts haggled about who would carry out the killing. Finally, petitioner relented, but he threatened to kill Martinez and his family if he contacted the police. Petitioner then stole Martinez's truck.

Petitioner's trial counsel presented very little mitigation evidence. This was due, at least in part, to petitioner's steadfast refusal for many months to allow his lawyers to contact his family members, who were living in Honduras and might have testified about his character and upbringing. Petitioner gave in on the eve of trial, and at that point, according to the state habeas courts, his lawyers "made every effort to contact [his] family." App. 171. They repeatedly contacted petitioner's family members and urged them to attend the trial; they requested that the U. S. Embassy in Honduras facilitate family members' travel to the United States; and they met in person with the Honduran Consulate to seek assistance. But these efforts were to no avail. Petitioner's sister told his legal team that the family would not leave Honduras because the journey would create economic hardship and because their father was ill and had killed one of their neighbors. A defense attorney who spoke to petitioner's mother testified that she seemed unconcerned about her son's situation. In general, the state habeas courts found, petitioner "did nothing to assist counsel's efforts to contact his family and did not want them contacted by the consulate or counsel." Id., at 174.

In the end, the only mitigation evidence introduced by petitioner's trial counsel consisted of three letters from petitioner's English instructor. The letters, each two sentences long, described petitioner as "a serious and attentive student who is progressing well in English." Ibid.

The jury unanimously concluded that petitioner should be sentenced to death, and a capital sentence was imposed. Petitioner secured new counsel to handle his appeal, and his conviction and sentence were affirmed by the Texas Court of Criminal Appeals in 1998. Ayestas v. State, No. 72,928, App. 115. Petitioner did not seek review at that time from this Court.

B

While petitioner's direct appeal was still pending, a third legal team filed a habeas petition on his behalf in state court. This petition included several claims of trial-level ineffective assistance of counsel, but the petition did not assert that trial counsel were ineffective for failing to investigate petitioner's mental health and abuse of alcohol and drugs. Petitioner's quest for state habeas relief ended unsuccessfully in 2008. Ex parte Ayestas, No. WR–69,674–01 (Tex. Ct. Crim. App., Sept. 10, 2008), 2008 WL 4151814 (per curiam) (unpublished).

In 2009, represented by a fourth set of attorneys, petitioner filed a federal habeas petition under 28 U. S. C. §2254, and this time he did allege that his right to the effective assistance of counsel at trial was violated because his attorneys failed to conduct an adequate search for mitigation evidence. As relevant here, petitioner argued that trial counsel overlooked evidence that he was mentally ill and had a history of drug and alcohol abuse. Ayestas v. Thaler, Civ. Action No. H–09–2999 (SD Tex., Jan. 26, 2011), 2011 WL 285138, *4. Petitioner alleged that he had a history of substance abuse, and he noted that he had been diagnosed with schizophrenia while the state habeas proceeding was still pending. See Pet. for Writ of Habeas Corpus in Ayestas v. Quarterman, No. 4:09–cv–2999 (SD Tex.), Doc. 1, pp. 21–23. Petitioner claimed that trial counsel's deficient performance caused prejudice because there was a reasonable chance that an adequate investiga-

tion would have produced mitigation evidence that would have persuaded the jury to spare his life.

Among the obstacles standing between petitioner and federal habeas relief, however, was the fact that he never raised this trial-level ineffective-assistance-of-counsel claim in state court. The District Court therefore held that the claim was barred by procedural default, Ayestas v. Thaler, 2011 WL 285138, *4–*7, and the Fifth Circuit affirmed, Ayestas v. Thaler, 462 Fed. Appx. 474, 482 (2012) (per curiam).

Petitioner sought review in this Court, and we vacated the decision below and remanded for reconsideration in light of two of our subsequent decisions, Martinez v. Ryan, 566 U. S. 1 (2012), and Trevino v. Thaler, 569 U. S. 413 (2013). Ayestas v. Thaler, 569 U. S. 1015 (2013). Martinez held that an Arizona prisoner seeking federal habeas relief could overcome the procedural default of a trial-level ineffective-assistance-of-counsel claim by showing that the claim is substantial and that state habeas counsel was also ineffective in failing to raise the claim in a state habeas proceeding. 566 U. S., at 14. Trevino extended that holding to Texas prisoners, 569 U. S., at 416–417, and on remand, petitioner argued that he fell within Trevino because effective state habeas counsel would have uncovered evidence showing that trial counsels' investigative efforts were deficient.

To assist in developing these claims, petitioner filed an ex parte motion asking the District Court for $20,016 in funding to conduct a search for evidence supporting his petition. He relied on 18 U. S. C. §3599(f), which provides in relevant part as follows:

> "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may

> authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor."

Petitioner averred that the funds would be used to conduct an investigation that would show that his trial counsel and his state habeas counsel were ineffective. Accordingly, he claimed, the investigation would establish both that his trial-level ineffective-assistance-of-counsel claim was not barred by procedural default and that he was entitled to resentencing based on the denial of his Sixth Amendment right to the effective assistance of trial counsel.

