

San Antonio Bar Association
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Criminal Law Institute**

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***“Lunch and
Ethics”***

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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Washington, DC (March 16, 2010) – I have been following the McCarthy-style attack campaign being waged against the Justice Department lawyers who formerly provided legal assistance to Guantanamo detainees and military commission defendants. That is why I was so pleased to see lawyers from across the country and across the political spectrum defending the constitutional role of legal counsel in justice system. As President of the National Association of Criminal Defense Lawyers, the world's largest criminal defense bar association, I want to thank all of them for standing up to persons who would tear our country apart and weaken the rule of law for the sake of scoring a few political points.

Some of the finest legal minds in the country – many of them brilliant young lawyers with tremendous earning potential in the private sector – have chosen instead to serve the public interest in the Department of Justice. These lawyers understand the constitutional right to a vigorous defense and the right not to be imprisoned without charges. They are assets to our country whether they are representing the Department of Justice or the detainees.

Vague allegations of "conflict of interest," that somehow these lawyers could prejudice the interests of the United States, are fanciful and misplaced. Conflicts between prosecuting attorneys and the accused are governed by the general conflict of interest rules, which are based on simple fairness and basic common sense. The ethical rules routinely help lawyers and firms avoid potential conflicts. As Attorney General Eric Holder has noted, the rules generally do not prohibit lawyers who once represented plaintiffs in a cause from representing defendants in the same area of law, or vice versa. While care must be taken to ensure that the lawyers' former clients are not adversely affected, the rules in no way diminish the Department appointees' loyalty to DOJ and the Constitution.

What saddens me about this non-story is that some selfishly seek to tarnish public servants, military lawyers and private counsel with unfounded nonsense and innuendo in order to advance their political agendas.

Let me be perfectly clear: securing the rights of the accused redounds to the benefit of our country and preserves our stature as a defender of liberty in the eyes of the world. The military and civilian lawyers who zealously represent Guantanamo detainees are some of the finest counsel I have ever seen, and in the noble tradition of John Adams, they deserve our thanks.

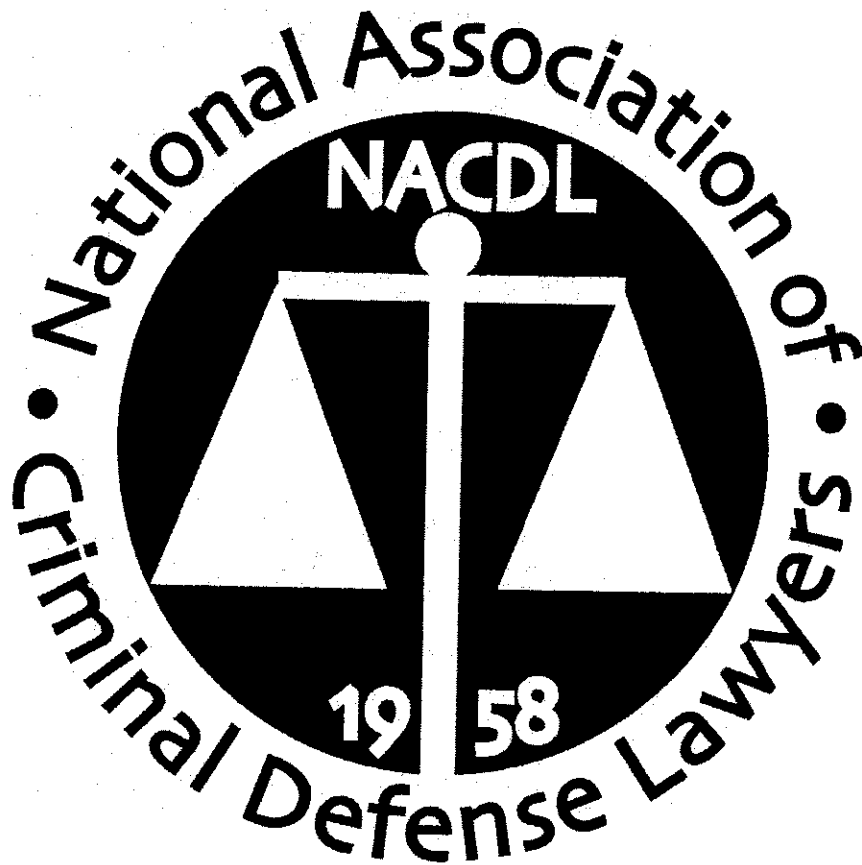
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National Association of Criminal Defense Lawyers

Principles and Recommendations to Strengthen Forensic Evidence and Its Presentation in the Courtroom



**Adopted by the Board of Directors
February 27, 2010
Austin, Texas**

PRINCIPLES AND RECOMMENDATIONS TO STRENGTHEN FORENSIC EVIDENCE AND ITS PRESENTATION IN THE COURTROOM

The National Association of Criminal Defense Lawyers (NACDL) is the largest organization in the United States advancing the mission of the Nation's criminal defense lawyers to ensure justice and due process for persons accused of crimes. Fundamental components of the representation of the accused are that all defendants have the Fifth Amendment right to due process of law and the Sixth Amendment rights to present evidence, to confront witnesses against them, to a fair trial, and to the effective assistance of counsel.

The great number of DNA and other exonerations undermines the belief that the criminal justice system correctly identifies the perpetrators of criminal offenses and prevents wrongful convictions. Especially troubling is the role that invalid and unreliable forensic evidence has at times played in contributing to those wrongful convictions. By way of illustration, a recent study observed that forensic science practitioners called by the prosecution provided trial testimony with conclusions either misstating empirical data or wholly unsupported by empirical data in greater than the majority of cases where DNA evidence exonerated someone whose conviction had been supported by forensic evidence.¹

There is, of course, a great difference between the use of forensic evidence to identify an individual as having left evidence at a crime scene and its use to exclude an individual as the possible contributor. It is generally a relatively simple and undisputed matter to exclude someone as the contributor of forensic evidence. Most problems in forensic identification evidence occur when practitioners conclude that a particular person is the contributor of evidence found on the scene.²

The United States Supreme Court cautioned a generation ago that “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”³ The recognition of deficiencies with forensic evidence has only grown since then.⁴ Nonetheless, the prevalence of

¹ Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009) (82 of 137 DNA exoneration cases relied upon invalid forensic evidence).

² Compare David H. Kaye, David E. Bernstein & Jennifer L. Mnookin, *The New Wigmore: Expert Evidence* 450 (2004) [hereinafter “Kaye, et al., *The New Wigmore*”] (“A suspect who is excluded rarely would be prosecuted. . . . Unless the government shows that the exclusion could be spurious or advances as to how a defendant who is not the source of the trace evidence could be guilty, the exclusion should be disparities.” (footnote omitted)); National Research Council, *The Evaluation of Forensic DNA Evidence* 51 (1996) (“The use of DNA techniques to exclude a suspect as the source of DNA has not been the subject of controversy.”) with Kaye et al., *The New Wigmore*, *supra* 447 (For matches, “ascertaining any association requires the assistance of technology to detect the characteristics. In addition, determining the extent to which the more esoteric trace evidence narrows the set of possible suspects requires specialized knowledge and study.”).

³ *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 595 (1993).

⁴ See *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, ___, 129 S. Ct. 2527, 2537 (2009) (“Serious deficiencies have been found in the forensic evidence used in criminal trials. . . . [T]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on”

forensic evidence in criminal cases has grown over time. In this era of increasing reliance on forensic evidence, defense lawyers, more than ever, need to have the ability to understand such evidence to effectively represent those accused and to ensure that every defendant is afforded due process of law. When it is the defense counsel who considers the affirmative use of forensic evidence – whether to provide reasons for the jury to doubt the prosecution’s charges or even to fully exonerate the defendant – defense lawyers, consistent with their Sixth Amendment and ethical obligations, need independent access to scientific and forensic experts and evidence to prepare and present the defense. In the more frequent instances in which it is the prosecution that seeks to use forensic evidence to carry its burden to prove beyond a reasonable doubt that a criminal defendant committed a crime, defense counsel is constitutionally and ethically obligated to ensure that the evidence is sufficiently accurate and reliable to be presented to a jury and that, if it is so presented, that the jury understands the limits of the evidence.

Contrary to media portrayals of forensic science in popular TV shows, forensic evidence presented in court is at times based on speculative research, subjective interpretations, and inadequate quality control procedures. Ensuring the scientific integrity of forensic evidence is essential to prevent wrongful convictions and to exonerate the innocent. A year ago this month, the National Academies’ National Research Council issued a report, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press 2009) (“NAS Report”), that set forth a roadmap for reform and renewed the promise of fairness in the criminal justice system.

In July 2009, then President-Elect Cynthia Orr created the NACDL Task Force on the Future of Forensic Science to formulate the NACDL response to the NAS Report and to provide additional recommendations for the improvement of the justice system as it relates to the scientific integrity of forensic evidence and to its availability to the defense community – particularly the indigent defense community. Since then, the Task Force closely studied issues surrounding the use of forensic evidence in the courtroom, drafted proposed recommendations that resulted in an interim report in November 2009, solicited comments from a broad array of lawyers, forensic science practitioners, research scientists, and academicians on that interim report,⁵ and drafted this document, “Principles and Recommendations to Strengthen Forensic Evidence and Its Presentation in the Courtroom,” for consideration by NACDL’s Board of Directors.

The NAS Report highlighted important deficiencies, and NACDL supports the recommendations intended to remedy those deficiencies. In addition, NACDL adopts the following Principles and Recommendations to produce accurate and reliable forensic evidence results and to increase the likelihood of fair and accurate verdicts in our courtrooms. The Principles and Recommendations discuss seven central areas of need: (1) a central, science-based federal agency, (2) a culture of science, (3) a national code of ethics, (4) the prerequisite of research, (5) education, (6) transparency and discovery, and (7) defense resources, particularly for indigent defense services.

discredited forensics.” (quoting Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491 (2006)).

⁵ To encourage a broad range of perspectives, NACDL promised confidentiality and anonymity to the reviewers. NACDL thanks the reviewers of the interim report for their time and attention. The final report is improved as a result of their contributions. NACDL also thanks its members who participated in the Task Force.

I. CENTRAL, SCIENCE-BASED FEDERAL AGENCY

PRINCIPLE: The NAS Report's primary and central reform – that Congress should establish and appropriate funds for the establishment of a science-based federal agency – is of the utmost importance. This agency's purpose would be to promote the development of forensic science into a field of multidisciplinary research and practice founded on the systematic creation, collection, and analysis of relevant data. As the NAS recognized, this agency cannot be part of the Department of Justice or any other existing federal department or agency whose primary mission involves prosecution or law enforcement. This agency should be created and established as an immediate policy priority while there are ongoing efforts to fund and generate research. Validated and reliable forensic evidence is an important and necessary component of the criminal justice system, and the development of such evidence should be encouraged. The results of any forensic theory or technique whose validity, limitations, and measures of uncertainty have not been established should not be admitted into evidence to prove the guilt of an accused person. *See* Section IV (Prerequisite of Research). Therefore, a central priority of the agency should be research programs to determine the validity, limitations, and measures of uncertainty associated with the forensic disciplines, particularly relating to forensic evidence that purports to identify any specific individual as the contributor of crime scene evidence.

RECOMMENDATION 1 (Staffing):

As the NAS Report suggested, the federal agency should have a full-time executive director, professional staff, and an advisory board composed of a broad range of individuals with interest and expertise in issues that relate to the forensic disciplines and the criminal justice system.

