USA v. John Doe Doc. 9029350527 Att. 1

ADVISORY COMMITTEE ON CRIMINAL RULES

Missoula, MT
September 19, 2016

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Meeting of the Advisory Committee on Criminal Rules
September 19, 2016
Missoula, MT

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ADVISORY COMMITTEE ON CRIMINAL RULES DRAFT MINUTES
April 18, 2016, Washington, D.C.

I. Attendance and Preliminary Matters

The Criminal Rules Advisory Committee ("Committee") met in Washington, D.C., on April 18, 2016. The following persons were in attendance:

Judge Donald W. Molloy, Chair
Carol A. Brook, Esq.
Judge James C. Dever
Judge Gary S. Feinerman
Mark Filip, Esq.
Chief Justice David E. Gilbertson
Judge Denise Page Hood
Judge Lewis A. Kaplan
Judge Terence Peter Kemp
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Michelle Morales, Esq.[1]
John S. Siffert, Esq.
James N. Hatten, Clerk of Court Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter
Professor Daniel R. Coquillette, Standing Committee Reporter
Judge Amy J. St. Eve, Standing Committee Liaison

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And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Rules Committee Officer and Secretary to the Committee on Practice and Procedure
Bridget M. Healy, Rules Office Attorney
Julie Wilson, Rules Office Attorney
Shelly Cox, Rules Committee Support Office
Laural L. Hooper, Federal Judicial Center
Margaret Williams, Federal Judicial Center

[1] Ms. Morales was joined at the meeting by Ms. Elizabeth Shapiro.

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II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Molloy opened the meeting and thanked the reporters for their work in preparing the agenda book. He then asked members to introduce themselves, and he welcomed observers, including Peter Goldberger of the National Association of Criminal Defense Lawyers and Catherine M. Recker of the American College of Trial Lawyers. Judge Molloy also thanked all of the staff members who made the arrangements for the meeting and the hearings.

B. Minutes of September 2015 Meeting

A motion to approve the minutes having been moved and seconded, the Committee unanimously approved the September 2015 meeting minutes by voice vote.

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

The Committee's proposed amendments to Rules 4, 41 and 45 were submitted to the Supreme Court, which has until May 1 to transmit them to Congress. Ms. Womeldorf expressed the hope that the amendments would soon be sent to Congress.[2] Judge Molloy expressed his appreciation for the members' hard work on these amendments.

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III. CRIMINAL RULES ACTIONS

A. Proposed Amendment to Rule 49

Judge Feinerman, chair of the Rule 49 Subcommittee, acknowledged the reporters' assistance and thanked the subcommittee members for their time, thought, and effort. He then presented the subcommittee's recommended amendment and committee note.

Judge Feinerman began by providing an overview of the subcommittee's work, which grew out of a Standing Committee initiative to adapt the rules of procedure to the modernization of the courts' electronic filing system. The subcommittee's work was guided by two imperatives, which were sometimes in tension: (1) the Advisory Committee's direction to draft a stand-alone rule on filing and service adapted to criminal litigation, and (2) the Standing Committee's direction to depart from the language of Civil Rule 5 only when justified by significant difference between civil and criminal practice. To achieve these objectives, the subcommittee worked closely with representatives of the Civil Rules Committee, who participated in the subcommittee's teleconferences and were in frequent communication with the reporters. Finally, the subcommittee received the advice of the style consultants.

[2] On April 28, 2016, the Supreme Court transmitted the amendments to Congress.

Judge Feinerman then provided a section-by-section analysis of the proposed amendment to Rule 49, inviting questions and comments from members as he presented each section.

49(a)(1). Judge Feinerman noted that subsection (a) (1) preserves much of the language from the current rule. The language regarding *what must be served* is retained from existing Rule 49(a): "any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper." Parties and courts know what the existing language means, no difficulties have arisen from the current language of the rule, and tinkering with it without a compelling reason could do more harm than good.

The subcommittee proposes, however, a change in the language governing *who must serve*, in order to reverse an unintended change that occurred when the rule was restyled from the passive to the active voice in 2002. That change inadvertently carved out nonparties. The subcommittee recommends a return to the passive construction used prior to 2002, so nonparties (as well as parties) will be required to serve the items described in (a).

Professor King noted that there had been a suggestion that the committee note might include a statement that the amendment did not modify or expand the scope of the rule or change the practice regarding concerning papers, such as discovery, that are disclosed but not necessarily filed or served. Concern had also been expressed about making clear that probation and pretrial services reports were not covered by the amended rule.

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Professor Beale added that committee notes cannot change the meaning of the rule, and there is always a question how much explanation should be provided. The proposed committee note does not include language stating that the scope of the papers that must be served has not changed, or language stating that it does not apply to probation and pretrial services reports. Beale also noted that the change to the passive voice in subsection (a) was an example of a point on which the style consultants had yielded to the subcommittee because the passive voice was necessary for substantive reasons. Indeed, the discovery of —and opportunity to correct—the unintended change wrought by restyling was an unanticipated benefit of the current project.

Finally, Judge Feinerman noted that the rule explicitly covers only service "on a party." Although nothing in the existing (or pre-2002) Rule 49 addresses service on nonparties, this does not seem to have caused any problems. The parties generally use common sense in determining when to serve nonparties, and the subcommittee thought it best not to try, at this time, to craft a rule that would apply in all of the situations when a nonparty may file in a criminal case, perhaps causing unintended consequences.

Rule 49(a)(2). Judge Feinerman noted Rule 49(a)(2) was unchanged except for a minor matter of style.

Rule 49(a)(3). Judge Feinerman then moved on the Rule 49(a)(3), noting it was a completely new provision that distinguishes between electronic service and service by other means. The subcommittee felt it was very important to put electronic service, which is the dominant mode of

service, first. Professor King noted that the both the Civil and Criminal amendments now use the language referring to the "court's electronic filing system."

Professor King then drew attention to a difference between the Civil and Criminal proposals, which use different phrasing to describe a situation in which electronic service is ineffective. The Civil proposal says electronic service is ineffective if the server learns that "*it* did not reach the person to be served." In contrast, the subcommittee's proposal provides service is ineffective if the server learns that the person to be served did not receive "the notice of electronic filing" (NEF). The subcommittee thought this language was more accurate.[3]

Members were reminded that the current rule (as well as the proposed civil rule) now treats electronic service differently than other forms of service (such as mail or delivery to a person's office or dwelling). Because of concerns about the reliability of electronic service, Civil Rule 5 (which governs in criminal cases as well) provides that service is not effective if the serving party knows that the electronic service did not reach the party to be served. In contrast, all other forms of service are effective if the serving party takes the specified action (such as mailing), even if for some reason the party to be served does not receive service. The civil and criminal proposals retain this favorable treatment for electronic service, which focuses on the serving party's knowledge that electronic service was not effective.

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Discussion turned to the appropriate scope of the exception. Mr. Hatten explained that the clerk's office does not receive bounce back messages, such as "out of office" notices. The clerks do, however, receive a notice if the CM/ECF system was unable to deliver the email, which occurs, for example, when the recipient's mailbox is full. In those cases, the clerk's office will follow up with the recipient of service. As a member noted, it would be a very rare instance in which the serving party learns that CM/ECF service was not effective. A lawyer member wondered if the proposed rule imposed too great a burden on defense lawyers, including those in small firms, who may have no one to monitor their emails. Mr. Hatten responded that in order to use the CM/ECF system lawyers had to agree to receive electronic service, and thus had to have in place a system to monitor their emails.

But a party may learn of and have access to papers that have been served even if the party never received the NEF. For example, a lawyer who did not receive a NEF (because, for example, of a changed email address that was not updated) might nonetheless learn of the document or order and access it from the docket. This would not constitute service under the subcommittee's proposal, which focuses exclusively on the server's knowledge of whether the party to be served received the NEF. (On this point, the phrasing of the Civil Rule, which uses "it," might allow the serving party to argue that the party to be served had received "it.")

The Committee concluded that if the party to be served has indeed received the document by some other means—whether by mail, email, or simply reading the docket—service should be deemed effective. A member moved to amend proposed Rule 49(a)(3)(A) to provide "service . . . is not

[3] This difference was later dropped as part of the effort to eliminate all unnecessary differences between the Criminal and Civil Rules. See note 4, infra.

effective if the serving party learns that neither the notice of electronic filing nor the paper reached the person to be served." The motion passed.[4] One member noted, however, that it might be difficult to determine the effective date of service if it became effective by some means other than receipt of the NEF, such as the party to be served reviewing the docket.

Professor Beale reminded the Committee of the importance of the use of uniform language in the Civil and Criminal Rules on filing and service, and she stated that the reporters would convey the Committee's view on this issue to the representatives of the Civil Rules Committee.

Rule 49(a)(4). Judge Feinerman noted that these provisions were drawn, verbatim, from Civil Rule 5. In general, the subcommittee recognized that it would not be helpful to tinker with the language because the Civil Rules Committee was satisfied with the language. For that reason, the subcommittee did not propose a change in the bracketed language on lines 35-36 unless the Civil Rules Committee would support a parallel amendment to Rule 5.