The District Court refused the funding request and ultimately denied petitioner's habeas petition. Ayestas v. Stephens, Civ. Action No. H–09–2999, (SD Tex., Nov. 18, 2014), 2014 WL 6606498, *6–*7. On the merits of petitioner's new ineffective-assistance-of-trial-counsel claim, the District Court held that petitioner failed both prongs of the Strickland test. See Strickland v. Washington, 466 U. S. 668 (1984). Noting that most of the evidence bearing on petitioner's mental health had emerged only after he was sentenced, the court concluded that petitioner's trial lawyers were not deficient in failing to find such evidence in time for the sentencing proceeding. 2014 WL 6606498, *5. In addition, the court found that state habeas counsel did not render deficient performance by failing to investigate petitioner's history of substance abuse, and that, in any event, petitioner was not prejudiced at the sentencing phase of the trial or during the state habeas proceedings because the potential mitigation evidence at issue would not have made a difference to the jury in light of "the extremely brutal nature of [the] crime and [petitioner's] history of criminal violence." Ibid.

With respect to funding, the District Court pointed to Fifth Circuit case law holding that a §3599(f) funding

applicant cannot show that investigative services are "'reasonably necessary'" unless the applicant can show that he has a "'substantial need'" for those services. Id., at *6. In addition, the court noted that "[t]he Fifth Circuit upholds the denial of funding" when, among other things, "a petitioner has . . . failed to supplement his funding request with a viable constitutional claim that is not procedurally barred." Ibid. (internal quotation marks omitted).

Given its holding that petitioner's new ineffective-assistance-of-counsel claim was precluded by procedural default, this rule also doomed his request for funding. The District Court denied petitioner's habeas petition and refused to grant him a certificate of appealability (COA). Id., at *7. On appeal, the Fifth Circuit held that a COA was not needed for review of the funding issue, but it rejected that claim for essentially the same reasons as the District Court, citing both the "substantial need" test and the rule that funding may be denied when a funding applicant fails to present "a viable constitutional claim that is not procedurally barred." Ayestas v. Stephens, 817 F. 3d 888, 895–896 (2016) (internal quotation marks omitted). With respect to petitioner's other claims, including his claim of ineffective assistance of trial counsel, the Fifth Circuit refused to issue a COA. Id., at 898.

C

We granted certiorari to decide whether the lower courts applied the correct legal standard in denying the funding request. 581 U. S. ___ (2017).

II

Before we reach that question, however, we must consider a jurisdictional argument advanced by respondent, the Director of the Texas Department of Criminal Justice.[1]

[1]We also consider a jurisdictional issue not raised by the parties,

Respondent contends that the District Court's denial of petitioner's funding request was an administrative, not a judicial, decision and therefore falls outside the scope of the jurisdictional provisions on which petitioner relied in seeking review in the Court of Appeals and in this Court.

A

When the District Court denied petitioner's funding request and his habeas petition, he took an appeal to the

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namely, whether we have jurisdiction even though no COA has yet been issued. We do not have jurisdiction if jurisdiction was lacking in the Court of Appeals, and the jurisdiction of a court of appeals to entertain an appeal from a final order in a habeas proceeding is dependent on the issuance of a COA. See 28 U. S. C. §2253(c)(l); Gonzalez v. Thaler, 565 U. S. 134, 142 (2012).

In this case, petitioner appealed an order of the District Court that denied both his request for funding under 18 U. S. C. §3599 and his underlying habeas claims. The Court of Appeals denied a COA as to the merits of his request for habeas relief but held that a COA was not required insofar as petitioner challenged the District Court's denial of funding under §3599. The Fifth Circuit relied on Harbison v. Bell, 556 U. S. 180 (2009), in which a prisoner appealed from an order that denied counsel under §3599 for a state clemency proceeding but that did not address the merits of any habeas petition. This Court held that a COA was not required. Here, petitioner took his appeal from the final order in his habeas proceeding.

The parties have not briefed whether that difference between Harbison and the present case is relevant or whether an appeal from a denial of a §3599 request for funding would fit within the COA framework, and we find it unnecessary to resolve the issue. Though we take no view on the merits, we will assume for the sake of argument that the Court of Appeals could not entertain petitioner's §3599 claim without the issuance of a COA.

We may review the denial of a COA by the lower courts. See, e.g., Miller-El v. Cockrell, 537 U. S. 322, 326–327 (2003). When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied. See Slack v. McDaniel, 529 U. S. 473, 485–486, 489–490 (2000). We take that course here. As we will explain, the correctness of the rule applied by the District Court in denying the funding request was not only debatable; it was erroneous.

Fifth Circuit under 28 U. S. C. §§1291 and 2253, which grant the courts of appeals jurisdiction to review final "decisions" and "orders" of a district court.[2] And when the Fifth Circuit affirmed, petitioner sought review in this Court under §1254, which gives us jurisdiction to review "[c]ases" in the courts of appeals.[3] As respondent correctly notes, these provisions confer jurisdiction to review decisions made by a district court in a judicial capacity. But we have recognized that not all decisions made by a federal court are "judicial" in nature; some decisions are properly understood to be "administrative," and in that case they are "not subject to our review." Hohn v. United States, 524 U. S. 236, 245 (1998).