RECOMMENDATION 2 (Scope of responsibilities):

Congress should allocate funds to the federal agency, which should serve as the authority by which funds are conscientiously dispensed with a national strategy in mind. As recognized by the NAS Report, the federal agency should, *inter alia*, oversee all programming that relates to forensic science and forensic evidence in the United States, establish national reporting standards for each forensic discipline, and encourage research by national research universities and other independent research-based institutions, including providing scholarships, fellowships, and grants to promote interest in the forensic disciplines among graduate students and faculty in the basic sciences, statistics, and engineering.⁶

⁶ The NAS Report details the broad scope of the agency's mandate. Such programming could include the development of programs to determine the validity and limitations of the forensic disciplines and to improve the understanding of them by members of the criminal justice system; a strategy to improve forensic science research and educational programs; the funding of academic, independent, and government research projects and educational programs, with emphasis on programs that address the credibility, validity, reliability, and understanding of forensic evidence; the establishment of best practices for forensic science practitioners and laboratories; the determination whether the government should financially support freestanding forensic science programs in colleges and universities or encourage conventional science, statistics, and engineering programs to include forensic tracks as part of their

RECOMMENDATION 3 (Board of accreditation and certification):

To strengthen regulation of the forensic disciplines, the federal scientific agency should establish a board on accreditation and certification with full authority to accredit and revoke the accreditation of all laboratories, to certify and discipline all forensic science practitioners, and to establish a program to audit all laboratories to ensure compliance with national standards.⁷ Oversight of accreditation and certification programs should be housed outside the forensic disciplines themselves and should be the sole responsibility of the federal agency. Certification is a matter for the federal agency and not for the courts. Forensic science practitioners who practice laboratory bench work should be certified. Conversely, because there is a difference between conducting bench examinations and evaluating the results of the examinations or evaluating the methodology underlying the examinations, those forensic science practitioners and other scientists and experts who have specialized knowledge and expertise and/or conduct research and/or teach in academic and private institutions but who do not perform routine bench work in a forensic facility do not need to be certified in the particular procedure to evaluate the empirical evidence concerning the validity, reliability, and accuracy of various examinations.⁸

RECOMMENDATION 4 (Proficiency testing program):

The federal agency should institute a national, uniform proficiency testing program. Proficiency testing should mirror actual case work. Because proficiency testing is an integral part of the accreditation and certification process, proficiency testing should be mandatory for forensic science practitioners.⁹

II. CULTURE OF SCIENCE

PRINCIPLE: A culture of science that encourages independence, openness, objectivity, error management, and critical review should be promoted in forensic science practitioners and facilities. Many forensic science practitioners and facilities already exhibit this culture. However, as the NAS Report recognized in calling for segregation of forensic facilities from law

programs; and evaluation of the development and introduction of new technologies in forensic investigations, the use of established technologies on new or different types of evidence, a comparison of new technologies with older ones, and a consideration of the limits of new ones.

⁷ Fraud in case work and other intentional acts of misconduct – as defined by the federal agency – are illustrative of grounds for revocation of accreditation or decertification.

⁸ The existence of certification should neither create a presumption of admissibility of the forensic science practitioner's testimony nor obligate the court to admit the testimony. Similarly, the absence of certification should neither create a presumption of inadmissibility nor obligate the court to exclude the evidence.

⁹ Efforts should be made to join with academic institutions and researchers to fund research for the development and implementation of "blind" proficiency testing that (1) mirrors actual case work, (2) is as difficult as true practitioner case work, (3) is well documented; (4) evolves with the learning of new developments that may affect proficiency, and (5) is, to the extent possible, not made known to the practitioner to be a test. Proficiency testing programs should provide a mechanism whereby failure to successfully complete a test is reported to the agency and made known to those legal professionals who rely on or who have relied upon the practitioner's work, and results in a corrective action plan for the forensic science practitioner.

enforcement and prosecutorial offices, a close working relationship with law enforcement has detrimentally influenced the mindset of other forensic laboratories and facilities and the personnel within them.¹⁰ There should be a national, fundamental commitment to a culture of science among *all* facilities and *all* practitioners.

RECOMMENDATION 1 (Independence):

Governmental forensic facilities and practitioners should be administered by independent agencies of federal, state, territorial, tribal, or local government. Law enforcement and prosecutorial agencies should have no controlling administrative, budgetary, or managerial relationships to forensic facilities and practitioners. Access of defense attorneys to governmental forensic facilities and forensic practitioners should not be limited by law, policy, or managerial attitude.

RECOMMENDATION 2 (Openness):

The exchange of research information, methods, and data is critical to the advancement of forensic science; therefore, forensic facilities should adopt policies that promote openness in operational, management, and scientific procedures. All scientific protocols, methodologies, and data should be available for examination and critique by academic and research scientists, legal scholars, and forensic science practitioners to promote knowledge, development, and education.

RECOMMENDATION 3 (Objectivity):

Forensic facilities and practitioners should ensure the segregation of case information extraneous to the examination and minimize the impact of unconscious bias on the interpretation of results.¹¹

¹⁰ Many forensic facilities have a number of ways in which they consciously and unconsciously have replaced a culture of science with a law enforcement mentality. *See* National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 24 (National Academies Press 2009) [hereinafter “Strengthening Forensic Science”] (“Congress should authorize and appropriate incentive funds . . . for the purpose of removing all public forensic laboratories and facilities from the administrative control of law enforcement agencies or prosecutors’ offices.”);

<http://www.asclد.org/files/membershipinfo.pdf>(defining membership of American Society of Crime Laboratory Directors as leadership of forensic facilities “whose principal function is the examination of physical evidence for *law enforcement agencies* in criminal matters and who provide testimony with respect to such physical evidence to the criminal justice system.” (emphasis added)).

¹¹ Garrett & Neufeld, *supra* note 1, at 67-71 (discussing erroneous forensic odontology interpretations); Dan E. Krane, et al., *Sequential Unmasking: A Means of Minimizing Observer Effects in Forensic DNA Interpretation*, 53 J. Forensic Sciences 1006 (2008) (calling for forensic science practitioners to analyze evidence without knowledge of known profiles); Robert B. Stacey, *A Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 54 J. Forensic Identification 706 (2004) (discussing false fingerprint identification of United States lawyer suspected of overseas terrorist act in part because lawyer was known to worship at mosque); William C. Thompson, *Painting the Target Around the Matching Profile: The Texas Sharpshooter Fallacy in Forensic DNA Interpretation*, 8 Law, Probability & Risk 257 (2009) (discussing *post hoc* interpretive shifting that can occur with forensic testing by practitioners seeking to fit crime scene evidence with known profile of suspect).

RECOMMENDATION 4 (Error management):

Forensic evidence conclusions should include the limitations of the opinion offered and the various error rates associated with the method or technique.¹² Error rates encompass both methodology error and practitioner error: the chance that the scientific procedure may produce the wrong result and the chance that the practitioner may not have done the procedure correctly. As the NAS Report recognized, errors associated with the method and those associated with the practitioner are inextricably linked. If research to quantify the various error rates is still ongoing and a report is written and/or trial testimony is given regarding the results of a forensic examination, forensic science practitioners should acknowledge the unknown nature and degree of error in such written and testimonial reports of their findings.¹³

RECOMMENDATION 5 (Critical review):

Employment with a forensic facility should require rigorous, continual evaluations of professional competency and independent technical review of case work. Within the forensic science community, there should be critical assessment by the scientific and legal communities through widely read and well-respected professional journal publications, conferences, and training seminars.¹⁴

III. CODE OF ETHICS

PRINCIPLE: All forensic science practitioners and supervisors should be required to adhere to a professional code of ethics that clearly articulates ethical obligations and contains a meaningful enforcement mechanism.¹⁵

¹² See, e.g., Strengthening Forensic Science 142 (“Although there is limited information about the accuracy and reliability of friction ridge analyses, claims that these analyses have zero error rates are not scientifically plausible.”); *id.* 154 (“[T]he decision of the tool mark examiner remains a subjective decision based on unarticulated standards and no statistical foundation for estimation of error rates.”). Forensic opinions of individualization and identity should be replaced by opinions that include probabilistic match associations, as is done with DNA evidence, together with provision of the error rates involved in determining that various characteristics on specimens “match.” Simon A. Cole, *Forensics without Uniqueness, Conclusions without Individualization: The New Epistemology of Forensic Identification*, 8 *Law, Probability & Risk* 233 (2009); Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 *Science* 892 (2005).

¹³ This Recommendation is made with the realization that some of the recommendations contained in this report may take longer to implement than others, and that, if some courts nevertheless admit forensic evidence prior to completion of studies to determine the measures of uncertainty of the particular forensic techniques, forensic science practitioners should then acknowledge the unknown nature and degree of error in such written and testimonial reports of their findings. Cf. Section IV (Prerequisite of Research), Principle (“The results of any forensic theory or technique whose validity, limitations, and measures of uncertainty have not been established should not be admitted into evidence to prove the guilt of an accused person.”).

¹⁴ Exchange programs, fellowships, and scholarships should be established to promote interaction and communications between the academic, research and forensic science practitioner communities.

¹⁵ While a national code of ethics would provide needed uniformity, discipline-specific codes or state codes enforced through licensing boards may be sufficiently effective. National model codes may provide useful guidance in unifying practices and standards.

RECOMMENDATION 1 (Continuing education):

The code of ethics should include continuing educational requirements for all forensic science practitioners that includes specialized training, discovery obligations, and evidence-handling requirements.

RECOMMENDATION 2 (Acknowledgement of subjectivity):

The code of ethics should require the acknowledgement of subjectivity in opinions and conclusions that may be presented in court given a particular set of findings.

RECOMMENDATION 3 (Disclosure obligations):

The code of ethics should reflect an understanding of discovery obligations and the constitutional duty of the government and its agents to disclose to the defense potentially favorable information in criminal proceedings.

RECOMMENDATION 4 (Enforcement):

The code of ethics should have a clearly articulated process for making complaints, and a transparent enforcement mechanism with a range of meaningful penalties that include the disqualification from forensic practice as an available sanction for intentional fraud and other gross misconduct. Adverse ethical findings should be made public.

IV. PREREQUISITE OF RESEARCH

PRINCIPLE: Research programs pertaining to the accuracy, reliability, and validity of forensic theories and techniques, and their limitations and measures of uncertainty where calculable, should immediately be established, fully funded, and carried out. This research should be led and primarily conducted by credentialed and qualified scientists at national research institutions; forensic science practitioners – particularly those guided by a culture-of-science mindset and with histories of independence from law enforcement – should be active research participants and partners.¹⁶ Not all forensic disciplines are equally grounded in validated science.¹⁷ Nor are

¹⁶ Strengthening Forensic Science 71 (“Although the FBI and NIJ have supported some research in the forensic science disciplines, the level of support has been well short of what is necessary for the forensic science community to establish strong links with a broad base of research universities and the national research community. Moreover, funding for academic research is limited and requires law enforcement collaboration, which can inhibit the pursuit of more fundamental scientific questions essential to establishing the foundation of forensic science.”); *id.* 189 (“Much more federal funding is needed to support research in forensic science and forensic pathology in universities and in private laboratories committed to such work.”).

¹⁷ *Id.* 6-7 (“The term ‘forensic science’ encompasses a broad range of forensic disciplines, each with its own set of technologies and practices. In other words, there is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material. . . . Many of these differences are discussed in the body of this report.”); *id.* 127-82 (describing various forensic disciplines and the differences in their scientific underpinnings).

all forensic processes within a particular discipline equally grounded in validated science.¹⁸ The results of any forensic theory or technique whose validity, limitations, and measures of uncertainty have not been established should not be admitted into evidence to prove the guilt of an accused person.¹⁹ Prior admissibility or use of the results of a forensic discipline, technique, or theory is not conclusive proof of validity or reliability.²⁰

¹⁸ For example, most uses of forensic evidence to exclude an individual as the possible contributor of evidence left on a crime scene are relatively straightforward applications of accepted procedures. *See supra* note 2.

¹⁹ *See generally In re Winship*, 397 U.S. 358, 362 (1970) (referring to presumption of innocence as “that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law’” (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895))).

While the prosecution presents at trial the vast majority of forensic evidence, defense counsel sometimes use forensic evidence affirmatively in their representation of accused persons. Defense attorneys should seek to use validated science – and should seek to avoid using science that has been demonstrated to be invalid – in their representation. Ultimately, a defense counsel’s use of forensic evidence in the case-in-chief is guided by all defendants’ constitutional right to present evidence in their behalf and by all defense attorneys’ obligations to zealously represent their clients and to provide constitutionally effective assistance of counsel. *See generally Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (“Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . [W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.”); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies.”); *Patrick v. State*, 750 S.W.2d 391, 391 (Ark. 1988) (“The legal question in this case is whether the results of a portable breath test, or what is sometimes called a roadside sobriety test, which are not admissible to prove a person is guilty of driving while intoxicated, are admissible when they would indicate a person is not guilty. In this case the answer is yes because the evidence is exculpatory, was crucial to the defense, and sufficiently reliable to warrant admission.”).