Rule 49(b)(1). Judge Feinerman noted that the major change from the current rule on filing was to restore the passive construction. He asked the reporters to draw the Committee's attention to key issues. Professor Beale noted that the subcommittee considered, but did not recommend, adding the qualifier "under this rule" between "served" and "together." She noted there are other rules that provide for service by specific means, such as the Committee's pending amendment to Rule 4 governing service on foreign corporations. The Subcommittee concluded that the phrase "under this rule" was not necessary. Where other rules identify specific means of service for certain documents or orders, it seems clear that the more general provisions of Rule 49 are not intended to override them. Moreover, adding the phrase "under this Rule" could engender confusion. The phrase is not included in the current rule, and its addition might suggest, misleadingly, that Rule 49 does not apply to a variety of items that other rules require to be served. Professor King noted that the rules specifying particular forms of service were Rule 4 (summons on corporations), Rule 41 (warrants), Rule 46 (sureties), and Rule 58 (appearances). Professor Beale explained that these rules will continue to coexist with Rule 49, which under (a)(1) governs service and filing of "any written motion . . . , written notice, designation of the record on appeal, or similar paper."

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One other point that the subcommittee considered was whether to delete the requirement

[4] After the meeting, the reporters and chair consulted with representatives of the other committees working on parallel drafts concerning electronic filing and service. There was a consensus that time did not permit consideration of this proposal by other committees before submission to the Standing Committee. In light of the importance of consistency in the rules of electronic filing and service, the representatives of the Criminal Rules Committee agreed to delete the new language from the draft of Rule 49 submitted to the Standing Committee. As the representatives of the other committees noted, the proposal would be a change in current law. Before such a change is recommended, the committees should have an opportunity to consider the policy implications, and whether this approach, if adopted, should be applied to other forms of service. The committees can, however, take the proposal up again at a later date. As part of the later effort to reconcile differences between the various sets of rules, Judges Molloy and Feinerman and the Reporters also reviewed and approved a modification to Rule 49 to retain the language of the Civil Rule, that is, stating that service is ineffective if the serving party learns that "it" was not received.

that filing of any paper required to be served must occur "within a reasonable time after service." The subcommittee considered deleting this restriction. Members were not aware of any problem with untimely filing in criminal cases, but decided to retain this provision to parallel Civil Rule 5.

One question that had been left open, reflected in brackets on line 40, was whether the rule should refer at this point to "any person" or "any party." Professor King noted that the Civil Rules Committee had now approved a draft amendment using "any person," which would be adopted as well in the Criminal amendment.

Rule 49(b)(2). Judge Feinerman noted that here, as in (a), the subcommittee proposed places electronic filing first in (b) for the same reasons it placed electronic service first in Rule 49(a). Also, the Subcommittee reasoned, the subsection including the definition what it means to "file electronically" should precede the use of that term. (In contrast, the civil proposal retains the current order of Rule 5's subdivisions, which places nonelectronic filing first.) Professor King stated that there was still a minor styling issue to be resolved ("by using" or some alternative such as "by use of"), which would be resolved in favor of uniformity after consultation with the style consultants and the other reporters and chairs. Professor Beale noted that the Civil Rules Committee just completed its meeting three days earlier. She reminded the Committee that because of the emphasis on uniform language among the parallel proposed amendments, it would be essential for Judges Molloy and Feinerman (with the reporters) to have leeway to agree to necessary stylistic changes as the proposals advance to the Standing Committee. Judge Feinerman agreed, though he observed that if he and Judge Molloy were asked to make significant changes in the proposal approved by the Committee, they would consider seeking approval from the Committee.

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Professor Beale also drew attention to the proposed provision regarding a filer's user name and password serving as an attorney's signature, which was closely related to the signature provision in (b)(4). In September, the Committee did not approve provisions on a signature block, which were phrased differently than the current proposal. The new proposal imports the language of Civil Rule 11(a). The subcommittee found it unnecessary to determine whether Civil Rule 11's signature provisions are presently included in Rule 49(d)'s directive to file "in a manner provided for in a civil action." If this requirement is not currently imported by Rule 49(d), the subcommittee thought it would be a desirable requirement as a matter of policy. Accordingly, the subcommittee decided to adopt the language of Rule 11 verbatim. A lawyer member questioned whether it was appropriate to incorporate the language of Civil Rule 11, which requires the attorney's signature in order to impose restrictions on counsel to certify the accuracy of the pleadings. He stressed that the role of defense counsel in civil and criminal cases is quite different: in criminal cases, the defense does not make representations but rather puts the government to its proof. He expressed concern that the signature requirement signaled an unfortunate drift towards the civil understanding of the lawyer's role. Professor King responded that the portions of Rule 11 that are relevant to this member's concern about good faith representations to the court are in Rule 11(b). The subcommittee's proposal, however, imports only the language of Rule 11(a). By importing only this language, the proposal does not bring in any requirements concerning counsel's representations.

Judge Feinerman also drew attention to one other aspect of proposed subdivision (b)(2)(A): the phrase "written or in writing." This language is now in Rule 49(e). The subcommittee favored retaining this language, rather than paring it down, because it captures the variety of phrases now used in the Rules of Criminal Procedure.

Rule 49(b)(3)(A) and (B). Noting that this provision creates a presumption that represented parties must file electronically, but that non represented parties must file by non-electronic means, Judge Feinerman invited the reporters to comment. Professor King reminded the Committee that the new presumption for electronic filing by represented parties was a central goal of the amendment process. It was the proper presumption for unrepresented parties that had originally divided the Civil and Criminal Rules Committees. This Committee took a strong stance that unrepresented parties in criminal cases should not file electronically unless specifically allowed by local rule or court order. The subcommittee's proposal implements that policy choice.

But even with a stand-alone amendment to Rule 49, the Civil Rules are still of concern to the Criminal Rule Committee because of their effect in habeas cases. Professor King noted that Rule 12 of the 2254 Rules, which govern state habeas cases, incorporates the Federal Rules of Civil Procedure unless they are inconsistent with the habeas rules. And the Rules Governing 2254 and 2255 actions are the responsibility of the Criminal Rules Committee.

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The proposal just adopted by the Civil Rules Committee provides that unrepresented parties in civil cases may be permitted or required to file electronically by local rules or orders which permit reasonable exceptions. The Civil Rules Committee wanted to provide explicit authorization for existing programs in some districts that now require inmates to file 2254 pleadings electronically. The clerk of court liaison to the Civil Rules Committee is from a district that now has such a local rule, which was designed in cooperation with officials at a local prison. In that institution, prisoners are required to take their 2254 pleadings to the prison library, where the staff members PDF them and then email them to the court. The same system operates in a neighboring district. Officials in these courts and participating prisons are very pleased with the program. The proposed Civil amendment would allow the continuation of such programs. Although the Criminal Rules Committee has no formal role in the approval of the changes to Rule 5, the reporters requested discussion of the Civil Rule so that they could share the Committee's views with their Civil counterparts.

Professor Beale noted that the policy implications of the current Civil proposal are somewhat different from the issues previously discussed by the Committee. At its prior meetings, the Committee took a strong stand against a national rule that would override the current local rules in many districts that do not permit electronic filing by unrepresented criminal defendants. But the current proposal does not override any local rules. Instead, it permits districts to adopt local rules that require—with reasonable exceptions—that unrepresented inmates file electronically. She noted that some districts have large caseloads of inmate filings, and the Civil Rules Committee wants to allow them the option of requiring unrepresented inmates to file electronically.

The proposed Civil Rule states that a local rule requiring unrepresented civil parties to file

electronically must allow reasonable exceptions. This provision requiring reasonable exceptions was added at the subcommittee's request, and it provides some protection against a local rule or order that would otherwise impose an unreasonable burden on state habeas filers.

Mr. Hatten put the proposed Civil Rule into its historical context. The current CM/ECF system began as a program in a single district with a heavy caseload of asbestos cases. It was implemented nationally in waves, allowing changes to be made based on experience. The system was designed solely for courts and attorney filers, not for lay filers. The current resources are designed for those filers, and the clerks do not screen filings. From the clerk's perspective (staffing, resources, and work measurement), he said, lay filers present very different issues. He expressed concern that the proposed Civil Rule seemed poised to expand lay filing nationwide without any redesign of the system or sufficient testing in individual courts.

Professor Beale responded that the Civil Rules proposal allowing local rules requiring unrepresented parties to file could be seen as the kind of step-by-step process that had worked well for electronic filing by attorneys and the courts. At present, these are programs developed by individual districts in conjunction with local correctional officials. They seem to be working well. On the other hand, the reporters are not sure how these local rules mesh with the current Rules Governing 2254 and 2255 Proceedings, which refer to internal prison filing systems for legal mail and inmates depositing papers to be filed showing prepaid postage.

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Professor King drew attention to several aspects of the current local rules regarding electronic filing by inmates that were of special concern to the Civil Rules Committee. The inmates do not receive individual access to the CM/ECF system. Rather, officials in the prison library receive the inmates' papers, convert them to PDFs, and then submit them to the court electronically. This has many advantages: it is cheaper and faster than using the mail, and it produces a record of when the paper was sent and received. We do not know exactly how other aspects of these programs work. For example, do inmates in these programs receive NEFs?

There was general agreement that these programs would not work everywhere, and electronic filing by inmates would not be possible in many districts. Justice Gilbertson stated that in South Dakota no state prisoners have access to electronic filing, and most prisoner filings are hand written. Requiring inmates to file electronically in his state would shut down inmate filing. At Judge Molloy's request, Justice Gilbertson agreed to make enquiries about other states through the National Center for State Courts.

A member asked who determines whether a local rule permits "reasonable exceptions," or what constitutes such a "reasonable exception." The reporters stated they had not researched this question, but they pointed out that this phrase is present in current Rule 49(e), as well as its Civil counterpart, Rule 5(d)(3). No one had noted any special problems in connection with the phrase. It seems likely that the proposed Civil rule would be given the same interpretation as the current rules.