The need for federal judges to make many administrative decisions is obvious. The Federal Judiciary, while tiny in comparison to the Executive Branch, is nevertheless a large and complex institution, with an annual budget exceeding $7 billion and more than 32,000 employees. See Administrative Office of the U. S. Courts, The Judiciary FY 2018 Congressional Budget Summary Revised 9–10 (June 2017). Administering this operation requires many "decisions" in the ordinary sense of the term—decisions about such things as facilities, personnel,

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[2] In relevant part §1291 declares that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Similarly, §2253 provides, as relevant, that "[i]n a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held." §2253(a).

[3] "Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." §1254(1).

equipment, supplies, and rules of procedure. In re Application for Exemption from Electronic Pub. Access Fees by Jennifer Gollan and Shane Shifflett, 728 F. 3d 1033, 1037 (CA9 2013). It would be absurd to suggest that every "final decision" on any such matter is appealable under §1291 or reviewable in this Court under §1254. See Hohn, supra; 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3903, pp. 134–135 (2d ed. 1992). Such administrative decisions are not the kind of decisions or orders—i.e., decisions or orders made in a judicial capacity—to which the relevant jurisdictional provisions apply.

Respondent argues that the denial of petitioner's funding request was just such an administrative decision, but the District Court's ruling does not remotely resemble the sort of administrative decisions noted above. Petitioner's request was made by motion in his federal habeas proceeding, which is indisputably a judicial proceeding. And as we will explain, resolution of the funding question requires the application of a legal standard—whether the funding is "reasonably necessary" for effective representation—that demands an evaluation of petitioner's prospects of obtaining habeas relief. We have never held that a ruling like that is administrative and thus not subject to appellate review under the standard jurisdictional provisions.

Respondent claims that two factors support the conclusion that the funding decision was administrative, but her argument is unpersuasive.

B

Respondent first argues as follows: Judicial proceedings must be adversarial; 18 U. S. C. §3599(f) funding adjudications are not adversarial because the statute allows requests to be decided ex parte; therefore, §3599(f) funding adjudications are not judicial in nature. This reasoning is

flawed.

It is certainly true that cases and controversies in our legal system are adversarial in nature, e.g., Bond v. United States, 564 U. S. 211, 217 (2011); Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240–241 (1937), but here, both the habeas proceeding as a whole and the adjudication of the specific issue of funding were adversarial. That the habeas proceeding was adversarial is beyond dispute. And on the funding question, petitioner and respondent plainly have adverse interests and have therefore squared off as adversaries. The motion for funding was formally noted as "opposed" on the Disrict Court's docket. App. 341. That is not surprising: On one side, petitioner is seeking funding that he hopes will prevent his execution. On the other, respondent wants to enforce the judgment of the Texas courts and to do so without undue delay. Petitioner and respondent have vigorously litigated the funding question all the way to this Court.

In arguing that the funding dispute is nonadversarial, respondent attaches too much importance to the fact that the request was made ex parte. As we have noted, the "ex parte nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character." Forrester v. White, 484 U. S. 219, 227 (1988).

In our adversary system, ex parte motions are disfavored, but they have their place. See, e.g., Hohn, supra, at 248 (application for COA); Dalia v. United States, 441 U. S. 238, 255 (1979) (application for a search warrant); 50 U. S. C. §1805(a) (application to conduct electronic surveillance for foreign intelligence); 18 U. S. C. §2518(3) (applications to intercept "wire, oral, or electronic communications"); 15 U. S. C. §1116(d)(1)(A) (application to seize certain goods and counterfeit marks involved in violations of the trademark laws); Fed. Rule Crim. Proc. 17(b) (application for witness subpoena); Fed. Rule Crim. Proc. 47(c)

(generally recognizing ex parte motions and applications); Ullmann v. United States, 350 U. S. 422, 423–424, 434 (1956) (application for an order granting a witness immunity in exchange for self-incriminating testimony); United States v. Monsanto, 491 U. S. 600, 603–604 (1989) (motion to freeze defendant's assets pending trial).

Thus, the mere fact that a §3599 funding request may sometimes be made ex parte is hardly dispositive. See Hohn, 524 U. S., at 249; Tutun v. United States, 270 U. S. 568, 577 (1926).

C

Respondent's second argument is based on the venerable principle "that Congress cannot vest review of the decisions of Article III courts in" entities other than "superior courts in the Article III hierarchy." Plaut v. Spendthrift Farm, Inc., 514 U. S. 211, 218–219 (1995) (citing Hayburn's Case, 2 Dall. 409 (1792)). Respondent claims that §3599 funding decisions may be revised by the Director of the Administrative Office of the Courts and that this shows that such decisions must be administrative. This argument, however, rests on a faulty premise. Nothing in §3599 even hints that review by the Director of the Administrative Office is allowed.

Respondent's argument rests in part on a handful of old lower court cases that appear to have accepted Administrative Office review of Criminal Justice Act of 1964 (CJA) payments that had been authorized by a District Court and approved by the chief judge of the relevant Circuit. See United States v. Aadal, 282 F. Supp. 664, 665 (SDNY 1968); United States v. Gast, 297 F. Supp. 620, 621–622 (Del. 1969); see also United States v. Hunter, 385 F. Supp. 358, 362 (DC 1974). The basis for these decisions was a provision of the CJA, 18 U. S. C. §3006A(h) (1964 ed.), stating that CJA payments "shall be made under the supervision of the Director of the Administrative Office of

the United States Courts."[4]

It is not clear whether these decisions correctly interpreted the CJA,[5] but in any event, no similar language appears in §3599. And respondent has not identified a single instance in which the Director of the Administrative Office or any other nonjudicial officer has attempted to review or alter a §3599 decision.