²⁰ *See, e.g., United States v. Green*, 405 F.Supp.2d 104, 109 (D. Mass. 2005) (“The more courts admit this type of tool mark evidence without requiring documentation, proficiency testing, or evidence of reliability, the more sloppy practices will endure; we should require more.”). Courts have historically exhibited extreme reluctance to deny the prosecution the use of forensic evidence at trial. *See* Strengthening Forensic Science 96 (citing Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice: And Some Suggestions for Reform*, 95 American J. Public Health S107, S109 (2005), and Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. Rev. 163 (2007)). The NAS Report, since its publication in February 2009, has become part of a change in the legal landscape in which the need for demonstration of the scientific validity and limitations of forensic theories and techniques can no longer be doubted, and therefore unvalidated forensic evidence should not be admitted against a defendant in court. Despite this proscription against admission by the prosecution of unvalidated forensic evidence, some courts may nonetheless improperly admit such evidence prior to completion of the necessary studies to determine their validity and limits. Such circumstances should not occur; however, if they do, at a minimum, jurors must be instructed about the lack of demonstrated validity, the limitations of the opinion offered, and the existence and degree of various error rates associated with the method or technique; and the defense must be permitted to present evidence consistent those instructions.

RECOMMENDATION 1 (Determination of probability associations):

Based upon the research into the uncertainties inherent in most forensic processes, match probability associations about the evidence should, whenever possible, generally replace conclusions such as “match,” “uniquely associated with,” “source attribution,” “individualization,” “conclusive,” “positive,” “absolute,” and other similar terminology; and if such terms *are* used, they should only be used when probabilistically defined elsewhere in the report.

RECOMMENDATION 2 (Relationship between research studies and case work):

Studies of the reliability, validity, and accuracy of forensic techniques or theories should mirror actual case work and samples. The research should distinguish between industry performance (achieved across practitioners and facilities) and individual performance (achieved by specific practitioners and specific facilities).

RECOMMENDATION 3 (Critical review):

All research concerning the validity of a forensic theory or technique should be the product of high-quality research using sound methodology and published in well-regarded scientific journals that are widely, publicly available.

RECOMMENDATION 4 (Error rates):

Research should be conducted to establish the various types of error rates associated with the analysis. *See, supra* Section II (Culture of Science), Recommendation 4 (Error management) and note 12. To explore these issues, research methods should follow those used in clinical laboratories to generate such error rates.

RECOMMENDATION 5 (Automated techniques):

Research conducted to develop automated techniques capable of enhancing forensic technologies should include consideration of subjective interpretations and assumptions embedded in the technique and any limitations associated with the automated technique. Notification of such limitations should be provided together with results.

RECOMMENDATION 6 (Minimizing bias):

The basic principles of human observer bias and sources of human error are sufficiently established that there are precautions that can and should be implemented now.²¹ As research into observer bias continues, additional findings should be taken into account in continual improvement of policies, protocols, and procedures.

RECOMMENDATION 7 (Documentation):

Documentation of all procedures and results of forensic examinations is necessary to permit an independent reconstruction of the examination to establish the reliability of the results. Research should be conducted to determine what constitutes sufficient documentation to permit an independent reconstruction of a forensic examination. Research should also be conducted into appropriate procedures for case-specific peer

²¹ *See, e.g.*, D. Michael Risinger, et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 Cal. L. Rev. 1 (2002).

review by practitioners of each other's work and documentation of such, taking into account, *inter alia*, the extensive current literature on observer bias.

V. EDUCATION

PRINCIPLE: The NAS Report accurately observed that legal professionals generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner. Attorneys and judges need significant education and training in the fundamentals of science, statistics, and common forensic practices; and in the limitations of, and potential forms and scope of error associated with, those practices.

RECOMMENDATION 1 (Law students):

Law schools should offer courses in scientific principles and scientific evidence. As part of a law school curriculum, students should be encouraged to take courses in science and statistics. The development of J.D.-Ph.D. programs in basic sciences, statistics, and engineering should be encouraged through grants, fellowships, and other means.

RECOMMENDATION 2 (Lawyers and judges):

The federal government should appropriate funding for the training of criminal defense attorneys, prosecutors, and judges in science, general scientific principles, and the ethical and constitutional obligations related to the disclosure and presentation of forensic evidence. Given the different roles in the adversarial process between the prosecution and the defense,²² separate trainings for prosecutors and defense counsel should be the primary pedagogical model, with the possibility of additional joint training where common purposes are identified. The training of prosecutors should include their disclosure obligations and the limits of forensic evidence. The training of defense lawyers should be focused on lawyers for indigent defendants, who have historically had the least access to forensic resources and on those regions of the country that have historically not had the funds to provide high-quality training to lawyers. The federal government should dedicate funds to public defender organizations, criminal defense bar associations, and other criminal defense organizations that currently have effective training programs and to any new or existing entities that demonstrate a commitment to training and present an effective training proposal for indigent representation.

²² Compare *Kyles v. Whitley*, 514 U.S. 419 (1995), *Giglio v. United States*, 405 U.S. 150 (1972), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959), with *Holmes v. South Carolina*, 547 U.S. 319 (2006), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Crane v. Kentucky*, 476 U.S. 683 (1986), *Strickland v. Washington*, 466 U.S. 668 (1984), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Washington v. Texas*, 388 U.S. 14 (1967). See also note 19, *supra* (citing cases on burden of proof, presumption of innocence, and right to compulsory process).

RECOMMENDATION 3 (Educational resources):

Funds should also be appropriated for the purpose of establishing through the federal agency a public repository for transcripts of forensic science practitioners; pleadings and transcripts in cases involving challenges to forensic evidence; and journal articles and treatises involving forensic evidence, especially those journals or treatises that are out-of-print or in limited circulation. The overseeing scientific federal agency should make available a public repository of such material.

VI. TRANSPARENCY AND DISCLOSURE

PRINCIPLE: The principle of transparency is fundamental to a fair and effective criminal justice system and is a hallmark of good science. As one scholar put it, “Science and secrecy do not sit comfortably together.”²³ The ability of attorneys to evaluate, investigate, present, and confront forensic evidence at trial is dependent upon the complete and timely disclosure of information about the examination, the conclusions of the forensic science practitioner, and the facility where the examination was conducted. In every case involving forensic evidence, regardless of the current state of the science and/or advancements made, both the prosecution and the defense will require full access to the forensic evidence and underlying data related to a particular case.

RECOMMENDATION 1 (Transparency of forensic facility operations):

All operations of forensic facilities should be open to scrutiny; their training, administrative, and policy manuals should be publicly accessible.

RECOMMENDATION 2 (Ethical requirement):

Forensic facilities and practitioners should adopt and follow a code of ethics that emphasizes, among other things, the importance of full disclosure. *See* Section III (Code of Ethics), Recommendation 3 (Disclosure obligations).

RECOMMENDATION 3 (Disclosure obligations):

Forensic science practitioners and forensic facility leadership should be trained on the legal obligations of disclosure of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995), and local discovery rules to ensure a full understanding of the constitutional duty of the government and its agents to disclose to the defense potentially favorable material and other discoverable information in criminal proceedings.

RECOMMENDATION 4 (Access to researchers and litigants):

Forensic research should be available to be scrutinized by scientists outside the forensic community. Research findings, underlying data, and courtroom testimony concerning such research and data should be archived in a publicly accessible database. *See* Section V (Education), Recommendation 3 (Educational resources).

²³ Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 Law & Contemporary Problems 21 (2006).

RECOMMENDATION 5 (Minimum disclosure requirements):

Uniform minimum disclosure requirements should be imposed in all jurisdictions to promote the effective assistance of counsel, due process, and fair trials for all criminal defendants.²⁴ Because, as noted before, *see, supra* notes 19 & 22, the prosecution and

²⁴ The following should be readily accessible to attorneys representing criminal defendants in cases involving scientific evidence:

(A) Information Pertaining to the Analysis

1. All “bench notes” (contemporaneous notes made during the examination or analysis), including all photographs, diagrams and descriptions of the analysis conducted;
2. All data including electronic data generated as part of the analysis whether or not the data was ultimately relied on in reporting the results or findings;
3. All communications concerning the case or the evidence whether oral or in writing between the forensic science practitioners, supervisors, technical leaders, and/or law enforcement, including police officers and prosecutors;
4. All chain of custody documentation regarding all samples examined and/or analyzed;
5. All documentation regarding the collection of all physical evidence and subsequent treatment as well as documentation regarding a decision not to collect any item of potential evidence;
6. All information pertaining to any review conducted by a peer or supervisor including all documentation and opinions rendered; and
7. All information generated by any database search including data on all of the candidates generated during a search, even if they are not identified as the source.

(B) Information Pertaining to Quality Control within the Forensic Facility

1. The most recent external audit report;
2. Internal audit reports and supporting documentation for the year preceding the analysis through the time of the anticipated testimony;
3. All internal quality control documents recording any errors of any kind (sometimes denominated as “unexpected results” logs) whether or not the correct result was ultimately obtained;
4. Contamination logs;
5. Records documenting corrective action taken following an error or “unexpected result”;
6. If no corrective action was taken when an error or “unexpected result” occurred, the written documented explanation of the inaction;
7. Records of any internal review or audits conducted for any reason other than accreditation purposes;
8. Calibration records for all equipment used in the analysis; and
9. A list of any documents published or unpublished relied on in forming an opinion in the case.

(C) Information Pertaining to the Forensic Science Practitioner

1. Current curriculum vitas or resumes of the testing practitioner, reviewer, and supervisor;

defense counsel have different responsibilities in our constitutional structure and because local discovery rules usually expand upon those differences by imposing broader disclosure obligations on the prosecution than on the defense, prosecution and defense disclosure obligations necessarily differ from each other.

RECOMMENDATION 6 (Reports):

Forensic reports should be complete, thorough, and accurate. Reports should be written so that members of the legal system are able to discern what method of comparison or technique was used. The report should clearly define the standards for the method or technique, all terms used in the report, and the results of the comparison.

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2. Listing of instances in which the practitioner testified with sufficient detail to allow ordering the transcripts if not already generated and held by the facility or archiving federal agency;
 3. Documentation of all education, training, employment, and other matters listed on the curriculum vitae or resume;
 4. Documentation of all relevant training received;
 5. All information concerning deficient, negligent, or incompetent performance;
 6. All records concerning any error or “unexpected result,” including instances when the practitioner or a reviewer caught and corrected the error before conclusion of the testing process;
 7. All records concerning all proficiency tests; and
 8. All records concerning certification.

(D) Standard Operating Procedure Manuals and Validation Studies

1. Standard operating procedure manuals for any technique or method in effect at the time of the testing through the time of the anticipated testimony;
2. Validation studies for any method or technique used in a particular case; and
3. Underlying data from the validations studies.

Reports should include:

1. The opinion that will be presented in court;
2. All assumptions being made in rendering the above opinion;
3. A clear characterization of any limitations and an associated statistic that describes the weight that should be attributed to the evidence; and
4. The underlying basis of the opinion including identification of any published or unpublished material relied on.

Forensic facilities should provide up-front information regarding the results of examinations, all results of automatic database searches conducted as part of the examination (*e.g.*, CODIS and AFIS), documentation of quality control problems in the facility or associated with a particular forensic science practitioner, and standard operating procedures and validation studies. While these disclosure requirements are broader than the current policies of most forensic facilities, they are not onerous and should not only be provided after litigation. In fact, some forensic facilities already disclose the case-specific information as a matter of course upon request, and/or provide protocols and other non-case-specific information publicly online.

RECOMMENDATION 7 (Databases):

Defense attorneys should have access to data in government-administered forensic databases upon a written statement that such access may lead to relevant evidence and is necessary for effective representation of a criminal defendant. Access should be provided in a manner consistent with the privacy rights of the individuals in the databases.