Concluding the discussion, Judge Feinerman reiterated the importance of the Civil Rules Committee's inclusion of the requirement that any local rule requiring unrepresented parties to file

electronically must provide for reasonable exceptions. He expressed the hope that this language would accommodate due process concerns and prevent the imposition of unreasonable burdens on inmate filers. He also observed that courts are unlikely to adopt local rules requiring electronic filing by unrepresented inmates without first consulting with prison authorities to determine what is feasible.

Rule 49(b)(4). Judge Feinerman then turned to one feature of subsection (b)(4) that had not previously been discussed: the provision stating that verification of pleadings is not required unless a statute or rule specifically states otherwise. This provision was drawn from the Civil Rules. Judge Feinerman noted it might provide a useful reminder for 2255 filers, because the Rules Governing 2255 actions require verification. Professor Beale agreed that it might provide a useful clarification for filers in 2255 cases. Additionally, because this language is included in the Civil Rules, its exclusion from Rule 49 might lead to a negative implication. Since the language might have some value and could do no harm, she concluded that it seemed best to parallel the Civil Rules.

Rule 49(c). Judge Feinerman explained that this provision makes explicit that nonparties may file and serve in criminal cases. Unlike the other provisions already discussed, he pointed out, (c) does not distinguish between represented and unrepresented nonparties. All nonparties are presumptively required to file by nonelectronic means. He identified several reasons for requiring nonparties to file outside the CM/ECF system. First, the architecture of the CM/ECF system is designed to permit only the government or a defendant to file electronically. Even a registered attorney user cannot file in a criminal case unless the attorney indicates that he represents either the government or a defendant. Second, members had informed the Subcommittee that many nonparty filers prefer not to use the CM/ECF system. Finally, victims may file material that should not go into the system and be available to all parties. The rule does allow the court to permit a particular nonparty to file electronically (with the assistance of the clerk), and it gives districts the option of adopting local court rules that allow nonparties to file electronically.

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Judge Feinerman noted that the proposed rule does not refer to filings by probation or pretrial services, which are neither parties nor nonparties ("neither fish nor fowl"). Because probation and pretrial services do file their reports electronically in some districts, he raised the question whether the committee note should be amended to make it clear they were not covered by Rule 49. Although there has been no question of the applicability of the current rule to probation and pretrial services, the addition of (c) now makes the application of the rule to nonparties clear. Members discussed the practice in their own districts. In some, probation and pretrial services did not use the CM/ECF system, but in others all of their reports were filed using CM/ECF (though presentence reports and some other documents were sealed). Professor Beale observed that everyone agreed that when the court issues an opinion, it is not governed by Rule 49. Since pretrial services and probation are arms of the court, the Subcommittee thought they were distinguishable from the parties and nonparties governed by the rule.

A motion was made to add language to the note stating that the rule was not applicable to the court or its probation and pretrial services divisions, but it was withdrawn after discussion. Professor

Coquillette reminded the Committee of the limited function of committee notes. A member noted that the Federal Defenders are also, as a matter of organization, a part of the court, but they are of course subject to Rule 49. Another member stated that he did not see a problem that required any change. Everyone understands that probation and pretrial services are part of the court and not covered by the Rule. The member who had made the motion withdrew it.

Rule 49(d). Judge Feinerman then turned to the last subsection of the proposed rule, which requires the clerk to serve notice of the entry of the court's order, and allows a party to serve the notice. He stated that the language in the Subcommittee draft was drawn from Civil Rule 77(d)(1), and its inclusion was consistent with the general presumption in favor of incorporating the relevant provisions of the Civil Rules. Professor Beale noted the interaction between the notice provisions and FRAP 4. FRAP 4(a) governs civil appeals, and 4(b) governs criminal appeals. Although the impact of the provision allowing a party to give notice would be somewhat different in civil and criminal cases, she observed that it seemed to have sufficient utility in criminal cases to justify its inclusion. Under FRAP 4(b), the notice given by a party might be relevant to a defendant's efforts to establish excusable neglect or good cause for a late filing. The Subcommittee had no strong feelings about this provision. Beale stated that in her view, since this provision was in the Civil Rule, might have some benefit in criminal cases, and would do no harm, it was appropriate to include it.

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There was a motion to approve the Subcommittee draft, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment, with the provision that Judge Molloy, Judge Feinerman, and the reporters would need to work with the other committees, and it might be necessary to make minor changes for consistency with the other proposed amendments.

The Committee voted unanimously to approve the proposed amendments to Rule 49, as amended, to transmit them to the Standing Committee, and to recognize the authority of the Committee chair, Subcommittee chair, and reporters to make minor changes to conform to the language of parallel proposals from other committees.

Discussion of the committee note was deferred until after the lunch break, to allow the reporters to determine what revisions would be required in light of the amendment to proposed Rule 49(a)(3)(A).

Judge Feinerman turned next to the Subcommittee's proposal to amend Rule 45. He explained that Rule 45(c) currently refers to several subsections of Civil Rule 5 describing different means of filing. As part of creating a stand-alone rule on filing and service, the Subcommittee's proposal incorporated these forms of service into Rule 49. Accordingly, the Subcommittee proposed an amendment replacing the cross references to Rule 5 with the appropriate cross references in Rule 49. Ms. Womeldorf and Professor Coquillettee confirmed that because this would be a technical and conforming amendment, it was not necessary to publish it for public comment. On the other hand, failure to publish now with the Rule 49 proposal might lead to some confusion and produce comments suggesting the need for such an amendment. Publication would make it clear that the

Committee was aware that its proposed amendment to Rule 49 would require this technical and conforming amendment. Under these circumstances, the reporters recommended publication.

The Committee voted unanimously to approve and transmit the proposed amendment to Rule 45(c) to the Standing Committee with the recommendation that it be published for public comment.

Judge Kethledge presented the report of the Rule 12.4 Subcommittee. The current rule, he explained, provides that if an organization is a victim, the government must file a statement identifying the victim; if the organizational victim is a corporation, the government must file a statement identifying any parent corporation and any publicly held corporation that owns more than 10% of the victim corporation's stock, or stating that there is no such corporation. Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 is to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

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In light of the amendment to the Code of Judicial Conduct, the Department of Justice asked the Committee to consider amending Rule 12.4 to restrict the scope of the government's required disclosures. It emphasized the difficulty of complying with the rule in cases with large numbers of organizational victims each of whom has sustained only a de minimus injury. The archetype, he said, was an antitrust prosecution where many victim corporations have paid a few cents more for a common product, such as a software program.

The Subcommittee agreed that the government had presented a persuasive case for bringing the rule in line with the change in the Code of Judicial Conduct in order to relieve the government of the burden of disclosure in such de minimus cases.

In drafting the language of its proposed amendment, the Subcommittee responded to feedback Judge Molloy had received from the Standing Committee. Standing Committee members stressed the importance of retaining judicial control. If the rule is to be revised, the court, not the government, should decide whether disclosure was needed in individual cases.

The Subcommittee recommended an amendment relieving the government of the burden of making the disclosures when it can show "good cause" for that relief. This standard, Judge Kethledge explained, retains judicial control and allows the court to balance the burden of disclosure against the risks of non-disclosure. Under a good cause standard, the court makes a holistic determination, rather than looking solely at the harm to the corporate victim.

The style consultants objected that "good cause" was a vague standard, but Judge Kethledge stated the Subcommittee strongly disagreed and viewed the matter as one of substance rather than mere style. Courts have a great deal of experience with the good cause standard,

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which is used in many other Federal Rules of Criminal Procedure. In contrast, the standard suggested by the style consultants—"minor harm"—is not used in any other Federal Rule of Criminal Procedure, it is not used in the Code of Judicial Conduct, and it would not allow the court to look at the overall balance of the burden of disclosure against the risks of non-disclosure.

Professor Beale stated that similar language was under consideration by the Appellate Rules Committee; the reporter for that committee had consulted with the Criminal Rules reporters and participated in the Subcommittee's telephone conferences. However, the Appellate Rules provision concerning disclosures regarding corporate victims was a small part of a larger project which was not yet ready for presentation to the Standing Committee. She noted that the current draft under consideration by the Appellate Rules Committee included not only corporations, but also other "publicly held entities." Noting that the reporters were not sure precisely what that phrase would include, she asked if Judge Kethledge or others had a view on whether similar language should be added to Rule 12.4. Judge Kethledge stated that he had no strong view. Speaking for the Department of Justice, Ms. Morales stated that the Department was satisfied with the proposal as it stood, without that phrase.

Judge Kethledge then turned to the proposed amendment to Rule 12.4(b), explaining that it was a modest proposal that had merit but likely would not have advanced on its own. But if we do amend Rule 12.4, it would be useful to set a fixed time for the disclosures, and to make it clear that not only changed, but also new information should be disclosed. In response to a member's comment that the rules now generally state time in multiples of seven, Judge Kethledge and the reporters took this as a friendly amendment. Although 30 days falls just over the line into the longer time periods that do not have to be divisible by seven, it seemed desirable to revise the time period here to 28 days.

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A member also expressed concern with the wording of the Subcommittee's proposed amendment to Rule 12.4, because it did not explicitly state that new information must be disclosed only if it falls within the scope of the disclosures required by the rule. Although that is implied, lawyers might argue for a broader interpretation. Members suggested various formulations, and a motion was made to revise (b) to require the government to provide a supplemental statement "if the party learns of *any* additional *required* information or any required information changes." The motion also contained the friendly amendment making the time for filing 28 days after the defendant's initial appearance. The motion passed unanimously. Professor Beale reminded the Committee that this language was subject to revision by the style consultants.