Moreover, attorneys' requests for CJA funds are markedly different from the funding application at issue here. Attorneys appointed under the CJA typically submit those requests after the conclusion of the case, and the prosecution has no stake in the resolution of the matter. The judgment in the criminal case cannot be affected by a decision on compensation for services that have been completed, and any funds awarded come out of the budget of the Judiciary, not the Executive. See 18 U. S. C. §3006A(i) (2012 ed.). Thus, the adversaries in the criminal case are not pitted against each other. In this case, on the other hand, as we have explained, petitioner and respondent have strong adverse interests. For these reasons, we reject respondent's argument that the adjudication of the funding issue is nonadversarial and administrative.

Respondent, however, claims that the funding decision is administrative for an additional reason. "A §3599(f) funding determination is properly deemed administrative," she contends, "because it . . . may be revised outside the traditional Article III judicial hierarchy." Brief for Respondent 23. The basis for this argument is a provision of §3599 stating that funding in excess of the generally

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[4] This language now appears at 18 U. S. C. §3006A(i) (2012 ed.).

[5] As far as we are aware, neither the Administrative Office nor any other nonjudicial entity currently claims the power to revise or reject a CJA compensation order issued by a court. Nothing in the CJA Guidelines suggests such a policy. See generally 7A Guide to Judiciary Policy (May 17, 2017).

applicable statutory cap of $7,500 must be approved by the chief judge of the circuit or another designated circuit judge. §3599(g)(2). If a funding decision is judicial and not administrative, respondent suggests, it could not be reviewed by a single circuit judge as opposed to a panel of three.

This argument confuses what is familiar with what is constitutionally required. Nothing in the Constitution ties Congress to the typical structure of appellate review established by statute. If Congress wishes to make certain rulings reviewable by a single circuit judge, rather than a panel of three, the Constitution does not stand in the way.

III

Satisfied that we have jurisdiction, we turn to the question whether the Court of Appeals applied the correct legal standard when it affirmed the denial of petitioner's funding request.

Section 3599(a) authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is "financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services." The statute applies to defendants in federal cases, §3599(a)(1), as well as to state and federal prisoners seeking collateral relief in federal court, §3599(a)(2).

Here we are concerned not with legal representation but with services provided by experts, investigators, and the like. Such services must be "reasonably necessary for the representation of the [applicant]" in order to be eligible for funding. §3599(f). If the statutory standard is met, a court "may authorize the [applicant's] attorneys to obtain such services on [his] behalf." Ibid.

The Fifth Circuit has held that individuals seeking funding for such services must show that they have a "substantial need" for the services. 817 F. 3d, at 896;

Allen v. Stephens, 805 F. 3d 617, 626 (2015); Ward v. Stephens, 777 F. 3d 250, 266, cert. denied, 577 U. S. ___ (2015). Petitioner contends that this interpretation is more demanding than the standard—"reasonably necessary"—set out in the statute. And although the difference between the two formulations may not be great, petitioner has a point.

In the strictest sense of the term, something is "necessary" only if it is essential. See Webster's Third New International Dictionary 1510 (1993) (something is necessary if it "must be by reason of the nature of things," if it "cannot be otherwise by reason of inherent qualities"); 10 Oxford English Dictionary 275–276 (2d ed. 1989) (OED) (defining the adjective "necessary" to mean "essential"). But in ordinary speech, the term is often used more loosely to refer to something that is merely important or strongly desired. ("I need a vacation." "I need to catch up with an old friend.") The term is sometimes used in a similar way in the law. The term "necessary" in the Necessary and Proper Clause does not mean "absolutely necessary," McCulloch v. Maryland, 4 Wheat. 316, 414–415 (1819), and a "necessary" business expense under the Internal Revenue Code, 26 U. S. C. §162(a), may be an expense that is merely helpful and appropriate, Commissioner v. Tellier, 383 U. S. 687, 689 (1966). As Black's Law Dictionary puts it, the term "may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." Black's Law Dictionary 928 (5th ed. 1979) (Black's).

Section 3599 appears to use the term "necessary" to mean something less than essential. The provision applies to services that are "reasonably necessary," but it makes little sense to refer to something as being "reasonably essential." What the statutory phrase calls for, we conclude, is a determination by the district court, in the exer-

cise of its discretion, as to whether a reasonable attorney would regard the services as sufficiently important, guided by the considerations we set out more fully below.

The Fifth Circuit's test—"substantial need"—is arguably more demanding. We may assume that the term "need" is comparable to "necessary"—that is, that something is "needed" if it is "necessary." But the term "substantial" suggests a heavier burden than the statutory term "reasonably." Compare 13 OED 291 (defining "reasonably" to mean, among other things, "[s]ufficiently, suitably, fairly"; "[f]airly or pretty well") with 17 id., at 66–67 (defining "substantial," with respect to "reasons, causes, evidence," to mean "firmly or solidly established"); see also Black's 1456 (10th ed. 2014) (defining "reasonable" to mean "[f]air, proper, or moderate under the circumstances . . . See plausible"); id., at 1656 (defining "substantial" to mean, among other things, "[i]mportant, essential, and material").