VII. DEFENSE RESOURCES

PRINCIPLE: Forensic reform must be viewed within the framework of the fundamental constitutional protections established to ensure fair and accurate verdicts based on trustworthy evidence and to prevent wrongful convictions. While the prosecution has historically been the primary proponent of forensic evidence, the defense bar also uses forensic evidence. Defense counsel sometimes use forensic evidence at trial, and, as is well known, many of the exonerations of innocent persons have been based on defense counsel's use of forensic evidence. Additionally, even hampered by severe economic constraints, it is typically the defense bar that has spotlighted deficiencies in, and limitations of, the various forensic disciplines.²⁵ Defense counsel should have the ability to consult with experts in the forensic disciplines and in related scientific fields to identify for the courts and juries the scientific limits of the evidence and to present the results of independent testing and the testimony of independent experts when appropriate. Forensic reform should therefore include providing the defense with resources to obtain the assistance of forensic and scientific experts for confidential consultation and testimony, and the use of forensic facilities for independent, confidential testing. In all jurisdictions, indigent defendants, like defendants with financial means, should have access to assistance from appropriate experts.

RECOMMENDATION 1 (Scope):

Criminal defendants should be provided expert assistance commensurate with the needs of the case. Assistance shall include consultation with experts, expert testimony, and testing at forensic facilities.

RECOMMENDATION 2 (Indigent defense):

The federal government, through the central federal scientific agency, should provide increased resources to the institutional indigent defense bar to provide for greater access to, and assistance by, experts versed in the forensic disciplines and their scientific underpinnings. In those circumstances where some or all indigent representation is provided by public defender offices, this money should be provided directly to federal, state, territorial, tribal, and local public defender offices for those offices' independent determinations of how best to use funding for forensic services in the representation of their indigent defendants. In those circumstances where indigent representation is provided by non-institutional court-appointed attorneys and

²⁵ See generally Jay D. Aronson, *Genetic Witness* (2007) (discussing how defense courtroom challenges to admission of forensic DNA evidence led to vast improvement in its development and presentation).

circumstances where the accused can retain counsel but cannot afford expert services, the central federal scientific agency should provide money specially targeted for scientific and forensic assistance to the courts or agencies designated to administer funding to court-appointed counsel. All such funds for non-institutional court-appointed lawyers should be available to court-appointed counsel upon a written, *ex parte* statement that expert assistance is necessary to effectively represent the defendant.

RECOMMENDATION 3 (Experts):

Although individuals trained as forensic science practitioners are one category of expert who may possess relevant and specialized knowledge, there are many other types of experts to whom prosecutors and defense lawyers can and should turn for assistance in understanding forensic evidence. In addition to forensic science practitioners, lawyers frequently consult with and call as trial witnesses scientists employed by academic and private institutions who have expertise and training in scientific and forensic disciplines, scientific principles including validity testing and the evaluation of empirical data, and in other scientific disciplines that provide the underpinning for, and context of, forensic disciplines. Further, courts have also recognized that even scholars and academic researchers who do not have degrees in science but whose publications demonstrate an understanding of the underpinnings of particular forensic discipline can contribute to the full and proper evaluation of forensic evidence. The funding for expert assistance should necessarily support and encourage assistance both from forensic practitioners and from scientists and academicians whose expertise can relate to and inform the meaning of the forensic evidence.

RECOMMENDATION 4 (Consultation):

Government forensic laboratories and other facilities that contract with the government should be open and accessible to both prosecutors and defense lawyers.²⁶ In that regard, forensic science practitioners and directors should be available to meet with defense counsel and experts retained by the defense to discuss and answer questions regarding the methodologies, tests, and findings in a particular case. Government forensic science practitioners should also, when practical, be available to consult with defense counsel about cases from the same or other jurisdictions in circumstances in which there is no legal conflict of interest if defense counsel elects to seek assistance from such experts. Best practices generally prescribe that defense counsel consult an expert who is entirely independent of law enforcement and the prosecution. There should, therefore, never be a requirement or expectation that

²⁶ The association between forensic facilities and practitioners and law enforcement must end, with a culture of science fully inculcated throughout the entire forensic science community. Recommendations 3 and 4 of this Section are made with the realization that some of the recommendations contained in this report may take longer to implement than others, and that the existing structure is one in which many forensic facilities *are* in an administrative, budgetary, and/or managerial subordinate role relative to law enforcement and prosecutorial agencies. *See supra* note 10.

defense counsel will rely upon government forensic science practitioners as experts instead of consulting with private, independent experts.

RECOMMENDATION 5 (Confidential testing):

Government forensic facilities should be available if there is no conflict of interest to conduct confidential testing and to provide confidential results to the defense at the request of defense counsel. Best practices generally prescribe that defense counsel use a forensic facility that is entirely independent of law enforcement and the prosecution. Therefore, there should never be a requirement or expectation that defense counsel will use government forensic facilities to conduct independent testing. The defense may employ whatever facility – public or private – that it deems appropriate in a particular case. Because forensic facilities offer different services and have different strengths and weaknesses, funding should be made available to the defense to seek forensic testing from more than one facility on the same piece(s) of evidence.

/END

Home > Briefing Room > Justice News

JUSTICE NEWS

MEMORANDUM FOR DEPARTMENT PROSECUTORS

Monday, January 4, 2010

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Guidance for Prosecutors Regarding Criminal Discovery

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. See USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, the United States Attorney's Manual describes the Department's policy for disclosure of exculpatory and impeachment information. See USAM §9-5.001. In order to meet discovery obligations in a given case, Federal prosecutors must be familiar with these authorities and with the judicial interpretations and local rules that discuss or address the application of these authorities to particular facts. In addition, it is important for prosecutors to consider thoroughly how to meet their discovery obligations in each case. Toward that end, the Department has adopted the guidance for prosecutors regarding criminal discovery set forth below. The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the Department's pursuit of justice. The guidance is subject to legal precedent, court orders, and local rules. It provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits. See *United States v. Caceres*, 440 U.S. 741 (1979).

By following the steps described below and being familiar with laws and policies regarding discovery obligations, prosecutors are more likely to meet all legal requirements, to make considered decisions about disclosures in a particular case, and to achieve a just result in every case. Prosecutors are reminded to consult with the designated criminal discovery coordinator in their office when they have questions about the scope of their discovery obligations. Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases. Prosecutors are also reminded to contact the Professional Responsibility Advisory Office when they have questions about those or any other ethical responsibilities.

Department of Justice Guidance for Prosecutors Regarding Criminal Discovery

Step 1: Gathering and Reviewing Discoverable Information ¹

A. Where to look—The Prosecution Team

Department policy states:

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

USAM §9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case. In multi-district investigations, investigations that include both Assistant United States Attorneys and prosecutors from a Department litigating component or other United States Attorney's Office (USAO), and parallel criminal and civil proceedings, this definition will necessarily be adjusted to fit the circumstances. In addition, in complex cases that involve parallel proceedings with regulatory agencies (SEC, FDIC, EPA, etc.), or other non-criminal investigative or intelligence agencies, the prosecutor should consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes.

Some factors to be considered in determining whether to review potentially discoverable information from another federal agency include:

- Whether the prosecutor and the agency conducted a joint investigation or shared resources related to investigating the case;
- Whether the agency played an active role in the prosecution, including conducting arrests or searches, interviewing witnesses, developing prosecutorial strategy, participating in targeting discussions, or otherwise acting as part of the prosecution team;
- Whether the prosecutor knows of and has access to discoverable information held by the agency;
- Whether the prosecutor has obtained other information and/or evidence from the agency;
- The degree to which information gathered by the prosecutor has been shared with the agency;
- Whether a member of an agency has been made a Special Assistant United States Attorney;
- The degree to which decisions have been made jointly regarding civil, criminal, or administrative charges; and
- The degree to which the interests of the parties in parallel proceedings diverge such that information gathered by one party is not relevant to the other party.

Many cases arise out of investigations conducted by multi-agency task forces or otherwise involving state law enforcement agencies. In such cases, prosecutors should consider (1) whether state or local agents are working on behalf of the prosecutor or are under the prosecutor's control; (2) the extent to which state and federal

19

governments are part of a team, are participating in a joint investigation, or are sharing resources; and (3) whether the prosecutor has ready access to the evidence. Courts will generally evaluate the role of a state or local law enforcement agency on a case-by-case basis. Therefore, prosecutors should make sure they understand the law in their circuit and their office's practice regarding discovery in cases in which a state or local agency participated in the investigation or on a task force that conducted the investigation.

Prosecutors are encouraged to err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes. Carefully considered efforts to locate discoverable information are more likely to avoid future litigation over *Brady and Giglio* issues and avoid surprises at trial.

Although the considerations set forth above generally apply in the context of national security investigations and prosecutions, special complexities arise in that context. Accordingly, the Department expects to issue additional guidance for such cases. Prosecutors should begin considering potential discovery obligations early in an investigation that has national security implications and should also carefully evaluate their discovery obligations prior to filing charges. This evaluation should consider circuit and district precedent and include consultation with national security experts in their own offices and in the National Security Division.

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed ². The review process should cover the following areas:

1. The Investigative Agency's Files: With respect to Department of Justice law enforcement agencies, with limited exceptions ³, the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted. Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. With respect to outside agencies, the prosecutor should request access to files and/or production of all potentially discoverable material. The investigative agency's entire investigative file, including documents such as FBI Electronic Communications (ECs), inserts, emails, etc. should be reviewed for discoverable information. If such information is contained in a document that the agency deems to be an "internal" document such as an email, an insert, an administrative document, or an EC, it may not be necessary to produce the internal document, but it will be necessary to produce all of the discoverable information contained in it. Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

2. Confidential Informant (CI)/Witness (CW)/Human Source (CHS)/Source (CS) Files: The credibility of cooperating witnesses or informants will always be at issue if they testify during a trial. Therefore, prosecutors are entitled to access to the agency file for each testifying CI, CW, CHS, or CS. Those files should be reviewed for discoverable information and copies made of relevant portions for discovery purposes. The entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment information should be included within this review.

If a prosecutor believes that the circumstances of the case warrant review of a non-testifying source's file, the prosecutor should follow the agency's procedures for requesting the review of such a file.

Prosecutors should take steps to protect the non-discoverable, sensitive information found within a CI, CW, CHS, or CS file. Further, prosecutors should consider whether discovery obligations arising from the review of CI, CW, CHS, and CS files may be fully discharged while better protecting government or witness interests such as security or privacy via a summary letter to defense counsel rather than producing the record in its entirety.

Prosecutors must always be mindful of security issues that may arise with respect to disclosures from confidential source files. Prior to disclosure, prosecutors should consult with the investigative agency to evaluate any such risks and to develop a strategy for addressing those risks or minimizing them as much as possible, consistent with discovery obligations.

3. Evidence and Information Gathered During the Investigation: Generally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc. As discussed more fully below in Step 2, in cases involving a large volume of potentially discoverable information, prosecutors may discharge their disclosure obligations by choosing to make the voluminous information available to the defense.

4. Documents or Evidence Gathered by Civil Attorneys and/or Regulatory Agency in Parallel Civil Investigations: If a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for purposes of defining discovery obligations, that agency's files should be reviewed. Of course, if a regulatory agency is not part of the prosecution team but is conducting an administrative investigation or proceeding involving the same subject matter as a criminal investigation, prosecutors may very well want to ensure that those files are reviewed not only to locate discoverable information but to locate inculpatory information that may advance the criminal case. Where there is an ongoing parallel civil proceeding in which Department civil attorneys are participating, such as a *qui tam* case, the civil case files should also be reviewed.

5. Substantive Case-Related Communications: "Substantive" case-related communications may contain discoverable information. Those communications that contain discoverable information should be maintained in the case file or otherwise preserved in a manner that associates them with the case or investigation. "Substantive" case-related communications are most likely to occur (1) among prosecutors and/or agents, (2) between prosecutors and/or agents and witnesses and/or victims, and (3) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. "Substantive" communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witnesses/victims, and factual issues relating to credibility. Communications involving case impressions or investigative or prosecutive strategies without more would not ordinarily be considered discoverable, but substantive case-related communications should be reviewed carefully to determine whether all or part of a communication (or the information contained therein) should be disclosed.