The Committee then unanimously approved the proposed amendment to Rule 12.4, as amended, for transmission to the Standing Committee with the recommendation that it be published for public comment.

Discussion then turned to the proposed committee note. Members suggested deleting two phrases—"in relevant cases" and "the government alleges." Judge Kethledge agreed that they

were not necessary, and accepted those suggestions on behalf of the Subcommittee. The proposed committee note was also revised to refer to 28, rather than 30, days.

The Committee voted unanimously to approve the committee note to Rule 12.4, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Following the lunch break, the reporters presented language amending the committee note to take account of the change in subsection (a)(3)(B) of the amendment to Rule 49. The proposed language stated that "(A) provides that electronic service is not effective if the serving party learns that neither "the notice of electronic filing" nor the paper to be served reached the person to be served."[5]

The Committee voted unanimously to approve the committee note to Rule 49, as amended, for transmittal to the Standing Committee with the recommendation that it be published for public comment.

Judge Dever, chair of the Rule 15 Subcommittee, informed the Committee that the Department of Justice had withdrawn its request for consideration of an amendment to address the inconsistency between the text of the rule and the committee note regarding the expenses of certain depositions requested by the defense. Ms. Morales explained that the Department was withdrawing its proposal because there had been so few instances in which the rule might create a problem that it did not seem possible to show a need for a rules change at this time. However, the Department intended to return to the Committee if it confronted a problem in a significant number of cases.

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Introducing the next item on the agenda, Judge Molloy explained that, with the aid of a study prepared by the Federal Judicial Center (FJC), the Committee on Court Administration and Management (CACM) had studied the problem of threats and harm to cooperating defendants, and had endorsed recommendations that would necessitate changes in the Federal Rules of Criminal Procedure. After discussion at the January 2016 meeting of the Standing Committee, the matter was referred to the Criminal Rules Committee. Judge Molloy then appointed a subcommittee, chaired by Judge Lewis Kaplan, to consider the FJC study and CACM's recommendations.

Judge Kaplan reported on the Subcommittee's actions and sought input from members who are not on the Subcommittee. The starting point for the Subcommittee is that CACM concluded, based on the FJC study, that there is a national problem with cooperators being identified and then either the cooperator being threatened or harmed, or the cooperator's family being threatened or harmed, or others being deterred from cooperating. The FJC determined that to some degree the information used to identify these cooperators comes from court documents.

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[5] Because the change to the proposed text of the rule that prompted this amendment to the note was later deleted, this change to the proposed Committee Note was deleted as well. See note 4, supra.

Accordingly, CACM concluded that a uniform national measure, including changes to the rules and a great deal of sealing, was required. CACM felt sufficiently strongly that it recommended these procedures be adopted as an interim measure by local district rules. The recommendations seek to prevent the identification of cooperators by making all plea agreements look identical, requiring every agreement to include an unsealed portion and a sealed portion that contains either the cooperation agreement or a statement that there is no cooperation agreement. Similarly, the minutes of all plea proceedings would also contain a sealed portion for any discussion of cooperation. Thus if someone examines the court records, there is no indication which cases involved cooperation.

After receiving CACM's recommendations, the FJC study, and a background memorandum from the reporters, the Subcommittee held a lengthy and productive telephone conference to get the initial reaction of members. Judge Kaplan summarized the Subcommittee discussion. First, there was agreement that any retaliation against cooperators is very serious, and the Committee should think very hard about any measures that would address it. However, other institutions, especially the Department of Justice and Bureau of Prisons, also have a role to play. Subcommittee members also voiced a variety of concerns and raised many questions:

- How widespread is the problem? The FJC study provided anecdotal evidence concerning 400-600 instances of harm or threats, but approximately 10,000 defendants receive credit for cooperation each year.
- To what extent would the cooperators be identified even if the sealing recommendations were followed? In other words, would the recommendation solve the problem?
- What impact would the CACM recommendations have on the defense function? The defense relies on research regarding cooperation to impeach and to argue for proportional sentencing.

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The Subcommittee concluded by asking the reporters to gather additional information on the following questions:

- How big is the problem compared to the universe of cooperators?
- Do identifiable classes of cases account for most of the incidents?
- Are there important geographic variations?
- How does the incidence of problems compare with the widely varied approaches taken in different districts?

The reporters were also asked to prepare a memorandum on the First Amendment issues raised by CACM's recommendations. Judge Kaplan noted that in his circuit the court of appeals has severely restricted sealing practices.

Before the Subcommittee's next telephone conference in July, further information will be gathered from the FJC and the Department of Justice. The Subcommittee asked the Department

of Justice for its position regarding CACM's interim and long term proposals and requested additional information about the Department's practices.

Judge Kaplan then asked Committee members for their initial thoughts about the problem and CACM's recommendations.

Many members agreed that retaliation against cooperators is a serious problem, and that the Committee had a responsibility to consider potential solutions. One member described it as a moral obligation to do whatever we can to protect cooperators and not to implement or maintain procedures that could discourage cooperators. Another member noted that although he was not generally in favor of sealing, courts now seal for reasons such as the protection of trade secrets. Preventing harm to cooperators is certainly at least as pressing a reason for sealing. If our records are being used, we have to figure out what we can do to be part of the solution.

But members also raised a variety of concerns and questions about CACM's proposals.

Several members spoke of the need for more information about the scope of the problem and the degree to which it arises from court records. Several members noted that violent threats to cooperators were much more likely in certain kinds of cases (such as cases involving gangs, drugs, terrorism, and organized crime) than in white collar prosecutions. There may also be differences among districts. A member noted that in sparsely settled areas everyone knows who is cooperating, and sealing would have no effect. Members also expressed the need for more information about the connection between the records that could be sealed and the potential for threats and harm. One member stated that criminal defendants and inmates are resourceful, and they have many different ways to identify cooperating defendants without court records, including continuances, absences at status hearings, and Rule 35 motions. Other members agreed that it would be important to determine whether the recommended procedures would make a big difference in reducing threats and harm to cooperators. Members noted, however, that this will be difficult to determine for many reasons. Although we can identify cooperators who have been threatened or harmed, the threat or harm may have been the result of some interaction in the prison, not the cooperation. Similarly, family members may not know the reason for a threat or assault. It will be difficult to be certain how helpful a rule change would be.

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A member noted that the experience in that member's district raised questions about the causal connection between sealing and threats/harm: that member's circuit was among those that most severely restricted sealing, but the member's district also had one of the lowest rates of threats/harm to cooperators.

Lawyer members expressed concern about the effect of CACM's proposal on their ability to represent their clients effectively. A member who represents both cooperating and non-cooperating defendants described various ways sealing would hamper the defense.

- Sealing would make it impossible to research disparity in sentencing. In the member's district, failure to conduct that research constitutes ineffective assistance of counsel.

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- Sealing would make counseling clients much more difficult.
- Sealing would hamper the ability to challenge racial disparities.
- Sealing would limit access to exculpatory material, even when prosecutors try in good faith to comply with *Brady*.

Another lawyer member noted that there may be a serious problem of retaliatory threats/harm in certain kinds of cases, such as terrorism or gang cases, but a national rule requiring sealing in all cases would also make it more difficult to effectively represent defendants in white collar cases, which present no threat of violent retaliation.

A member agreed that the Committee would need to determine how much the current rules are contributing to the problem of threats/harm; consider whether a rules change could solve the problem; and address objections including ineffective assistance of counsel, *Brady*, and the First Amendment.

Another member added other issues that should be explored. The first is a comparing the effectiveness of sealing to other alternatives that might address the problem. It would be important to know if sealing would make a significant difference. Second, it would be helpful to understand exactly what the FJC counted as physical harm in order to gauge the seriousness of the problem.

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A member who had participated in CACM's deliberations stated that the FCJ study and the findings made by Judge Clark after an evidentiary hearing demonstrated the existence of a problem. The member noted that CACM had raised many of the same questions now being asked by the Committee. It is important to determine the prevalence of the problem of threats/harm to cooperators and whether it is limited to certain kinds of cases or geographic areas. It would also be very helpful to have information about the experience of cooperating defendants from the District of Maryland, which already follows the procedures CACM is recommending. Has it solved the problem?

The Department of Justice representatives, Ms. Shapiro and Ms. Morales, stated that the Department has not determined its position on the CACM proposals for interim rules in the district courts and changes in the Rules of Criminal Procedure. Ms. Shapiro was a member of the privacy subcommittee of the Standing Committee, which held the Fordham conference in 2010. At that time the Department was unable to reach an internal consensus on the best approach. It surveyed the districts at that time and is updating that survey now. In 2010, practices in the districts varied, and judges in each district were committed to their own practices and thought them most effective.

Ms. Morales expressed the view that it would be very difficult to trace particular harms/threats to rules that could be amended. Even if we can identify cooperators who have been harmed, we won't know why they were injured. It could have been because of a dispute in the prison. We can identify the individuals who get Rule 35 or 5K sentencing reductions for cooperation, but they are only a subset of the cooperators. Many other individuals may have

cooperated at some point, but not to the degree necessary to get a Rule 35 or 5K reduction. So it will be hard to get enough information to feel comfortable that we can assess the impact of the current rules or of changes in the rules.