The difference between "reasonably necessary" and "substantially need[ed]" may be small, but the Fifth Circuit exacerbated the problem by invoking precedent to the effect that a habeas petitioner seeking funding must present "a viable constitutional claim that is not procedurally barred." 817 F. 3d, at 895 (internal quotation marks omitted). See also, e.g., Riley v. Dretke, 362 F. 3d 302, 307 (CA5 2004) ("A petitioner cannot show a substantial need when his claim is procedurally barred from review"); Allen, supra, at 638–639 (describing "'our rule that a prisoner cannot show a substantial need for funds when his claim is procedurally barred from review'" (quoting Crutsinger v. Stephens, 576 Fed. Appx. 422, 431 (CA5 2014) (per curiam)); Ward, supra, at 266 ("The denial of funding will be upheld . . . when the constitutional claim is procedurally barred").

The Fifth Circuit adopted this rule before our decision in Trevino, but after Trevino, the rule is too restrictive.

Trevino permits a Texas prisoner to overcome the failure to raise a substantial ineffective-assistance claim in state court by showing that state habeas counsel was ineffective, 569 U. S., at 429, and it is possible that investigation might enable a petitioner to carry that burden. In those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding.

Congress has made it clear, however, that district courts have broad discretion in assessing requests for funding. Section 3599's predecessor declared that district courts "shall authorize" funding for services deemed "reasonably necessary." 21 U. S. C. §848(q)(9) (1988 ed.). Applying this provision, courts of appeals reviewed district court funding decisions for abuse of discretion. E.g., Bonin v. Calderon, 59 F. 3d 815, 837 (CA9 1995); In re Lindsey, 875 F. 2d 1502, 1507, n. 4 (CA11 1989); United States v. Alden, 767 F. 2d 314, 319 (CA7 1984). Then, as part of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1226, Congress changed the verb from "shall" to "may," and thus made it perfectly clear that determining whether funding is "reasonably necessary" is a decision as to which district courts enjoy broad discretion. See Kingdomware Technologies, Inc. v. United States, 579 U. S. ___, ___ (2016) (slip op., at 9).

A natural consideration informing the exercise of that discretion is the likelihood that the contemplated services will help the applicant win relief. After all, the proposed services must be "reasonably necessary" for the applicant's representation, and it would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief. Proper application of the "reasonably necessary" standard thus requires courts to consider the potential merit of the

claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.

To be clear, a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks. But the "reasonably necessary" test requires an assessment of the likely utility of the services requested, and §3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.

Petitioner does not deny this. He agrees that an applicant must "articulat[e] specific reasons why the services are warranted"—which includes demonstrating that the underlying claim is at least "'plausible'"—and he acknowledges that there may even be cases in which it would be within a court's discretion to "deny funds after a finding of 'reasonable necessity.'" Brief for Petitioner 43.

These interpretive principles are consistent with the way in which §3599's predecessors were read by the lower courts. See, e.g., Alden, supra, at 318–319 (explaining that it was "appropriate for the district court to satisfy itself that [the] defendant may have a plausible defense before granting the defendant's . . . motion for psychiatric assistance to aid in that defense," and that it is not proper to use the funding statute to subsidize a "'fishing expedition'"); United States v. Hamlet, 480 F. 2d 556, 557 (CA5 1973) (per curiam) (upholding District Court's refusal to fund psychiatric services based on the District Court's conclusion that "the request for psychiatric services was . . . lacking in merit" because there was "no serious possibility that appellant was legally insane at any time pertinent to the crimes committed"). This abundance of precedent shows courts have plenty of experience making the determinations that §3599(f) contemplates.

IV

Perhaps anticipating that we might not accept the Fifth Circuit's reading of §3599(f), respondent devotes a substantial portion of her brief to an alternative ground for affirmance that was neither presented nor passed on below.

Respondent contends that whatever "reasonably necessary" means, funding is never "reasonably necessary" in a case like this one, where a habeas petitioner seeks to present a procedurally defaulted ineffective-assistance-of-trial-counsel claim that depends on facts outside the state-court record. Citing 28 U. S. C. §2254(e)(2), respondent contends that the fruits of any such investigation would be inadmissible in a federal habeas court.

We decline to decide in the first instance whether respondent's reading of §2254(e)(2) is correct. Petitioner agrees that the argument remains open for the Fifth Circuit to consider on remand. Tr. of Oral Arg. 6.

* * *

We conclude that the Fifth Circuit's interpretation of §3599(f) is not a permissible reading of the statute. We therefore vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16–6795

CARLOS MANUEL AYESTAS, AKA DENNIS ZELAYA COREA, PETITIONER v. LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 21, 2018]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, concurring.

The Court correctly concludes that the Fifth Circuit applied the wrong legal standard in evaluating a request for funding for investigative services under 18 U. S. C. §3599(f). That should come as no surprise, as the Fifth Circuit required capital habeas petitioners to show a "'substantial need'" for services, when the statute requires only a showing that the services are "'reasonably necessary.'" Ante, at 16. "Substantial," of course, imposes a higher burden than "reasonable." Ante, at 16. The Fifth Circuit "exacerbated the problem" by requiring a showing of "a viable constitutional claim that is not procedurally barred," which ignores "that investigation might enable a petitioner . . . to overcome the obstacle of procedural default." Ante, at 16–17 (internal quotation marks omitted). I therefore join the opinion of the Court in full holding that to satisfy §3599(f), a petitioner need only show that "a reasonable attorney would regard the services as sufficiently important." Ante, at 16.