Prosecutors should also remember that with few exceptions (*see, e.g., Fed.R.Crim.P. 16(a)(1)(B)(iii)*), the format of the information does not determine whether it is discoverable. For example, material exculpatory information that the prosecutor receives during a conversation with an agent or a witness is no less discoverable than if that same information were contained in an email. When the discoverable information contained in an email or other communication is fully memorialized elsewhere, such as in a report of interview or other document(s), then the disclosure of the report of interview or other document(s) will ordinarily satisfy the disclosure obligation.

6. Potential *Giglio* Information Relating to Law Enforcement Witnesses: Prosecutors should have candid conversations with the federal agents with whom they work regarding any potential *Giglio* issues, and they should follow the procedure established in USAM §9-5.100 whenever necessary before calling the law enforcement employee as a witness. Prosecutors should be familiar with circuit and district court precedent and local practice regarding obtaining *Giglio* information from state and local law enforcement officers.

7. Potential Giglio Information Relating to Non-Law Enforcement Witnesses and Fed.R.Evid. 806 Declarants: All potential Giglio information known by or in the possession of the prosecution team relating to non-law enforcement witnesses should be gathered and reviewed. That information includes, but is not limited to:

Prior inconsistent statements (possibly including inconsistent attorney proffers, *see United States v. Triumph Capital Group*, 544 F.3d 149 (2d Cir. 2008))

Statements or reports reflecting witness statement variations (see below)

Benefits provided to witnesses including:

Dropped or reduced charges

Immunity

Expectations of downward departures or motions for reduction of sentence

Assistance in a state or local criminal proceeding

Considerations regarding forfeiture of assets

Stays of deportation or other immigration status considerations

S-Visas

Monetary benefits

Non-prosecution agreements

Letters to other law enforcement officials (e.g. state prosecutors, parole boards) setting forth the extent of a witness's assistance or making substantive recommendations on the witness's behalf

Relocation assistance

Consideration or benefits to culpable or at risk third-parties

Other known conditions that could affect the witness's bias such as:

Animosity toward defendant

Animosity toward a group of which the defendant is a member or with which the defendant is affiliated

Relationship with victim

Known but uncharged criminal conduct (that may provide an incentive to curry favor with a prosecutor)

Prior acts under Fed.R.Evid. 608

Prior convictions under Fed.R.Evid. 609

Known substance abuse or mental health issues or other issues that could affect the witness's ability to perceive and recall events

8. Information Obtained in Witness Interviews: Although not required by law, generally speaking, witness interviews⁵ should be memorialized by the agent⁶. Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized. When a prosecutor participates in an interview with an investigative agent, the prosecutor and agent should discuss note-taking responsibilities and memorialization before the interview begins (unless the prosecutor and the agent have established an understanding through prior course of dealing). Whenever possible, prosecutors should not conduct an interview without an agent present to avoid the risk of making themselves a witness to a statement and being disqualified from handling the case if the statement becomes an issue. If exigent circumstances make it impossible to secure the presence of an agent during an interview, prosecutors should try to have another office employee present. Interview memoranda of witnesses expected to testify, and of individuals who provided relevant information but are not expected to testify, should be reviewed.

a. Witness Statement Variations and the Duty to Disclose: Some witnesses' statements will vary during the course of an interview or investigation. For example, they may initially deny involvement in criminal activity, and the information they provide may broaden or change considerably over the course of time, especially if there are a series of debriefings that occur over several days or weeks. Material variances in a witness's statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as Giglio information.

b. Trial Preparation Meetings with Witnesses: Trial preparation meetings with witnesses generally need not be memorialized. However, prosecutors should be particularly attuned to new or inconsistent information disclosed by the witness during a pre-trial witness preparation session. New information that is exculpatory or impeachment information should be disclosed consistent with the provisions of USAM §9-5.001 even if the information is first disclosed in a witness preparation session. Similarly, if the new information represents a variance from the witness's prior statements, prosecutors should consider whether memorialization and disclosure is necessary consistent with the provisions of subparagraph (a) above.

c. Agent Notes: Agent notes should be reviewed if there is a reason to believe that the notes are materially different from the memorandum, if a written memorandum was not prepared, if the precise words used by the witness are significant, or if the witness disputes the agent's account of the interview. Prosecutors should pay particular attention to agent notes generated during an interview of the defendant or an individual whose statement may be attributed to a corporate defendant. Such notes may contain information that must be disclosed pursuant to Fed.R.Crim.P. 16(a)(1)(A)-(C) or may themselves be discoverable under Fed.R.Crim.P. 16(a)(1)(B). *See, e.g., United States v. Clark*, 385 F.3d 609, 619-20 (6th Cir. 2004) and *United States v. Vallee*, 380 F.Supp.2d 11, 12-14 (D. Mass. 2005).

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, prosecutors should not delegate the disclosure determination itself. In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence. Such broad disclosure may not be feasible in national security cases involving classified information.

Step 3: Making the Disclosures

The Department's disclosure obligations are generally set forth in Fed.R.Crim.P. 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady*, and *Giglio* (collectively referred to herein as "discovery obligations"). Prosecutors must familiarize themselves with each of these provisions and controlling case law that interprets these provisions. In addition, prosecutors should be aware that Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information, and provides for broader disclosures than required by *Brady* and *Giglio*. Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations. If a prosecutor chooses this course, the defense should be advised that the prosecutor is electing to produce discovery beyond what is requi

the circumstances of the case but is not committing to any discovery obligation beyond the discovery obligations set forth above.

A. Considerations Regarding the Scope and Timing of the Disclosures: Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery consistent with any countervailing considerations. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, prosecutors should always consider any appropriate countervailing concerns in the particular case, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and other strategic considerations that enhance the likelihood of achieving a just result in a particular case. In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. The Working Group determined that practices differ among the USAOs and the components regarding disclosure of ROIs of testifying witnesses. Prosecutors should be familiar with and comply with the practice of their offices.

Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the "file" is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that the court may deem to have been part of the "file."

When the disclosure obligations are not clear or when the considerations above conflict with the discovery obligations, prosecutors may seek a protective order from the court addressing the scope, timing, and form of disclosures.

B. Timing: Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. See USAM §9-5.001. Section 9-5.001 also notes, however, that witness security, national security, or other issues may require that disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act. Prosecutors should be attentive to controlling law in their circuit and district governing disclosure obligations at various stages of litigation, such as pre-trial hearings, guilty pleas, and sentencing.

Prosecutors should consult the local discovery rules for the district in which a case has been indicted. Many districts have broad, automatic discovery rules that require Rule 16 materials to be produced without a request by the defendant and within a specified time frame, unless a court order has been entered delaying discovery, as is common in complex cases. Prosecutors must comply with these local rules, applicable case law, and any final court order regarding discovery. In the absence of guidance from such local rules or court orders, prosecutors should consider making Rule 16 materials available as soon as is reasonably practical but must make disclosure no later than a reasonable time before trial. In deciding when and in what format to provide discovery, prosecutors should always consider security concerns and the other factors set forth in subparagraph (A) above. Prosecutors should also ensure that they disclose Fed.R.Crim.P. 16(a)(1)(E) materials in a manner that triggers the reciprocal discovery obligations in Fed.R.Crim.P. 16(b)(1).

Discovery obligations are continuing, and prosecutors should always be alert to developments occurring up to and through trial of the case that may impact their discovery obligations and require disclosure of information that was previously not disclosed.

C. Form of Disclosure: There may be instances when it is not advisable to turn over discoverable information in its original form, such as when the disclosure would create security concerns or when such information is contained in attorney notes, internal agency documents, confidential source documents, Suspicious Activity Reports, etc. If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel, including particular language, where pertinent, prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant.

Step 4: Making a Record

One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case. Keeping accurate records of the evidence disclosed is no less important than the other steps discussed above, and poor records can negate all of the work that went into taking the first three steps.

Conclusion

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. This guidance does not and could not answer every discovery question because those obligations are often fact specific. However, prosecutors have at their disposal an array of resources intended to assist them in evaluating their discovery obligations including supervisors, discovery coordinators in each office, the Professional Responsibility Advisory Office, and online resources available on the Department's intranet website, not to mention the experienced career prosecutors throughout the Department. And, additional resources are being developed through efforts that will be overseen by a full-time discovery expert who will be detailed to Washington from the field. By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a just and final result in every criminal prosecution. Thank you very much for your efforts to achieve those most important objectives.

¹For the purposes of this memorandum, "discovery" or "discoverable information" includes information required to be disclosed by Fed.R.Crim.P. 16 and 26.2, the Jencks Act, *Brady*, and *Giglio*, and additional information disclosable pursuant to USAM §9-5.001.

²How to conduct the review is discussed below.

³Exceptions to a prosecutor's access to Department law enforcement agencies' files are documented in agency policy, and may include, for example, access to a
 22
 testifying source's files.

⁴Nothing in this guidance alters the Department's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses contained in USAM §9-5.100.

⁵"Interview" as used herein refers to a formal question and answer session with a potential witness conducted for the purpose of obtaining information pertinent to a matter or case. It does not include conversations with a potential witness for the purpose of scheduling or attending to other ministerial matters. Potential witnesses may provide substantive information outside of a formal interview, however. Substantive, case-related communications are addressed above.

⁶In those instances in which an interview was audio or video recorded, further memorialization will generally not be necessary.

Home » Briefing Room » Justice News

JUSTICE NEWS

MEMORANDUM FOR HEADS OF DEPARTMENT LITIGATING COMPONENTS HANDLING CRIMINAL MATTERS

ALL UNITED STATES ATTORNEYS

Monday, January 4, 2010

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Requirement for Office Discovery Policies in Criminal Matters

Earlier this year, I asked the Assistant Attorney General of the Criminal Division and the Chair of the Attorney General's Advisory Committee to convene a working group to undertake a thorough review of the Department of Justice's policies, practices, and training related to criminal case management and discovery and to evaluate areas for improvement. Members of this working group included senior level prosecutors from United States Attorneys' Offices (USAOs) and Main Justice, Information Technology support personnel, and law enforcement representatives. In addition, members of the Attorney General's Advisory Committee and the Department's Criminal Chiefs Working Group reviewed and provided comments on the Working Group Report. The case management and discovery working group examined current Department of Justice policies, and surveyed all of the USAOs, the criminal litigating components of Main Justice, and the Department of Justice's law enforcement agencies, as well as the U.S. Postal Inspection Service, to evaluate current discovery practices, case management practices, and related training, and to identify areas for improvement.

Today, in response to some of the recommendations in the Working Group Report, I sent out a memorandum to all prosecutors that included Guidance for Prosecutors Regarding Criminal Discovery that prosecutors should follow to help ensure that they meet discovery obligations in future cases. This guidance is not intended to establish new disclosure obligations. Those obligations are already set forth in Fed.R.Crim.P. 16 and 26.2, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and 18 U.S.C. §3500 (the Jencks Act). In addition, Department policy provides for broader disclosures of exculpatory and impeachment information than *Brady* and *Giglio* require. See USAM §9-5.001. Prosecutors in every district and component must comply with legal requirements and with Department policy. Moreover, there are times when providing discovery broader than that provided for even by current Department policy serves the interests of justice. Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of a case. On the other hand, there are times when countervailing considerations counsel against broad and early disclosure. For these reasons, the discovery guidance is intended to assure that prosecutors make considered decisions about whether to disclose information beyond the requirements of law and policy and when to disclose it.

The Working Group Report recognized that some local variation in discovery practices is inevitable. Inconsistent discovery practices among prosecutors within the same office, however, can lead to burdensome litigation over the appropriate scope and timing of disclosures, judicial frustration and confusion, and disparate discovery disclosures to a defendant based solely on the identity of the prosecutor who happens to have been assigned a case. In many instances, the discovery guidance directs that prosecutors be familiar with circuit and district court precedent and the local rules of the district in which they practice.

In order to assist prosecutors maintain this familiarity and to establish uniform criminal discovery practices within the same office, I am today directing the USAOs and each Department litigating component handling criminal matters to develop a discovery policy that reflects circuit and district court precedent and local rules and practices.