Professor Coquillette emphasized Judge Sutton's hope that the Subcommittee and the full Committee will take a broad view of the issue. If the Committee determines that it is not a problem that can be solved by amending the rules, it would be beneficial for it to remain engaged, be aware of what is being studied and considered by other constituencies, and be as helpful as possible.

Margaret Williams, who was one of the authors of the FJC report prepared for CACM, was present at the meeting and was asked to comment. She stated that the FJC data would permit an analysis of whether the frequency of threats/harms varies from district to district. But the FJC's data will not answer other issues that have been raised. The survey did not ask about the types of cases in which there had been threats/harm (though some respondents volunteered that information). As noted by a member, Maryland has sealing procedures like those recommended by CACM, but those procedures were already in place at the time of the FJC's study. So the FJC its data would not permit a "before and after" analysis of the effect of sealing.

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Judge Kaplan thanked the members for their responses, and commented that it was likely there would be a lot of unknowns at the end of the Subcommittee's work.

The Committee turned next to new suggested amendments.

Professor Beale briefly described 15-CR-D, from Sai, which proposed multiple changes: (1) redaction of the last four digits of social security numbers in pleadings; (2) sealing of affidavits in support of applications for appointed counsel; (3) providing unpublished materials cited in pleadings to pro se litigants; and (4) electronic filing for pro se litigants. The suggestion had been addressed to all of the rules committees. The other committees had already held their spring meetings, and Professor Beale explained the actions they had taken.

Regarding the proposal to redact the last four digits of individual social security numbers, Professor Beale reported that the other committees had all agreed that the Rules Committees should not take this issue up. Rather, it should be referred to the Committee for Court Administration and Management, which made the policy decision reflected in the current rules, and is in the best position to do research and consider tradeoffs. Professor Beale noted that she and Professor King recommended that the Committee take the same approach.

With regard to the sealing of affidavits, Professor Beale noted that the Civil Rules Committee was not, at this time, moving forward with this suggestion. A member noted, however, that applications for appointments under the Criminal Justice Act are already filed ex parte under seal. So on the criminal side, no further action is needed.

With regard to requiring litigants to provide copies of unpublished opinions to pro se

litigants, the Civil Rules Committee had decided not to move forward at this time. This may be a good practice, but is not necessarily something that should be mandated in a national rule.

Finally, with regard to the question whether pro se litigants should be permitted to file electronically using the CM/ECF system, that proposal was at odds with the Committee's decision to preclude such filing in the proposed amendment to Rule 49 absent a court order or local rule.

After a brief discussion, the Committee concurred in the decision to refer the question of the last four digits of Social Security numbers to CAMC, and it decided to take no further action on the other proposals.

The next suggestion, 15-CR-E, from Robert Miller, also proposed that indigent parties be allowed to file in the CM/ECF system. Judge Molloy and Professor Beale agreed that like 15-CR-D, this proposal had been considered and rejected by the Committee's action in approving the current proposal to amend Rule 49.

The next suggestion, 15-CR-F, came from Judge Richard Wesley, who drew a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings to the Committee's attention. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Some courts have held that the inmate who brings the 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts (and the committee note) treat this as a right.

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Professor Beale solicited the advice of the style consultants on language that might respond to this split and clarify that the rule was intended to create a right to file. She noted that the consultants thought the rule's current language clearly creates a right, and there should be no need to clarify the language. But confronted by the split in the lower courts, they did suggest some language that might be employed to make this clearer.

Professor King noted the 2255 caseload is very heavy in some districts and courts must process these cases quickly. She surmised that the courts that ruled an inmate has no right to file may have been looking at pre-2004 precedents without realizing that the rule was modified in 2004 to provide for a right to reply. She summed up the reasons in favor of putting this proposal on the Committee's agenda for further study:

- A rule is causing a problem. Inmates in some courts are not being given the opportunity to file a reply as intended by the 2004 revision.
- Although the style consultants believe the text is clear now, the split in the lower courts demonstrates that courts are not finding it to be clear.
- The decisions not recognizing the right to file a response may seriously affect inmates who may have a persuasive response but are not permitted to file it.

Professor King acknowledged that we do not know precisely how many cases would be affected

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by a clarification of the rule. However, the suggestion did come to the Committee from a member of the Standing Committee, which indicated that the Standing Committee might be receptive if the Criminal Rules Committee considered an amendment.

Judge Molloy informed the Committee of his intention to form a subcommittee to address Rule 5(d), and members were invited to make comments that might be helpful to it. Professor King noted that one issue for the subcommittee would be whether there was also a need to clarify the 2254 Rules. Another issue was whether the rule should specify a presumptive time for the filing of a reply. In 2004, the Committee felt there was no reason not to permit an inmate to file a reply to the government's response. But the Committee chose not to set a presumptive time for filing. The style consultants questioned this omission, noting that other rules specify time limits for filing.

Members discussed their practices concerning the time for filing a reply in 2255 cases. Several members set a briefing schedule giving the government 28 days to respond to the petition, and the inmate 21 or 28 days to respond. One judge who set such a schedule noted that he had never turned down a request for an extension of time. Several other members noted they typically set similar schedules: 28 days for the government and 28 for the respondent.

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Later in the meeting, Judge Molloy announced that he was appointing the following to serve on the Rule 5 Subcommittee:

Judge Kemp, chair
Ms. Brook
Judge Dever
Justice Gilbertson
Mr. Hatten
Judge Hood
Ms. Morales (Department of Justice)

The next suggestion, 16-CR-A, came from James Burnham, who proposed that Rule 12(b)(3)(B)(v) be amended to make it clear that the standard for the dismissal of a criminal indictment is the same as the standard for the dismissal of a civil complaint under Civil Rule 12(b)(6). Professor Beale commented that the proposal presents the policy question whether criminal practice should be brought closer to the civil model.

A member who said he was "intrigued" by the proposal presented a recent example. Several elderly men had cut through several levels of security fences to gain entry to a nuclear facility, where they prayed. They did no other harm to the facility. After they refused to plead to a more minor offense, the government added a more serious charge that required an intent to harm the national defense. The defendant's conviction was reversed on appeal. The appellate court held that as a matter of law the facts established by the prosecution could not prove the necessary intent, and thus did not constitute sabotage. Although the appellate court concluded that the conduct in question did not, as a matter of law, constitute the offense charged, at the trial

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court level there had been a jury trial and a lengthy sentencing hearing. The member, who noted that there is a slight difference in the language of the civil and criminal rules, acknowledged that he did not know whether there are also significant differences in the pleading rules in criminal and civil cases.

Judge Molloy observed that the pleading practices are set by the appellate rulings holding that an indictment is sufficient if it states the date and parallels the language of the offense that has been charged.

Another member expressed interest in the proposal but thought it was unlikely to be adopted. He noted that a mechanism to raise claims already exists. As amended in 2014, Rule 12 of the Rules of Criminal Procedure provides for a pretrial motion to challenge "a defect in the indictment or information, including . . . failure to state an offense." But circuit law determines what constitutes failure to state an offense. The Second Circuit will uphold a conviction if the proof is sufficient and not inconsistent with the indictment, which may be bare bones.

A member responded that minimal pleading in criminal cases is hundreds of years old, not something new. This looks like a proposal to return to the old common law pleading rules. He is sympathetic to the problem this poses for defendants, but it's a problem about the pleading standards.

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A judge member stated that with indictments stated in broad general terms and very limited pretrial discovery he does have occasional cases in which defense counsel at the pretrial conference says that he or she still does not know what the defendant is being accused of. The issue is closely connected to discovery. The member expressed interest in exploring the question whether the government could be required to be more specific at some point: if not at the outset, then at some point before trial.

Speaking for the Department of Justice, Ms. Morales said that the Supreme Court has ruled that the pretrial notice requirements are met by an indictment issued by a grand jury. This proposal seeks to create new substantive rights, which is beyond the authority of the Rules Committee.

Judge Molloy asked whether Mr. Burnham's objections could be met by a rules change, or were really objections to how the courts have interpreted the rule. Two members responded. One noted that Burnham had proposed specific language to amend Rule 12. Another said this was not really a proposal about changing the language of Rule 12, and that it sought a substantive change that would raise issues under the Rules Enabling Act.

A member described how the rule works in cases brought under RICO, where the government is alleging a pattern of racketeering activity that may extend over a decade or more. According to the precedents, the government can meet the pleading requirements and avoid pretrial dismissal of the indictment with language paralleling the statute defining the offense and the dates involved. Prosecutors have an incentive to do that in order to avoid post trial claims of

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some variance between the allegations in the indictment and the proof.

Some members returned to the idea that this is a sufficiency of the pleading issue. One stated that although Rule 7(c) requires a "plain, concise, and definite statement of the offense charged," the level of detail that courts accept in criminal cases is less than that required in civil cases. Another member stated that it appears more conclusory language is allowed in criminal than in civil cases.

A member stated that he was not in favor of moving forward with the proposal. He stated it would have significant implications of requiring more specificity for terrorism cases. The Department of Justice is reluctant to provide a high level of specificity in the charging documents that might reveal intelligence means and methods. During the pretrial period, under the Classified Information Procedure Act (CIPA), more specifics are provided in a manner that protects national security. Moreover, the proposal would invite in criminal cases the kind of costly, repetitive, and lengthy pretrial motions practice that now occurs in some kinds of civil cases, including big financial cases, antitrust cases, and securities class actions. If a judge needs to take control of a case to get to the core, the judge has ample tools to do so now.