Having answered the question presented of what is the appropriate §3599(f) standard, the Court remands Ayestas' case for the lower courts to consider the application of

the standard in the first instance. Ante, at 19.[1] I write separately to explain why, on the record before this Court, there should be little doubt that Ayestas has satisfied §3599(f).

I

At the center of the §3599(f) funding request in this case is Ayestas' claim that his trial counsel was ineffective for failing to investigate mitigation. Specifically, Ayestas claims that his trial counsel was deficient in failing to conduct an investigation of his mental health and substance abuse, which could have been presented at the penalty phase of the trial to convince the jury to spare his life. As the Court notes, however, Ayestas faces a hurdle in presenting this ineffective-assistance-of-trial-counsel claim in his federal habeas petition, as his state postconviction counsel never presented that claim in the Texas collateral proceedings. See ante, at 5.

To overcome that procedural default, Ayestas relies on Martinez v. Ryan, 566 U. S. 1 (2012), and Trevino v. Thaler, 569 U. S. 413 (2013). In those cases, this Court recognized a "particular concern" in the application of a procedural default rule that would prevent a petitioner from "present[ing] a claim of trial error," especially "when the claim is one of ineffective assistance of counsel." Martinez, 566 U. S., at 12. "The right to the effective assistance of counsel," the Court reasoned, "is a bedrock principle in our justice system." Ibid. The Court thus held that where the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," then "'a procedural default will not bar a federal

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[1] The Court also declines to consider arguments that respondent advanced that were neither presented nor passed on below. Ante, at 19.

habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel . . . was ineffective.'" Trevino, 569 U. S., at 429 (quoting Martinez, 566 U. S., at 17; alteration omitted).[2]

Therefore, the fact that Ayestas' postconviction counsel failed to raise his ineffective-assistance-of-trial-counsel claim in state court does not bar federal review of that claim if Ayestas can show that the "attorney in his first collateral proceeding was ineffective" and that "his claim of ineffective assistance of trial counsel is substantial." Id., at 18. The substantiality of the ineffective-assistance-of-trial-counsel claim and the ineffectiveness of postconviction counsel are both analyzed under the familiar framework set out in Strickland v. Washington, 466 U. S. 668 (1984). "Ineffective assistance under Strickland is deficient performance by counsel resulting in prejudice, with performance being measured against an objective standard of reasonableness." Rompilla v. Beard, 545 U. S. 374, 380 (2005) (citation and internal quotation marks omitted).

Remember, however, the specific context in which ineffective assistance is being considered in Ayestas' case: a request under §3599(f) for investigative services, which requires a showing only that "a reasonable attorney would regard the services as sufficiently important." Ante, at 16. Ayestas is not "expected to prove that he will be able to win relief if given the services he seeks." Ante, at 18

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[2]The reason for this exception is evident. Excusing the procedural default "acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient." Martinez, 566 U. S., at 14. "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy," and "the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." Id., at 11–12; see also Trevino, 569 U. S., at 423–424, 428.

(emphasis in original). A court simply must consider at this stage "the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way." Ante, at 17–18. Thus, the inquiry is not whether Ayestas can prove that his trial counsel was ineffective under Strickland or whether he will succeed in overcoming the procedural default under Martinez and Trevino. Rather, at this §3599(f) request stage, the focus is on the potential merit of these claims.

II

A

With this framework in mind, the focus first is on the evidence of the deficient performance of Ayestas' state-appointed counsel.[3] Trial counsel secured the appointment of an investigator, who met with Ayestas shortly after the appointment. For nearly 15 months, however, there was apparently no investigation into Ayestas' history in preparation for trial. Counsel instructed the investigator "to resume investigation" only about a month before jury selection. Record 878. The investigator then subpoenaed psychological and disciplinary prison records and had Ayestas fill out a questionnaire, in response to which Ayestas revealed that he had experienced multiple head traumas and had a history of substance abuse. Jail records also noted a rules infraction for possession of homemade intoxicants. Trial counsel never followed up on any of this information, sought further related records, or had Ayestas evaluated by a mental health professional.

About two weeks before jury selection, trial counsel for the first time reached out to Ayestas' family in Honduras.

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[3] The State appointed two attorneys to represent Ayestas at trial. I refer to them together as "trial counsel."

Shortly thereafter, five days before trial, counsel wrote Ayestas' family stating that she needed them to come testify. Ayestas' family agreed, but they indicated that they could not obtain visas because a letter that trial counsel was supposed to have sent to the U. S. Embassy to facilitate their travel never arrived, and ultimately no family members appeared at Ayestas' trial.