This directive requires each office to establish a discovery policy with which prosecutors in that office must comply. The policy should also provide that specific, case-related considerations may warrant a departure from the uniform discovery practices of the office. Because it is expected that such considerations will sometimes justify a departure from the particular office practice, your policy must set forth procedures prosecutors are required to follow to obtain supervisory approval to depart from the uniform practices in an appropriate case.

Although the format is left to your discretion, the policy should address recurring issues such as: the timing of disclosures; disclosure of reports of interview for testifying or non-testifying witnesses; providing disclosure beyond the requirements of Fed.R.Crim.P 16 and 26.2, *Brady*, *Giglio*, the Jencks Act, and USAM §9-5.001; the scope of the "prosecution team" in national security cases or cases involving regulatory agencies, parallel proceedings, or task force investigations; storing and reviewing substantive, case-related communications such as email; obtaining *Giglio* information from local law enforcement officers; disclosure questions related to trial preparation witness interviews; disclosure of agent notes; and maintaining a record of disclosures. I encourage you to seek input from investigative agencies regarding these issues as well.

The Criminal Discovery and Case Management Survey conducted as part of the Working Group's efforts showed that 90% of USAOs currently have standardized discovery policies or practices, so in many offices this directive requires only that you re-visit or formalize your current policy and revise as necessary to make sure that your policy reflects law and practice and addresses, to the extent appropriate, the issues set forth above.

The Working Group survey showed that 52% of the litigating components reported having standardized discovery policies or practices. I recognize that the litigating components that practice in multiple districts cannot develop a practice to reflect the local rules and practices of each district. Each litigating component should nonetheless develop a policy that guides the discovery practice of the component, understanding that litigating component prosecutors should examine—and in appropriate circumstances defer to—local policy when litigating in a particular district. Component policies should also address as appropriate the topics set forth above.

I encourage you to create or modify your policy as soon as possible, but in any event you are directed to have a revised or new policy in place no later than March 31, 2010, and to provide a copy to the Office of the Associate Attorney General and the Office of the Deputy Attorney General. USAOs should also provide a copy to the Executive Office for United States Attorneys.

I am confident that this effort along with the other steps being taken in response to the Working Group report will facilitate discovery practices that comply with our legal obligations and enhance our ability to achieve justice in every case. Thank you very much for your cooperation in this effort.

¹The Department will be issuing additional guidance on this issue by separate memorandum.

Home > Briefing Room > Justice News

JUSTICE NEWS

MEMORANDUM FOR DEPARTMENT PROSECUTORS

Monday, January 4, 2010

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Issuance of Guidance and Summary of Actions Taken in Response
to the Report of the Department of Justice Criminal Discovery and
Case Management Working Group

Earlier this year, on behalf of the Attorney General, I asked the Assistant Attorney General of the Criminal Division and the Chair of the Attorney General's Advisory Committee to convene a working group to undertake a thorough review of the Department of Justice's policies, practices, and training related to criminal case management and discovery and to evaluate areas for improvement. Members of this working group included senior level prosecutors from United States Attorneys' Offices (USAOs) and Main Justice, Information Technology support personnel, and law enforcement representatives. In addition, members of the Attorney General's Advisory Committee and the Department's Criminal Chiefs Working Group reviewed and provided comments on the Report. The case management discovery working group examined current Department of Justice policies, and surveyed all of the USAOs, the criminal litigating components of Main Justice, and the Department of Justice's law enforcement agencies, as well as the United States Postal Inspection Service, to evaluate current discovery practices, case management practices, and related training, and to identify areas for improvement.

The Attorney General and I want to thank the members of the Working Group for the time and effort they put into this review and for the thorough and helpful report that the review produced. I called for the review in order to determine whether the Department was well positioned to meet its discovery obligations in future cases. The Working Group primarily focused on three areas pertinent to this determination: resources, training, and policy guidance. The Working Group's survey demonstrated that incidents of discovery failures are rare in comparison to the number of cases prosecuted. This conclusion was not surprising and reflects that the vast majority of prosecutors are meeting their discovery obligations. I thank you all for the extraordinary efforts you make every day in pursuit of criminal justice. Any discovery lapse, of course, is a serious matter. Moreover, even isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.

Justice Sutherland's observations regarding the role of a prosecutor are as true today as they were when he wrote them over 70 years ago. He wrote:

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

Berger v. United States, 295 U.S. 78, 88 (1935). In the alcove outside the Attorney General's Office here in Washington, an inscription that rings the space reads: "The United States wins its point whenever justice is done its citizens in the courts." Over the years, the Department has consistently taken the necessary steps to assure that we meet these expectations. Towards that end, the United States Attorney's Manual (USAM) sets forth broad discovery policies that establish the Department's minimum expectations for prosecutors handling criminal cases in all jurisdictions. See USAM §§ 9-5.001 and 9-5.100. In 2006, the Department amended the United States Attorney's Manual regarding *Brady/Giglio* obligations by requiring prosecutors to go beyond the requirements of the Constitution and "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." USAM § 9-5.001. With the advice of the Working Group, I have approached any further revisions to Department policy with the understanding that local practices and judicial expectations vary among districts, and that a one-size-fits-all approach might result in significant changes in some districts and no changes in others.

As representatives of the United States, our duty is to seek justice. In many cases, broad and early disclosures might lead to a speedy resolution and preserve limited resources for the pursuit of additional cases. In other cases, disclosures beyond those required by relevant statutes, rules and policies may risk harm to victims or witnesses, obstruction of justice, or other ramifications contrary to our mission of justice.

Recognizing this reality, we have today issued the Department's Guidance for Prosecutors Regarding Criminal Discovery that establishes the minimum considerations that prosecutors should undertake in every case. This guidance was developed at my request by a working group of experienced attorneys with expertise regarding criminal discovery issues that included attorneys from the Office of the Deputy Attorney General, the United States Attorneys' Offices, the Criminal Division, and the National Security Division. The working group sought comment from the Office of the Attorney General, the Attorney General's Advisory Committee, the Criminal Chiefs Working Group, the Appellate Chiefs Working Group, the Professional Responsibility Advisory Office, and the Office of Professional Responsibility. The working group produced a consensus document intended to assist Department prosecutors to understand their obligations and to manage the discovery process. I thank all concerned for the resulting memorandum.

By making deliberate choices regarding discovery issues, prosecutors are most likely to comply with discovery obligations imposed by law and Department policy and assure that the goals of a prosecution are met. By separate memorandum to the United States Attorneys and to the heads of components that prosecute criminal cases, I am directing that each USAO and component develop a discovery policy that establishes discovery practice within the district or component. This directive will assure that USAOs and components have developed a discovery strategy that is consistent with the guidance and takes into account controlling precedent, existing local practices, and judicial expectations.

In addition to issuing this discovery guidance and establishing component discovery policies, the Department is taking further steps in response to the Working Group report. Each USAO and the litigating components handling criminal cases have now named a discovery coordinator, and those coordinators attended a "Train the Trainer" discovery conference at the National Advocacy Center in October. These coordinators will provide discovery training to their respective offices no less than annually and serve as on-location advisors with respect to discovery obligations. In addition, we will:

Create an online directory of resources pertaining to discovery issues that will be available to all prosecutors at their desktop;
Produce a Handbook on Discovery and Case Management similar to the Grand Jury Manual so that prosecutors will have a one-stop resource that addresses va

25

relating to discovery obligations;

Implement a training curriculum and a mandatory training program for paralegals and law enforcement agents;

Revitalize the Computer Forensics Working Group to address the problem of properly cataloguing electronically stored information recovered as part of federal investigations;

Create a pilot case management project to fully explore the available case management software and possible new practices to better catalogue law enforcement investigative files and to ensure that all the information is transmitted in the most useful way to federal prosecutors.

These efforts will be overseen by an attorney detailed to Washington to assure timely completion of all of these measures.

All of the steps that the Department is taking are intended to ensure that we have the resources, training and guidance to meet our obligations and that we thoroughly and thoughtfully evaluate our discovery obligations in every case in a manner that facilitates our sole function—to seek justice. Thank in you in advance for your cooperation in this effort.

¹ *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

Bill Eases Penalty For Crack Cocaine Possession

by ARI SHAPIRO



Enlarge

AP

Current law punishes people who possess crack, which is much cheaper than powder, 100 times more heavily than people who possess powder cocaine.

out in real life.

"The penalty for possession of a saccharin package worth of crack cocaine is a five-year mandatory minimum. And it goes up from there astronomically to where you're at a life sentence before you can bat an eye with crack cocaine," she said, "Whereas you have to have 5 kilos of powder cocaine, so it's literally 100 times more severe penalty for the same amount of drug."

A Change In Perception

Congress enacted these rules in the early 1990s, when crack was ravaging urban communities. In those days, Reggie Walton worked on drug policy in the first Bush administration. Back then he supported the sentencing disparity, but now he is a federal judge in Washington and feels differently.

"We believed it was a different chemical substance. We now know that's not the case," Walton said. "The reality is that crack cocaine and powder cocaine are the same chemical substance."

Walton has testified on this issue before Congress on behalf of the Judicial Conference. He says the sentencing disparity has had a huge impact on people of color.

"You have a large percentage of people who are Latino or African-American being locked up for crack cocaine convictions," he said.

The Right Balance

That's partly because crack is much cheaper than powder. Walton says he believes there will still be objections to the Senate bill from people who think crack and powder should be treated the same.

Scott Burns, executive director of the National District Attorneys' Association, says he thinks the bill strikes the right balance.

"The political reality is there was going to be a reduction, and as opposed to 1-to-1, the district attorneys fully support the 18-to-1 disparity," Burns said.

Now the House must decide what to do. A House committee has already approved a bill that treats crack and powder identically. The full House could adopt the Senate's 18-to-1 sentencing ratio or push for the House bill with a 1-to-1 ratio.

Orr, of the criminal defense lawyers association, says she would prefer if crack were not treated 18 times more seriously than powder.

"There's a great frustration," she said. "But it's 80 percent less great a frustration than it has been in

March 18, 2010

text size A A A

After more than a decade of debates, hearings and lobbying, the Senate has passed a bill to change the punishment for possession of crack cocaine.

The bill had strong support from both conservative Republicans and liberal Democrats. While the current law punishes crack users 100 times more heavily than powder cocaine users, the new Senate bill brings the 100-to-1 ratio down to 18-to-1.

In an interview, Cynthia Orr, president of the National Association of Criminal Defense lawyers, described how the 100-to-1 ratio plays

the past."

The Senate bill is "such an important move," she says. "I'm not going to diminish it in any way."

Orr says if the House passes the Senate bill and the president signs it into law, she will consider that a great day.

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Recent First



Niroshan Singh (Bobbi24) wrote:
 I reiterate, Americans focus on the most inane, banal issues. There are people going to bed hungry in America too (and that is focusing on one's own, right?), and people sleeping in cars but most Americans would rather focus on how biased things are instead of giving one another a helping hand.
 March 19, 2010 8:39:50 AM CDT
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Edmund Singleton (edmundsingleton) wrote:
 All the people in jail who use drugs should be set free and sent to hospital for treatment. But it is safe to say that those who make a living running jails will not like it to be so...
 March 19, 2010 4:03:01 AM CDT
[Recommend \(0\)](#) [Report abuse](#)



c g (cdgraves) wrote:
 "c g (cdgraves) w , you obviously never read antiquities you're an idi ot that just confused his @ss with an IQ."
 Is this supposed to excuse our treatment Africans long after human slavery ended in the rest of the developed world?
 March 19, 2010 12:10:34 AM CDT
[Recommend \(0\)](#) [Report abuse](#)



Andie Butler (andybu) wrote:
 Niroshan this is America, really, most country's focus on thier own before they think of other countries. grow up!
 March 18, 2010 6:33:01 PM CDT
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Ed Alonzo (boink) wrote:
 Hey, wasn't Timothy Franz Geithner the guy who was standing behind Bill Clinton when he signed into law the removal of regulations from mortgages and comercial banks that brought down the economy?
 March 18, 2010 6:28:40 PM CDT
[Recommend \(3\)](#) [Report abuse](#)

1. Alternatives to Incarceration

Synopsis of Proposed Amendment: In September 2009, the Commission indicated that one of its policy priorities would be continued study of alternatives to incarceration, including consideration of any potential changes to the zones incorporated in the Sentencing Table in Chapter Five and/or other changes to the guidelines that might be appropriate in light of the information obtained from that study. See 74 FR 46478, 46479 (September 9, 2009). The Commission is publishing this proposed amendment to inform the Commission's consideration of alternatives to incarceration.