Judge Molloy announced that he did not intend to set up a Subcommittee to pursue the proposed amendment to Rule 12.

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Professor Beale presented 16-CR-B, from the National Association of Defense Lawyers (NACLD) and the New York Council of Defense Lawyers (NYCDL), which proposes that Rule 16 be amended to impose additional disclosure obligations on the government in complex cases. NACDL and NYCDL assert that prosecutorial discovery is a problem in complex cases that involve "millions of pages of documentation," "thousands of emails," and "more gigabytes of information." They based their proposal on orders frequently issued by courts in the Southern and Eastern Districts of New York. It provides a standard for defining a "complex case" and steps to create reciprocal discovery.

At Judge Molloy's request, the reporters briefly described the history of other attempts to amend Rule 16 to require the government to provide additional pretrial discovery. Professor Beale noted that proposals to amend Rule 16 have been defeated in the Criminal Rules Committee, in the Standing Committee, at the Judicial Conference, and in Congress. She reminded the Committee that the Rules Enabling Act process is, by design, conservative: it sets up multiple points at which a controversial proposal may be stopped. She also noted that the Department of Justice had strongly opposed amendments to Rule 16, but had itself implemented many non-rule solutions, including amendments to the U.S. Attorneys' Manual. She reminded the Committee that 18 U.S.C. § 3500 imposes serious limits on certain forms of pretrial disclosure and reflects many of the interests the Department was seeking to protect in its advocacy in the rules process. She briefly described two attempts to amend the rule during her time as reporter. The first time, after the Department took the unusual step of inviting Committee members to participate in its efforts to revise the U.S. Attorneys' Manual as an alternative to revising Rule 16, a sharply divided Committee approved an amendment that was

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rejected by the Standing Committee. The second time, responding to a letter from Judge Sullivan after the Stevens prosecution, the Committee asked the Federal Judicial Center (FJC) to survey the views of judges, defense lawyers, and prosecutors concerning the need for an amendment. The responses from judges were sharply split, and the Committee, despite a great deal of effort, was unable to formulate a beneficial revision to Rule 16 that would not run afoul of 18 U.S.C. § 3500. Accordingly, the Committee pursued other alternatives, working with the Benchbook committee to encourage judges to supervise discovery.

Ms. Hooper, one of the FJC researchers who conducted the discovery study, stated that the survey found that district judges were evenly split on whether they perceived a problem with prosecutorial failure to disclose exculpatory evidence, 90% of defense lawyers perceived a problem, and prosecutors did not perceive a problem.

Judge Molloy asked whether the judicial members had standing orders similar to the NACDL/ NYCDL proposal. One judge member stated that although he had presided over many cases that would fall within the proposal, he did not have a standing order because every case is different. In a complex case, the trial judge has to require the government to make expedited discovery (which varies depending on the case) so that the defense has adequate time to absorb. Also, if the government has the information in a form that will facilitate the defense getting into it, it must be provided in that format, e.g., hard drives in a certain format. He has ordered CJA funds for technical people to organize the electronically stored information for the defense.

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The member expressed the view that it is hard to legislate wisdom for trial judges. The trial judge must get into the case far enough to determine what's required for that case. And it's not appropriate to force a case with a huge amount of documents and witnesses to trial on the normal schedule. Experienced judges understand without being told, or given specific overbroad definitions. In some cases in which enormous quantities of information may be produced, but only a tiny fraction of that material will be relevant.

Other judicial members agreed that these issues are handled by judges on a case-by-case basis, and that it was not clear whether there was a need for rules and metrics. As the case proceeds, defendants and issues may be dropped and what could have been a complex case is no longer.

A practitioner member whose practice regularly includes complex cases responded that courts don't understand the defense perspective, and how hard it is for the defense in cases with, for example, 100,000 taped conversations, to identify specific pieces of evidence that are relevant to the government's theory and to your own case. The only way this can work is for the government to identify the data it will rely on to prove its case. He agreed, however, with the premise that no one-size-fits-all rule works for all cases. But many judges now take a one-size-fits-all approach, and that approach is simply to follow Rule 16. The Rule needs an escape clause for a small set of cases that require special treatment, not a routine application of Rule 16. Although the member did not agree with every provision in the NACDL/NYCDL proposal (which was more like a regulation than a rule), the main point is that an amendment is needed for

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this subset of cases because some judges continue to apply Rule 16 in complex cases without any adjustment, which makes it impossible to mount a defense and forces defendants to plead guilty. The member reiterated that some judges do not understand what the defense must do in these cases, so they seek to move their dockets and are reluctant to impose a burden on the government.

The member advocated for something "simple" that would recognize a category of complex cases that require different treatment (e.g., requiting the government to identify its exhibits in advance) and allow the defense adequate time for preparation, but also require reciprocal defense discovery. The member was more concerned at this point about the concept of what is needed—special class of cases requiring special procedures—than the specifics.

Another member opposed moving forward with the proposal, because it was better to leave this to the discretion of judges than to try to legislate with the rules. He emphasized that the complexity of cases can vary on multiple dimensions, particularly the nature of the case and the makeup of the defense team (which could be two local lawyers or 50 lawyers in three law firms in different countries). He also predicted that the Department of Justice would strongly oppose the proposal because of the impact it could have in national security cases. He favored leaving this to judicial discretion, which is more flexible than a rule.

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Another member urged consideration of the impact of complex cases on CJA lawyers, who do not have the resources of Federal Defender offices, noting that judges are not familiar with the situation CJA lawyers face in complex cases. The member strongly supported the creation of a subcommittee to try to develop an approach that would preserve judicial discretion but send a signal to judges to modify procedures in complex cases.

Speaking for the Department of Justice, Ms. Morales first stated that the Department distinguished between the current proposal and more general prior attempts to modify Rule 16. But the Department still does not think a rule is the best way to deal with these issues. The Department has worked hard with the defense bar to develop guidance for judges on electronic discovery, which led to a pocket guide. That kind of collaboration is nimble and can change quickly as the technology changes. Technology is a moving target. The Department favors a focus on developing best practices and guidance, not specific prescriptive rules.

A member agreed this is a significant issue, and is related to the broader issue of electronic data and discovery, which is being studied by another committee. That committee has been conducting hearings, and has heard repeatedly of the problems encountered by individual CJA lawyers, who lack the knowledge and resources of the Federal Defenders. He noted, however, that it was not yet clear whether this problem is a rules problem.

Judge Molloy announced the appointment of a Rule 16 Subcommittee to study the proposal and the more general issue:

Judge Kethledge, chair

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Mr. Filip
Judge Feinerman
Mr. Kerr
Ms. Morales, for the Department of Justice
Mr. Siffert

Professor Beale introduced the last agenda item. She explained that in bankruptcy cases there are routine filings of containing large amounts of personal data that should be redacted. In some cases, a failure to redact has been discovered. Although bankruptcy courts have general taken action to redact material in such cases, the Bankruptcy Committee thought it would be desirable to add a rule providing for such retroactive redaction. When the Bankruptcy Committee presented this to the Standing Committee as an information item, the Standing Committee encouraged the Civil, Criminal, and Appellate Committees to consider whether a similar rule would beneficial.

The issue was being presented at this meeting to get members' initial reactions, with the expectation that it would be on the fall agenda for a more extended discussion. Professor Beale asked for initial reactions on several questions. Had members encountered cases in which information that should have been redacted was filed in a criminal case? If so, did they think a rules change to deal with those cases would be beneficial? And if members had not encountered the problem, might it be beneficial to adopt a rules change to parallel the Bankruptcy rule? This would provide a mechanism to deal with the few cases that might arise in the future, and would avoid the negative implication that might arise from a comparison with the Bankruptcy Rule authorizing retroactive redaction.

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Several members said they had encountered failure to redact material in a few cases. In each case the court or the party that failed to make the required redaction took corrective action. In some cases the clerk of court restricted access to a document while corrective action was taken. Professor Beale summed up the responses: failure to redact as required by Rule 49.1 does occur occasionally in criminal cases, and courts have been dealing with it successfully. One judge expressed an interest, if a retroactive redaction procedure is developed, to include a requirement of an explanation of the failure to make the redaction and/or to discover the failure in a timely fashion. Professor Beale stated that the reporters would collaborate with their colleagues on the other committees on these issues. They would consider the argument that a rule providing guidance would be valuable, but also the fact that the issue arises only infrequently and courts have been dealing with it successfully.

Finally, Judge Molloy noted the next meeting of the Committee will be September 19-20 in Missoula, Montana. His tentative plan is to meet in the fall of 2017 in Chicago, and perhaps in New York in the fall of 2018. The next two spring meetings be in Washington, D.C.,

The meeting was adjourned.

TAB 1B

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 6, 2016 | Washington, D.C.

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its fall meeting in Washington, D.C., on June 6, 2016. The following members participated in the meeting:

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Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Jr., Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Michelle M. Harner, Associate Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

The Honorable Sally Quillian Yates, Deputy Attorney General, represented the Department of Justice, along with Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente.

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Other meeting attendees included: Judge David G. Campbell; Judge Robert M. Dow; Judge Paul W. Grimm; Sean Marlaire, staff to the Court Administration and Case Management Committee (CACM); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; and Professor Joseph F. Spaniol, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Hon. Jeremy D. Fogel	Director, FJC
Emery G. Lee	Senior Research Associate, FJC
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

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Judge Sutton called the meeting to order. He first acknowledged a number of imminent departures from the Standing Committee effective October 1, 2016: Justice Brent Dickson, Roy Englert, Judge Neil Gorsuch, and Judge Patrick Schiltz are ending their terms as members of the Standing Committee and Judge Steve Colloton is ending his term as Chair of the Appellate Rules Advisory Committee, a position that will be assumed by Judge Gorsuch. Judge Sutton offered remarks on the contributions each has made to the Committee over the years and warmly thanked them for their service.