The guilt phase lasted two days, and trial counsel presented no witnesses. The penalty phase lasted less than a day, and trial counsel presented two minutes of mitigation evidence consisting of three letters from an instructor who taught English classes to Ayestas in prison, attesting that he was "a serious and attentive student." App. 41–43.[4]

On this record, Ayestas has made a strong showing that trial counsel was deficient. "It is unquestioned that under the prevailing professional norms at the time of [Ayestas'] trial, counsel had an obligation to conduct a thorough investigation of [his] background." Porter v. McCollum, 558 U. S. 30, 39 (2009) (per curiam) (internal quotation marks omitted). Here, Ayestas' trial counsel "clearly did not satisfy those norms." Ibid. With a client facing a possible death sentence, counsel and her investigator did not start looking into Ayestas' personal history until the eve of trial. The little the investigator uncovered—head trauma and a history of substance abuse—should have prompted further inquiry. Yet trial counsel did nothing. Even if Ayestas prohibited counsel from contacting his family in Honduras until the start of trial was imminent, see ante, at 3,[5] that still would not explain why counsel

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[4] Trial counsel also attempted to introduce evidence that Ayestas had no criminal history in Honduras, but failed to link Ayestas to the records, which were under his given name, "Dennis Zelaya Corea." See Ayestas v. Stephens, 817 F. 3d 888, 892, n. 1 (CA5 2016) (per curiam).

[5] During postconviction proceedings, trial counsel filed an affidavit asserting that Ayestas did not allow contact with his family in Honduras until after jury selection had commenced. When the record evi-

failed to perform any other mitigation investigation, see Porter, 558 U. S., at 40 (noting that even if the defendant is "uncooperative, . . . that does not obviate the need for defense counsel to conduct some sort of mitigation investigation (emphasis in original)). In the end, the decision to sentence Ayestas to death was made in less than one day, and his counsel spent less than two minutes presenting mitigation to the jury. Two minutes.

This Court has recognized that the decision not to present mitigation may be supported in certain cases by "strategic judgments," provided the reviewing court is satisfied with "the adequacy of the investigations supporting those judgments." Wiggins v. Smith, 539 U. S. 510, 521 (2003). But this does not appear to be one of those cases. There is nothing in the record that would support the conclusion that counsel chose the two-minutes-of-mitigation strategy after careful investigation and consideration of Ayestas' case. Instead, counsel for the most part "did not even take the first step of interviewing witnesses or requesting records" and "ignored pertinent avenues for investigation of which [they] should have been aware." Porter, 558 U. S., at 39–40.

In evaluating the potential merit of Ayestas' claim, the Fifth Circuit misapplied Strickland and the §3599(f) standard. It reasoned that Ayestas had not presented a viable claim that trial counsel was deficient in failing to investigate Ayestas' mental illness because, as he was not diagnosed with schizophrenia until his time in prison, there was nothing that flagged mental illness issues prior to trial.[6] See Ayestas v. Stephens, 817 F. 3d 888, 895–897

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dence contradicted that assertion, counsel submitted another affidavit with a revised timeline. Ayestas disputes having instructed trial counsel not to contact his family in Honduras.

[6]It is unclear whether the Fifth Circuit ultimately relied on its determination that trial counsel was not deficient in rejecting Ayestas' claims. In its panel opinion, it incorrectly stated that trial counsel had

(2016) (per curiam). The absence of a documented diagnosis, however, did not excuse trial counsel from their "obligation to conduct a thorough investigation of [Ayestas'] background." Porter, 558 U. S., at 39 (internal quotation marks omitted). In fact, the obligation to investigate exists in part precisely because it is all too common for individuals to go years battling an undiagnosed and untreated mental illness.

In any event, the Fifth Circuit failed to consider that one of the purposes of the §3599(f) investigation was to look at Ayestas' life around the time of the crime and trial to determine if there were mitigating circumstances that trial counsel could have discovered, such as whether symptoms of his schizophrenia had begun to manifest even before his diagnosis. The Court makes clear today that in evaluating §3599(f) funding requests, courts must consider "the likelihood that the services will generate useful and admissible evidence." Ante, at 17. It was error, therefore, for the Fifth Circuit to evaluate the merit of the ineffective-assistance-of-trial-counsel claim and to deny §3599(f) funding based solely on an evaluation of the evidence in the record at the time of the request, without evaluating the potential evidence that Ayestas sought. Ante, at 17–18.

B

The evidence concerning the deficiency of Ayestas' state postconviction counsel is similarly strong. State postconviction counsel retained the services of a mitigation specialist, who prepared an investigation plan noting that it

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conducted a psychological evaluation of Ayestas. 817 F. 3d, at 897. After Ayestas corrected the record in his petition for rehearing, the panel issued an order reaffirming its holding, relying on its finding of no prejudice. See Ayestas v. Stephens, 826 F. 3d 214, 215 (2016) (per curiam). Still, the Fifth Circuit never disavowed its conclusion regarding trial-counsel deficiency. Ibid.

was "obvious no social history investigation was conducted" and that the jury had "heard nothing about [Ayestas'] . . . mental health, possible mental illness, [or] substance abuse history." App. 81, 266. The plan also noted that it was "clear that [Ayestas] had a history of substance abuse." Record 721; see also App. 267. The specialist recommended a comprehensive investigation into Ayestas' biological, psychological, and social history to explore, inter alia, issues related to addiction and mental health.

State postconviction counsel failed to follow these recommendations. He did nothing to investigate issues related to Ayestas' mental health or substance abuse. Notably, Ayestas suffered a psychotic episode and was diagnosed with schizophrenia while his state postconviction application was pending. Moreover, in 2003, a counsel-arranged evaluation pursuant Atkins v. Virginia, 536 U. S. 304 (2002), noted concerns about Ayestas' "delusional thinking." App. 139–140. These events still did not prompt counsel to investigate Ayestas' mental health history.