The proposed amendment contains two parts (A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not necessarily mutually exclusive.

Part A expands the authority of the court to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria. This part does so by creating a new guideline, §5C1.3, that provides the court with authority under the guidelines to impose a sentence of probation (with a requirement that the offender participate in a [residential] treatment program) rather than a sentence of imprisonment, without regard to the applicable Zone of the Sentencing Table. To use this authority, the court must find that the drug offender has demonstrated a willingness to participate in a substance abuse treatment program and [will likely benefit from such a program][that participation in such a program will likely

address the defendant's need for substance abuse treatment], and the court must impose a condition of probation that requires the defendant to participate in a [residential] substance abuse treatment program. To be eligible for this alternative to incarceration, a drug offender must have committed the offense while addicted to a controlled substance[, and the controlled substance addiction must have contributed substantially to the commission of the offense]. Also, the drug offender's total offense level must be not greater than [11]-[16]. Finally, the drug offender must meet the "safety valve" criteria set forth in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Part A also makes conforming changes to §5B1.1 (Imposition of a Term of Probation) and §5C1.1 (Imposition of a Term of Imprisonment).

Part B expands Zones B and C in the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of Criminal History Categories I through VI (taking this area from Zone C), and expands Zone C by one level in each of Criminal History Categories I through VI (taking this area from Zone D). Part B also provides guidance on the effectiveness of residential treatment programs. Finally, Part B makes conforming changes to §§5B1.1 and 5C1.1.

Issues for comment are also included.

Proposed Amendment

Part A:

Chapter Five, Part C is amended by adding at the end the following new guideline:

"§5C1.3. Substance Abuse Treatment Program as Alternative to Incarceration for Certain Drug Offenders

- (a) Subject to subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court may sentence the defendant to a term of probation without regard to the applicable Zone of the Sentencing Table, if the court finds that the defendant meets the criteria set forth below:
- (1) the defendant committed the offense while addicted to a controlled substance[, and the controlled substance addiction contributed substantially to the commission of the offense];
 - (2) the defendant has demonstrated a willingness to participate in a substance abuse treatment program, and [will likely benefit from such a program][participation in such a program will likely address the defendant's need for substance abuse treatment];
 - (3) the total offense level for purposes of the Sentencing Table in

Chapter Five, Part A, is not greater than [11]-[16];

- (4) each of the criteria set forth in §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

- (b) If the court imposes probation under subsection (a), the court must include a condition that requires the defendant to participate in a [residential] substance abuse treatment program."

Section 5B1.1(a) is amended in paragraph (2) by striking the period at the end and inserting "; or"; and by adding at the end the following:

"(3) §5C1.3 applies."

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1 by adding at the end the following:

"(c) Where §5C1.3 applies. See §5C1.3.";

and in Note 2 by inserting ", except as provided in §5C1.3" after "probation".

Section 5C1.1 is amended by adding at the end the following:

"(g) Notwithstanding subsections (a)-(f), a sentence of imprisonment is not required if §5C1.3 applies."

The Commentary to §5C1.1 captioned "Application Notes" is amended by adding at the end the following:

"9. Subsection (g) provides that, notwithstanding subsections (a) through (f), a sentence of imprisonment is not required if §5C1.3 applies."

Part B:

The Sentencing Table in Chapter Five, Part A, is amended—

- (1) by increasing Zone B by one level in each of Criminal History Categories I through VI (so that Zone B contains offense levels 9-11 in Criminal History Category I; 6-10 in Criminal History Category II; 5-9 in Criminal History Category III; 4-7 in Criminal History Category IV; 3-6 in Criminal History Category V; and 2-5 in Criminal History Category VI), and, correspondingly, by removing each such offense level from Zone C; and
- (2) by increasing Zone C by one level in each of Criminal History Categories I through VI (so that Zone C contains offense levels 12-13 in Criminal History Category I; 11-12 in Criminal History Category II; 10-11 in Criminal History Category III; 8-9 in Criminal History Category IV; 7 in Criminal History Category V; and 6 in Criminal History Category VI).

For an illustration of the proposed amendment to the Sentencing Table, as executed, see table.

The existing boundaries of Zones B and C are marked with straight lines; the new proposed lower boundary of Zone B is shaded; and the new proposed lower boundary of Zone C is marked with a wavy line.

SENTENCING TABLE

(in months of imprisonment)

| Offense | Criminal History Category (Criminal History Points) | | | | | |
|---------|---|----------------|------------------|-----------------|-------------------|--------------------|
| | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
| Level | | | | | | |
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 2-8 | 3-9 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 4-10 | 6-12 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 6-12 | 9-15 |
| 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 12-18 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 15-21 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 18-24 |
| 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 21-27 |
| 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 24-30 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 27-33 |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 30-37 |
| 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 33-41 |
| 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 37-46 |
| 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 41-51 |
| 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 46-57 |
| 18 | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 | 51-63 |
| 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 57-71 |
| 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 63-78 |
| 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 70-87 |
| 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 77-96 |
| 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 | 84-105 |
| 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 92-115 |
| 25 | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 | 100-125 |
| 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 110-137 |
| 27 | 70-87 | 78-97 | 87-108 | 100-125 | 120-150 | 120-150 |
| 28 | 78-97 | 87-108 | 97-121 | 110-137 | 130-162 | 130-162 |
| 29 | 87-108 | 97-121 | 108-135 | 121-151 | 140-175 | 140-175 |
| 30 | 97-121 | 108-135 | 121-151 | 135-168 | 151-188 | 151-188 |
| 31 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 | 168-210 |
| 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 188-235 |
| 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 210-262 |
| 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 | 235-293 |
| 35 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 | 262-327 |
| 36 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 | 292-365 |
| 37 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 | 324-405 |
| 38 | 235-293 | 262-327 | 292-365 | 324-405 | 360-life | 360-life |
| 39 | 262-327 | 292-365 | 324-405 | 360-life | 360-life | 360-life |
| 40 | 292-365 | 324-405 | 360-life | 360-life | 360-life | 360-life |
| 41 | 324-405 | 360-life | 360-life | 360-life | 360-life | 360-life |
| 42 | 360-life | 360-life | 360-life | 360-life | 360-life | 360-life |
| 43 | life | life | life | life | life | life |

The Commentary to §5B1.1 captioned "Application Notes" is amended in Note 1(b) by striking "six" and inserting "nine"; and in Note 2 by striking "eight" and inserting "ten".

The Commentary to §5C1.1 captioned "Application Notes" is amended in Note 3 by striking "six" after "not more than" and inserting "nine"; and

in Note 4 by striking "eight, nine, or ten months" and inserting "ten or twelve months"; by striking "8-14" both places it appears and inserting "10-16"; by striking "sentence of four" both places it appears and inserting "sentence of five"; and by striking "five" after "and a sentence of" and inserting "ten"; and

by redesignating Notes 6, 7, and 8 as Notes 7, 8, and 9, respectively; and

by inserting after Note 5 the following:

- "6. There may be cases in which community confinement in a residential treatment program is warranted to accomplish a specific treatment purpose. In such a case, the court should consider the effectiveness of the residential treatment program.

An effective program should possess, at a minimum, the following features:

- (A) The program is licensed, certified, accredited, or otherwise approved by the

relevant state regulatory agency.

- (B) The program is operated by professionals who are well trained, qualified, and experienced in the evaluation and treatment of participants and who follow established ethical and professional standards.

- (C) The evaluation and treatment of participants is based on the best available scientific knowledge."; and

in Note 9 (as so redesignated) by striking "twelve" and inserting "15".

Issues for Comment

1. The Commission requests comment on how Part A of the proposed amendment should interact with other provisions in the Guidelines Manual. In particular, if the Commission were to promulgate Part A, what other amendments to Chapter Five of the Guidelines Manual would be appropriate?

For example, §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) currently provides, among other things, that physical condition "is not ordinarily relevant in determining whether a departure is warranted" and that "drug or alcohol dependence or abuse is not a reason for a downward departure". If the Commission were to

promulgate Part A, what changes, if any, should the Commission make to §5H1.4?

2. The Commission requests comment on whether defendants with a condition other than drug addiction, such as a mental or emotional condition, should be eligible for treatment programs as an alternative to incarceration.

3. The Commission requests comment on whether the proposed amendment should include standards for effective treatment programs. The Commission has provided standards for other types of programs; for example, §8B2.1 (Effective Compliance and Ethics Program)) provides minimum requirements for corporate compliance and ethics programs. Should the Commission similarly provide standards for effective treatment programs? If so, what standards should the Commission provide?

4. The Commission requests comment on whether the Zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The Zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (e.g., to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be

covered by it?

5. The Commission requests comment on what revisions to Chapter Five, Part B (Probation), and Chapter Five, Part F (Sentencing Options), may be appropriate to provide more guidance on the use of alternatives to incarceration.

As explained in the Introductory Commentary to Chapter Five, Part B, "probation is a sentence in and of itself", and may be used as an alternative to incarceration, "provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant".

Are there changes the Commission should make to the guidelines to guide courts in fashioning sentences that meet the statutory purposes of sentencing, see 18 U.S.C. § 3553(a)(2), and to better implement the requirements of 28 U.S.C. § 994(j) (requiring the Commission to ensure that "the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense")?

In particular, should the Commission make changes to Chapter Five, Parts B and F, to more broadly encourage the use of alternatives to incarceration, such as community confinement, home detention, and intermittent confinement (see §§5F1.1 (Community Confinement), 5F1.2 (Home

Detention), and 5F1.8 (Intermittent Confinement))? If so, what changes should the Commission make?

Should the Commission make changes to Chapter Five, Parts B and F, to provide more guidance to the court in deciding whether to impose an alternative to incarceration in a particular case and, if so, in deciding what specific alternative to incarceration should be imposed? For example, what guidance should the Commission provide with regard to how the court should decide among sentencing a particular defendant to imprisonment, intermittent confinement, community confinement, or home detention?

2. Specific Offender Characteristics

Issues for Comment

1. In September 2009, the Commission indicated that one of its policy priorities would be a "review of departures within the guidelines, including (A) a review of the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence; and (B) possible revisions to the departure provisions in the Guidelines Manual." See 74 FR 46478, 46479 (September 9, 2009).

The Sentencing Reform Act (the "Act") contained several provisions regarding the relevance of

SENATOR JEFF WENTWORTH
SENATE DISTRICT 25



CHAIRMAN
SOUTHERN LEGISLATIVE CONFERENCE
2008 - 2009

PRESIDENT PRO TEM
OF THE TEXAS SENATE
2004 - 2005

COMMITTEES
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COUNTIES IN
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The Senate of The State of Texas

December 9, 2009

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Mr. James D. Bethke
Task Force on Indigent Defense
Tom C. Clark Building
205 W. 14th Street
Austin, Texas 78701

Dear Mr. Bethke:

In recent months I have been working with Dr. Tony Fabelo of the Council of State Governments, Justice Center, on his examination of the probation system of Bexar County. He recently issued a preliminary report that raised many important issues about the effectiveness of how the Bexar County courts are organized in relation to the operations of the probation department. I am a member of the Task Force on Indigent Defense, and his report has now raised my interest in examining how the Bexar County judiciary have implemented and met the requirements of the Fair Defense Act of 2001.

I request that you conduct a thorough program assessment, not unlike an internal audit, of Bexar County's indigent defense system and report your findings to my office, the Commissioners Court, and the local Board of Judges. It is my understanding that this is within your statutory established duties. I am particularly interested in examining how the Bexar County judiciary has implemented prompt appointment requirements, established appropriate attorney qualifications and set a standard method of payment.

More importantly, I am interested in determining if the local judiciary is appropriately selecting counsel based on the requirements for fair, neutral and non-discriminatory appointments. Your final report should include a set of recommendations to improve the overall operations and effectiveness of the Bexar County indigent defense system. Your examination should also allow the Task Force to determine if there are areas where better enforcement by the Task Force is necessary.