Judge Sutton recognized three individuals for reaching milestones of service to the Committee. Rick Marcus has served for twenty years as the Associate Reporter to the Advisory Committee on Civil Rules. Dan Capra has served for twenty years as the Reporter to the Advisory Committee on Evidence Rules. And Joe Spaniol has served twenty-five years as a style consultant to the Standing Committee.

Finally, Dan Coquillette took a moment to thank Judge Sutton, whose tenure as Chair of the Standing Committee comes to an end October 1, 2016.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the January 7, 2016 meeting.**

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VISIT OF CHIEF JUSTICE ROBERTS

Chief Justice Roberts and Jeffrey Minear, the Counselor to the Chief Justice, visited the Standing Committee. Chief Justice Roberts made some brief remarks. He thanked the members of the Committee for their service and acknowledged, as an alumnus of the Appellate Rules Committee himself, that such service could be a significant commitment of time. And he congratulated the Committee on the new discovery rules that went into effect on December 1, 2015, rule amendments he highlighted in his 2015 Year-End Report on the Federal Judiciary.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra provided the report on behalf of the Advisory Committee on Evidence Rules, which met on April 29, 2016, in Washington, D.C. Judge Sessions presented two action items and a number of information items.

Action Items

RULE 803(16) – The first matter for final approval was an amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before January 1, 1998. The version of Rule 803(16) published for comment would have eliminated the exception entirely. After hearing from many lawyers who continue to rely on the ancient documents exception, the Advisory Committee decided against eliminating the exception. Instead, the Advisory Committee revised its proposal to provide a cutoff date for the application of the exception. The Advisory Committee decided against leaving the exception in its current form because, unlike certain "ancient" hard copy documents, the retention of electronically-stored information beyond twenty years does not by itself suggest reliability. Judge Sessions acknowledged that any cutoff date will have a degree of arbitrariness, but also observed that electronically-stored information (known as "ESI") first started to explode around 1998 and that the ancient documents exception itself set an arbitrary time period of twenty years for its applicability.

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Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 803(16), as amended after publication, for submission to the Judicial Conference for final approval.**

RULE 902 (13) & (14) – The second matter for final approval was an amendment to Rule 902 to add two new subdivisions ((13) and (14)) that would allow for the authentication of certain electronic evidence through certification by a qualified person without requiring that person to testify in person. The first provision would allow self-authentication of machine-generated information upon a submission of a certification prepared by a qualified person. The second provision would provide a similar certification procedure for a copy of data taken from an electronic device, medium, or file. The proposals for new Rules 902(13) and 902(14) would have the same effect as current Rules 902(11) and 902(12), which permit a foundation witness to establish the authenticity of business records by way of certification. One Committee member suggested providing instructions on the application of the rule with the inclusion of examples in the Committee Note. After discussion, Professor Capra agreed to do that.

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Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 902 (13) and (14) for submission to the Judicial Conference for final approval.**

Information Items

Judge Sessions highlighted several information items on behalf of the Advisory Committee.

GUIDE FOR AUTHENTICATING ELECTRONIC EVIDENCE – The Standing Committee discussed the use and dissemination of the draft Guide for Authenticating Electronic Evidence. Written by Judge Grimm, Gregory Joseph, and Professor Capra, the manual would be for the use of the bench and bar and can be amended as necessary to keep pace with technological advances. The manual will be published by the Federal Judicial Center (FJC). The manual is not an official publication of the Advisory Committee itself. The members of the Standing Committee discussed the manual, noting its great value to judges and practitioners who regularly deal with the issue of authenticating electronic evidence, and expressed deep gratitude to its three authors for their work creating it and to the FJC for its assistance with publication.

POSSIBLE AMENDMENTS TO THE NOTICE PROVISIONS IN THE EVIDENCE RULES – The Advisory Committee has been considering ways to amend and make more uniform several notice provisions throughout the Federal Rules of Evidence. For the notice provision of Rule 807(b), the Residual Exception to the hearsay rule, the Advisory Committee is inclined to add a good cause exception to excuse lack of timely notice of the intent to offer statements covered under this exception. The Advisory Committee is also inclined to require that notice under 807(b) be written and not just oral. For the notice provision of Rule 404(b), the Advisory Committee is inclined to remove the requirement that the defendant in a criminal case must first specifically request that the government provide notice of their intent to offer evidence of previous crimes or other bad acts against the defendant. The Advisory Committee concluded that this requirement in Rule 404 was an unnecessary trap for the unwary lawyer and differs from most local rules. Finally, the Advisory Committee has concluded that the notice provisions in Rules 412, 413, 414, and 415 should not be changed through the Rules Enabling Act process as those rules were congressionally enacted and, in any event, are rarely used.

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RESIDUAL EXCEPTION: RULE 807 – Judge Sessions reported on the symposium held in connection with the Advisory Committee's fall 2015 Chicago meeting regarding the potential elimination of the categorical hearsay exceptions (excited utterance, dying declaration, etc.) in favor of expanding the residual hearsay exception. The lawyers who testified before the Advisory Committee unanimously opposed the elimination of the hearsay exceptions. The Advisory Committee agrees that the exceptions should not be eliminated. But the Advisory Committee continues to consider expansion of the residual exception to allow the admission of reliable hearsay even absent "exceptional circumstances." The Advisory Committee included a working draft of amended Rule 807 in the agenda materials. It is planning a symposium in the fall to continue to discuss possible amendments to Rule 807, to be held at Pepperdine School of Law.

TESTIFYING WITNESS'S PRIOR INCONSISTENT STATEMENT: RULE 801(D)(1)(A) – The Advisory Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows, which

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are prior inconsistent statements made under oath during a formal proceeding. The Advisory Committee has rejected the idea of expanding the rule to cover all prior inconsistent statements, but continues to consider inclusion of prior inconsistent statements that have been video recorded.

EXCITED UTTERANCES: RULE 803(2) – The Advisory Committee considered four separate proposals to amend or eliminate Rule 803(2) on the grounds that "excited utterances" are not necessarily reliable. It determined not to take up any of the suggestions given the impact on other rules, as well as an FJC report regarding various social science studies on Rule 803(2) which provided some empirical support for the proposition that immediacy and excitedness tend to guarantee reliability.

CONVERTING CATEGORICAL HEARSAY EXCEPTIONS INTO GUIDELINES – At the suggestion of Judge Milton Shadur, the Advisory Committee considered reconstituting the categorical hearsay exceptions as standards or guidelines rather than binding rules. The Advisory Committee ultimately decided against doing so.

CONSIDERATION OF A POSSIBLE AMENDMENT TO RULE 803(22) – At the suggestion of Judge Graber, the Advisory Committee considered eliminating two exceptions to Rule 803(22): convictions from nolo contendere pleas and misdemeanor convictions. The Advisory Committee concluded that retaining each of these exceptions was warranted.

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RULE 704(B) – Similarly, the Advisory Committee determined not to proceed with suggestions to eliminate Rule 704(b) or to create a specific rule regarding electronic communication and hearsay.

IMPLICATIONS OF *CRAWFORD* – The Advisory Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Maggs provided the report on behalf of the Advisory Committee on Appellate Rules, which met on April 5, 2016, in Denver, Colorado. Judge Colloton advised that Judge Gorsuch will be the new chair of the Advisory Committee as of October 2016.

Judge Colloton reported that the Advisory Committee had four action items in the form of four sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

CONFORMING AMENDMENTS TO RULES 8, 11, AND 39(E)(3) – The first set of amendments recommended for publication were amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Rule of Civil Procedure 62 by revising any clauses that use the antiquated term "supersedeas bond." The language would be changed to "bond or other

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security" as appropriate in each of the rules. Judge Colloton noted that the Civil Rules Committee would discuss the amendment to Rule 62 later in the meeting. He added that the Style Consultants suggested a minor edit to proposed Rule 8(b) (adding the word "a" before "stipulation" on line 16) after the publication of the agenda book materials, and that the Advisory Committee accepted the edit. The Standing Committee discussed the phrase "surety or other security provider" and whether "security provider" contained within it the term "surety" and made minor edits to the proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed conforming amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3), contingent on the Standing Committee's approval of the proposed amendment to Civil Rule 62 later in the meeting.**

LIMITATIONS ON THE FILING OF AMICUS BRIEFS BY PARTY CONSENT: RULE 29(A) – The proposed amendment to Rule 29(a) would allow a court to prohibit or strike the filing of an amicus brief based on party consent where the filing of the brief might cause a judge's disqualification. This amendment would ensure that local rules that forbid the filing of an amicus brief when the filing could cause the recusal of one or more judges would be consistent with Rule 29(a). Professor Coquillette observed that, as important as preserving room for local rules may be, congressional committees in the past have responded to the proliferation of local rules by urging the Rules Committee to allow them only if they respond to distinctive geographic, demographic, or economic realities that prevail in the different circuits. Judge Colloton explained that this proposed amendment is particularly relevant to the rehearing en banc process which traditionally has been decentralized and subject to local variations. He further explained that the Advisory Committee discussed and rejected expanding the exception to other types of amicus filings. The Advisory Committee made minor stylistic edits to the proposed amended rule.