Instead, state postconviction counsel explored the circumstances of Ayestas' arrest, conducted some juror interviews, and interviewed Ayestas' mother and sisters, obtaining affidavits regarding Ayestas' upbringing in Honduras and their interactions with trial counsel. Postconviction counsel eventually filed an application that contained a narrow claim of ineffective assistance of trial counsel with respect to mitigation regarding the attorneys' failure to secure the attendance of Ayestas' family members at trial. The Texas Court of Criminal Appeals denied the application, relying on the affidavit submitted by trial counsel, see n. 4, supra, to find no ineffectiveness in failing to get Ayestas' family to attend trial.

The Fifth Circuit concluded that Ayestas' state postconviction counsel was not ineffective because, in its view, Ayestas had not established any deficiency at trial in the failure to investigate mental health and substance abuse

mitigation. See 817 F. 3d, at 898. That conclusion, as noted in Part II–A, supra, was based on a misapplication of Strickland and the §3599(f) standard, and thus cannot support a finding that the failure to present the claim in postconviction proceedings was "strategic." 817 F. 3d, at 898. Nor is there anything else in the record that would excuse that deficiency. State postconviction counsel ignored his own mitigation specialist, who alerted him to a serious failing in the trial because the jury heard virtually no mitigation and to the serious failings of trial counsel because of the failure to conduct a social history investigation of Ayestas. Even after Ayestas' psychotic episode, schizophrenia diagnosis, and documented tendencies of "delusional thinking" during the course of the representation, state postconviction counsel did nothing. As with trial counsel, the record provides no support for any "strategic justification" to disregard completely a mitigation investigation of Ayestas' mental health and substance abuse.

III

Strickland next requires consideration of prejudice. To establish prejudice, this Court has held that a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," meaning "a probability sufficient to undermine confidence in the outcome." 466 U. S., at 694. In cases alleging a failure to investigate mitigation, as here, the Court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." Wiggins, 539 U. S., at 534.

Even with the scant evidence in the record at this time as to what Ayestas could have presented to the jury in the form of mitigation, Ayestas has made a strong showing that his claim has potential merit. That trial counsel presented only two minutes of mitigation already goes a

long way to establishing prejudice. In fact, the State emphasized to the jury at sentencing:

> "Does he have anything there that would lead you to conclude there is some type of mitigation, anything at all? There is no drug problem . . . no health problem . . . no alcohol problem. . . . [O]nly . . . these three pieces of paper . . . . Making steps to learn a second language does not lessen his moral blameworthiness . . . ." Record 4747.

The State, in contrast, presented evidence of Ayestas' criminal history as well as victim impact testimony. After deliberating for only 25 minutes, the jury assessed a punishment of death against Ayestas, finding that he was a future danger, that he intended to cause death or anticipated the loss of life, and that there were no mitigating circumstances that warranted imposition of a life sentence over a death sentence. Had just one juror dissented on a single one of these findings, no death sentence could have been imposed. See Tex. Code Crim. Proc. Ann., Art. 37.071, §2(g) (Vernon Cum. Supp. 2017); see also ante, at 2. With even minimal investigation by trial counsel, at least one may well have, as this Court has held that evidence of mental illness and substance abuse is relevant to assessing moral culpability. See Rompilla, 545 U. S., at 393; Porter, 558 U. S., at 43–44. Instead, the jury "heard almost nothing that would humanize [him] or allow them to accurately gauge his moral culpability." Id., at 41. There is thus good reason to believe that, were Ayestas' §3599(f) motion granted, he could establish prejudice under Strickland.

The Fifth Circuit held otherwise based on its belief that no amount of mitigation would have changed the outcome of the sentencing given the "brutality of the crime." 817 F. 3d, at 898. That "brutality of the crime" rationale is simply contrary to our directive in case after case that, in

assessing prejudice, a court must "consider the totality of the available mitigation evidence . . . and reweigh it against the evidence in aggravation." Porter, 558 U. S., at 41 (internal quotation marks and alterations omitted); see also Williams v. Taylor, 529 U. S. 362, 397–398 (2000); Wiggins, 539 U. S., at 534. By considering aggravation in isolation, the Fifth Circuit directly contravened this fundamental principle.[7]

IV

In sum, Ayestas has made a strong showing that he is entitled to §3599(f) funding. As the Court notes, the statute affords district courts some discretion in these funding determinations, even where a petitioner shows the services are "'reasonably necessary.'" Ante, at 17–18. Exercise of that discretion may be appropriate if there is a showing of gamesmanship or where the State has provided funding for the same investigation services, as Ayestas conceded at argument. See Tr. of Oral Arg. 13. Nonetheless, the troubling failures of counsel at both the trial and state postconviction stages of Ayestas' case are exactly the types of facts that should prompt courts to afford investigatory services to ensure that trial errors that go to a "bedrock principle in our justice system" do not go unaddressed. Martinez, 566 U. S., at 12.

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[7] Notably, application of this "brutality of the crime" rule is particularly irrational in the §3599(f) context, where the court is unaware of what the undiscovered evidence of mitigation looks like.