Please feel free to call my office if you need assistance or further direction in conducting this assessment. I appreciate the work of your office and look forward to examining your findings.

Sincerely,

Jeff Wentworth

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ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

The public defense function, including the selection, funding, and payment of defense counsel, is independent.

Defense counsel's ability, training, and experience match the complexity of the case.

Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

The same attorney continuously represents the client until completion of the case.

Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

Defense counsel is provided with and required to attend continuing legal education.

Defense counsel's workload is controlled to permit the rendering of quality representation.

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

With Commentary

1 The public defense function, including the selection, funding, and payment of defense counsel,¹ is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.² To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.³ Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.⁴ The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.⁵

2 Where the caseload is sufficiently high,⁶ the public defense delivery system consists of both a defender office⁷ and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.⁸ The appointment process should never be *ad hoc*,⁹ but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.¹⁰ Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.¹¹

3 Clients are screened for eligibility,¹² and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request,¹³ and usually within 24 hours thereafter.¹⁴

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.¹⁵ Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.¹⁶ To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.¹⁷

5 Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.¹⁸ National caseload standards should in no event be exceeded,¹⁹ but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.²⁰

6 Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.²¹

7 The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.²² The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.²³ Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.²⁴ Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess,

unusual, or complex cases,²⁵ and separately fund expert, investigative, and other litigation support services.²⁶ No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.²⁷ This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.²⁸

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.²⁹

NOTES

¹ "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

² National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1(D).

³ NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

² Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

⁵ ABA, *supra* note 2, Standard 5-4.1

⁶ "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

⁷ NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

⁸ ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

⁹ NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

¹⁰ ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

¹¹ NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

¹² For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

¹³ NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

¹⁴ NSC, *supra* note 2, Guideline 1.3.

¹⁵ American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

- ¹⁶ NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.
- ¹⁷ ABA Defense Function, *supra* note 15, Standard 4-3.1.
- ¹⁸ NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).
- ¹⁹ Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should “reflect” (NSC Guideline 5.1) or “under no circumstances exceed” (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). See also ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter “Death Penalty”].
- ²⁰ ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter “Appellate”], Standard 1-F.
- ²¹ Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.
- ²² NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).
- ²³ NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (Performance); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). See NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). Cf. NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).
- ²⁴ ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.
- ²⁵ NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.
- ²⁶ ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.
- ²⁷ ABA Defense Function, *supra* note 15, Standard 4-1.2(d).
- ²⁸ NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).
- ²⁹ NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

Remarks as Prepared for Delivery by Attorney General Eric Holder at the Brennan Center for Justice Legacy Awards Dinner

WASHINGTON, Nov. 16 /PRNewswire-USNewswire/ -- The following are prepared remarks of Attorney General Eric Holder at the Brennan Center for Justice Legacy Awards Dinner:

Thank you, Jim, for that wonderful introduction. It's always a pleasure to be introduced by a great lawyer, an old friend and a person committed to the ideals of this wonderful institution.

I also want to thank the leadership of the Brennan Center for Justice for honoring me with this award. Let me also congratulate my co-honoree and friend, Nicole Seligman, for the award she is receiving tonight. Nicole, thank you for all you do -- your award is well deserved.

I also want to congratulate and commend the members and supporters of the Brennan Center for your dedication to democracy and the rule of law. You have been leaders in the effort to modernize voter registration -- that is, to remove the single biggest barrier to voting in the United States, our antiquated registration system.

You also have worked hard to protect voting rights through your lawsuits and advocacy, and you have provided us with critical support in our determined effort to defend campaign finance reform legislation.

In these and other issues -- from access to justice to racial justice, to ensuring that we advance the rule of law as we defend our national security -- please know that we hear you in Washington, we respect your views, and we appreciate your engagement.

Now, as many of you know, Justice Brennan came from humble beginnings. The son of Irish immigrants, he epitomized the American dream, growing from a boy who delivered milk and pumped gas to become one of the most renowned and influential Supreme Court Justices of our time. Throughout his illustrious career, Justice Brennan never forgot where he came from. He credited his interest in individual rights and civil liberties to his upbringing and the hardships he witnessed in his own neighborhood.

Justice Brennan's legacy -- his work and the way he approached it -- embodies our collective responsibility to those who do not always have a voice in the legal and policy decisions that impact our communities. You honor his legacy not only in your critical work for justice, but with this annual reminder to all of us to strive toward realizing the values of equality and common human dignity that motivated Justice Brennan.

"Equality and common human dignity." Justice Brennan knew that these values, although lofty, are attainable. I want to use our time together tonight to reflect on a challenge -- a really difficult challenge -- that calls for our ongoing, collective commitment to these values: the need for indigent defense reform. Given the Center's work in New Orleans, Michigan and elsewhere, as well as your publication of helpful resources such as the Guidelines for Appointing Defense Counsel, I know that this is an issue about which you care deeply, as do I.

Imagine with me for a few moments that you receive a frantic call saying that your son or daughter, niece or nephew, has been arrested and charged with a crime. I would wager that most of you would make a call and hire a great lawyer. You certainly would never allow your child to plead guilty and face the possibility of jail time without first speaking to a lawyer. You would not stand by if someone in your family was made to wait weeks, even months, before getting access to a lawyer who could fight for his or her release.

But, hard as it may be to believe, some of our fellow citizens suffer through circumstances like these every single day.

A recent report commissioned by a joint resolution of the Michigan state legislature, for example, found counties in the state where defendants are charged and plead guilty to crimes that carry jail time without ever speaking to a lawyer. In other parts of the country, according to another report, defendants may sit in jail cells for weeks, even months, waiting for a lawyer. In one example, a 50-year-old woman charged with shoplifting spent 11 months in jail waiting for a lawyer to be appointed. Another woman charged with stealing \$200 from a slot machine spent 8 months in jail before receiving a lawyer.

Even when counsel is appointed the appointment is oftentimes not meaningful, not truly effective. The most recent comprehensive national study on the state of indigent defense documented a Missouri county where the public defenders office started to refuse cases after its lawyers began averaging 395 cases a year, causing the State Public Defender Director to acknowledge publicly that with caseloads that high, mistakes were being made.

In Tennessee, a county public defender office had six attorneys handle more than 10,000 misdemeanor cases in 2006 -- which means lawyers could spend an average of just under an hour per case. High caseloads leave even those lawyers with the best of intentions little time to investigate, file appropriate motions, and do the basic things we assume lawyers do. Some don't even have time to go to trial.

High caseloads are not the only problem. Although Gideon was decided more than 45 years ago, there are still seven states in this great nation that contribute nothing to trial-level public defense, putting the burden on their counties. Because of a chronic lack of resources, many counties, in turn, rely on so-called "flat-fee" contracts that pay lawyers the same amount regardless of how much (or more likely, how little) time the attorney spends on each case. Indeed, in states like Utah and Pennsylvania that rely entirely on individual counties to fund indigent defense, the quality of legal representation that a defendant receives may end up being determined by the side of a county line on which the crime was committed.

In addition to resource problems, many public defender offices have insufficient independence or oversight to ensure that the lawyers are effectively representing the interests of the accused. In some places judges assign cases to lawyers, which can influence the representation the lawyers provide. For example, a statewide survey of Nebraska judges in 2006 raised such concerns, including about judges who refused to reappoint those lawyers who requested too many trials.

Perhaps most troubling, all too often we've seen similar problems in juvenile systems. In 2005, for example, the Florida Supreme Court found that in one Florida Circuit, three out of four youth waived the right to counsel and faced charges without the guidance of counsel. What is more,

such waivers sometimes occur without the opportunity to speak to counsel who might help young people understand what they're giving up.

For me, this is an issue of personal importance and national conscience. As a judge, I saw firsthand how ill-equipped and unprepared defense counsel distort the entire system.

Ours is an adversarial system of justice -- it requires lawyers on both sides who effectively represent their client's interests, whether it's the government or the accused. When defense counsel are handicapped by lack of training, time, and resources -- or when they're just not there when they should be -- we rightfully begin to doubt the process and we start to question the results. We start to wonder: Is justice being done? Is justice being served?

The integrity of our criminal justice system aside, the crisis in indigent defense is also about dollars and cents. An analysis conducted by the State Appellate Defender Office in Michigan found that the state's failure to invest resources at the trial court level has contributed to the costly imprisonment of defendants whose convictions were later reversed. The office reported that since 1996, there have been approximately 50 successful habeas corpus actions based on ineffective assistance of counsel claims in state court proceedings.

Even assuming these defendants were guilty of the crimes for which they were originally convicted, the public still must bear the cost of appeals and retrials because the system didn't get it right the first time. And for those cases in which the defendants were not guilty, then obviously the price tag is much higher -- both in the ultimate nightmare scenario of sending an innocent person to jail, and in terms of letting the person who actually committed the crime remain free.

Let me give you just one example of all of the losses associated with the crisis in representation. Eddie Joe Lloyd served nearly 17 years in a Michigan prison for the murder and rape of a young girl -- crimes that DNA evidence later proved he did not commit. Lloyd's appointed attorneys -- one replaced another a week before trial -- failed to conduct any investigation. No one ever cross-examined the police about Lloyd's false confession -- which Lloyd gave to the police while he was a non-voluntarily committed patient in a mental health hospital. No one ever interviewed Lloyd's family or his doctors. No one visited the crime scene, or challenged Lloyd's competence. The appeals and the 17 years of imprisonment cost Michigan nearly a million dollars, and that amount does not include the \$4 million civil judgment Lloyd later obtained for his wrongful conviction. And of course there is the real danger to the community of having the actual murderer and rapist remain at large some 20 years later.

So, what is to be done? In order to fulfill the promises of Gideon and Gault, we need the engagement of partners at the federal, state, and local levels, both within and outside of government. Much good work has already gone into developing model standards for public defense systems, including the American Bar Association's Ten Principles of a Public Defense Delivery System and the National Juvenile Defender Center's Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems. I am grateful for organizations like the Brennan Center that are on the front lines of this effort, whether it is through education or litigation.

I want to emphasize education because I believe that if more Americans knew more about how some of their fellow citizens experience the criminal justice system, they would be shocked and angered.

I am also encouraged by the fact that some states and local jurisdictions have begun to do the hard work to ensure that their public defense systems have the independence, oversight, and resources needed to operate effectively. In Nevada earlier this year, for example, the state Supreme Court issued an order calling for widespread changes in the public defense system, including requiring attorney performance standards and removing judges from the appointment process. In April, New York City became the first city to commit to phase in caps on caseloads for public defenders. The state legislature in Michigan -- where Eddie Joe Lloyd was convicted -- will soon consider proposed legislation to establish there for the first time a statewide public defense system.

At the Department of Justice, I have convened an internal working group to help me identify ways we can do our part in this effort. I've instructed them to leave no stone unturned in identifying potential funding sources, legislative initiatives, and other ways we can work with our state and local partners to establish effective public defense systems. I have personally met with leaders from the indigent defense community to learn more about the problem and to get their advice and ideas on ways the Department can help. And our Office of Justice Programs is currently planning a national indigent defense conference in February that will bring together public defenders from all 50 states.

As I have said before, every day, conscientious prosecutors around the country do justice on behalf of the American people, often under very trying circumstances. We owe them our sincere gratitude for their hard work and their sacrifices on our behalf. But our system of justice cannot depend on them alone.

Justice Brennan once said, "We must remember that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape." Let us ensure that we further Justice Brennan's legacy by maintaining the most basic constitutional protection -- the right to have truly effective defense counsel. In the past few days, with the stakes at their highest, I have expressed great faith in our criminal justice system. As great as it is, we need to significantly improve the quality of representation that is provided in that system to the poor and the powerless. Let us truly dedicate ourselves to the legacy of Justice Brennan by working to reform that system so that it truly reflects those most basic of American values: equality and fairness. The problems I have mentioned are man made. They are, therefore, susceptible to man made solutions. Together, I am confident that we can create a system that is both consistent with our founding documents and of which we can truly be proud. I look forward to working with you in that effort.

Thank you.

SOURCE U.S. Department of Justice