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Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 29(a)**.

APPELLATE FORM 4 – Litigants seeking permission to proceed in forma pauperis are currently required by Appellate Form 4 to provide the last four digits of their Social Security number. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus of the clerks of court that the last four digits of a Social Security number are not needed for any purpose, the Advisory Committee proposes to amend Form 4 by deleting this question.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Appellate Form 4**.

REVISION OF APPELLATE RULE 25 TO ADDRESS ELECTRONIC FILING, SIGNATURES, SERVICE, AND PROOF OF SERVICE – In conjunction with the publication of the proposed amendment to Civil Rule 5, and in an effort to achieve an optimal degree of uniformity, the Advisory Committee

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proposes to amend Appellate Rule 25 to address electronic filing, signatures, service, and proof of service. The proposed revision generally requires all parties represented by counsel to file electronically. The Standing Committee discussed the use of "person" versus "party" throughout the proposed amended rule, as well as the use of these phrases in the companion Criminal and Civil Rules. One minor stylistic amendment was proposed. The Standing Committee decided to hold over the vote to approve publication of the proposed amendment to Rule 25 until the discussion regarding Civil Rule 5.

Information Item

Judge Colloton discussed whether Appellate Rules 26.1 and 29(c) should be amended to require additional disclosures to provide further information for judges in determining whether to recuse themselves. It is an issue that the Advisory Committee will consider at its fall meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Advisory Committee on Civil Rules, which met on April 14, 2016, in Palm Beach, Florida. The Advisory Committee had four action items in the form of three sets of proposed amendments to be published this upcoming summer and the pilot project proposal.

Action Items

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RULE 5 – The Advisory Committees for Civil, Appellate, Bankruptcy, and Criminal Rules have recently worked together to create uniform provisions for electronic filing and service across the four sets of rules to achieve an optimal degree of uniformity. Professor Cooper explained that the Advisory Committee for Criminal Rules wisely decided to create their own stand-alone rule, proposed Criminal Rule 49.

With regard to filing, the proposed amendment to Rule 5 requires a party represented by an attorney to file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. It allows unrepresented parties to file electronically if permitted by court order or local rule. And it provides that an unrepresented party may be required to file electronically only by court order or by a local rule that includes reasonable exceptions. Under the amended rule, a paper filed electronically would constitute a written paper for purposes of the rules.

With regard to service, the amended rule provides that a paper is served by sending it to a registered user by filing it with the court's electronic filing system or by sending it by other electronic means if that person consents in writing. In addition, service is complete upon filing via the court's electronic filing system. Rule 5(b)(3), which allows electronic service only if a local rule authorizes it, would be abrogated to avoid inconsistency with the amended rule.

The Standing Committee discussed the use of the terms "person" and "party" throughout Rule 5 and across other sets of rules and agreed to consider this issue further after the meeting.

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Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 5 for publication for public comment**.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Appellate Rule 25 that conforms to the amended Civil Rule 5**.

RULE 23 – Judge Bates detailed six proposed changes to Rule 23, many of which concern settlements in class action lawsuits. Rule 23(c)(2)(B) extends notice consideration to a class proposed to be certified for settlement. Rule 23(e) applies the settlement procedural requirements to a class proposed to be certified for purposes of settlement. Rule 23(e)(1) spells out what information parties should give the courts prior to notice and under what circumstances courts should give notice to the parties. Rule 23(e)(2) lays out general standards for approval of the proposed settlement. Rule 23(e)(5) concerns class action objections, requiring objectors to state to whom the objection applies, requiring court approval for any payment for withdrawing an objection or dismissing an appeal, and providing that the indicative ruling procedure be used if an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. Finally, Rule 23(f) specifies that an order to give notice based on a likelihood of certification under Rule 23(e)(1) is not appealable and extends to 45 days the amount of time for an appeal if the United States is a party. Judge Robert Dow, the chair of the Rule 23 Subcommittee, explained the outreach efforts by the subcommittee and stated that many of the proposed changes would provide more flexibility for judges and practitioners. The Rule 23 Subcommittee, under Judge Dow's leadership and with research support from Professor Marcus, has devoted years to generating these proposed amendments, organized multiple conferences around the country with class action practitioners, and considered many other possible amendments.

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Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed package of amendments to Civil Rule 23 for publication for public comment**.

RULE 62 – Judge Bates reported that a subcommittee composed of members of the Appellate and Civil Rules Committees and chaired by Judge Scott Matheson laid the groundwork for amendments to Rule 62. The proposed amendment includes three changes to the rule. First, Rule 62(a) extends the automatic stay from 14 days to 30 days in order to eliminate the "gap" between the 14-day automatic stay and the 28 days allowed for various post-judgment motions. Second, it recognizes the court's authority to dissolve the automatic stay or replace it with a court-ordered stay for a longer duration. Third, Rule 62(b) clarifies that security other than a bond may be posted. Another organizational change is a proposed new subsection (d) that would include language from current subsections (a) and (c). Judge Bates added that the word "automatic" would be removed from the heading of Rule 62(c) and that conforming edits will be made to the proposed rule to accommodate changes made to the companion Appellate Rules. Professor Cooper stated that Rule 65.1 would be conformed to Appellate Rules 8, 11, and 39 after the conclusion of the meeting.

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Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 62 for publication for public comment. It also approved granting to the Civil Rules Advisory Committee the authority to make amendments to Rule 65.1 to conform it to Appellate Rules 8, 11, and 39 with the goal of seeking approval of the Standing Committee in time to publish them simultaneously in August 2016. Finally, with the amendment to Civil Rule 62 officially approved for publication, it also approved for publication the proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) which all conform to the amended Civil Rule 62**.

PILOT PROJECTS – Judge Campbell provided the report of the Pilot Projects Subcommittee, which included participants from the Standing Committee, CACM, and the FJC. The Subcommittee has collected and reviewed a lot of information, including working with focus groups of lawyers with experience with these types of discovery regimes. As a result of this work, the Advisory Committee seeks approval to forward the Mandatory Initial Discovery Pilot Project and Expedited Procedures Pilot Project to the Judicial Conference for approval. The first project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay.

Judge Campbell proceeded to detail each pilot project and asked for comments and suggestions on the proposals. For the first pilot project, Judge Campbell explained the proposed procedures. The Standing Committee then discussed whether or not all judges in a district would be required to participate in the pilot project, how to choose the districts that should participate, and how to measure the results of the pilot studies. Judge Bates noted the Advisory Committee's strong support of the project. Several Standing Committee members voiced their support as well.

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For the second pilot project, many of the procedures are already available, and the purpose of the pilot project is to use education and training to achieve greater use of available procedures. Judge Campbell advised the Committee that CACM has created a case dashboard that will be available to judges via CM/ECF, and that judges will be able to use this tool to monitor the progress of their cases. The pilot would require a bench/bar meeting each year to monitor progress.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the recommendation to the Judicial Conference of the (i) Mandatory Initial Discovery Pilot Project and (ii) Expedited Procedures Pilot Project, with delegated authority for the Advisory Committee and the Pilot Projects Subcommittee to make refinements to the projects as discussed by the Committee.**

Information Items

EDUCATIONAL EFFORTS REGARDING 2015 CIVIL RULES PACKAGE – Judge Bates outlined some of the efforts undertaken by the Advisory Committee and the FJC to educate the bench and the bar about the 2015 discovery reforms of the Rules of Civil Procedure. Among other efforts, he mentioned the production of several short videos, a 90-minute webinar, plenary sessions at

workshops for district court judges and magistrate judges, segments on the discovery reforms at several circuit court conferences, and other programs sponsored by the American Bar Association.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Ericksen, to consider possible amendments to Rule 30(b)(6). Professor Cooper stated that the Advisory Committee is considering amending Rule 81(c) in light of a concern that it may not adequately protect against forfeiture of the right to a jury trial after a case has been removed from state court.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Advisory Committee on Criminal Rules, which met on April 18, 2016, in Washington, D.C. He reported that the Advisory Committee had three action items in the form of three proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

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RULE 49 – Judge Molloy explained the proposed new stand-alone rule governing electronic service and filing in criminal cases. The Advisory Committee determined to have a stand-alone rule for criminal cases rather than to continue the past practice of incorporating Civil Rule 5 by reference. The proposed amendments to Rule 49 track the general order of Civil Rule 5 rule and much of its language. Unlike the civil rule, Rule 49's discussion of electronic filing and service comes before nonelectronic filing and service in the new criminal rule. Both rules provide that an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. But one substantive difference between the two rules is that, under Civil Rule 5, an unrepresented party may be required to file electronically by court order or local rule. A second substantive difference is that all nonparties must file and serve nonelectronically in the absence of a contrary court order or local rule. This conforms to the current architecture of CM/ECF which only allows the government and the defendant to file electronically in a criminal case. Third, proposed Rule 49 contains language borrowed from Civil Rule 11(a) regarding signatures.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rules 49 for publication for public comment.**

RULE 45(C) – The proposed amendment to Rule 45(c) is a conforming amendment. It replaces the reference to Civil Rule 5 with a reference to Rule 49(a)(4)(C),(D), and (E).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rules 45(c) for publication for public comment.**

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RULE 12.4 – The proposed amendment to Rule 12.4, changes the required disclosures for statements under Rule 12.4 regarding organizational victims. It permits a court, upon the showing of good cause, to relieve the government of the burden of filing a statement identifying any organizational victim. The proposed amendments reflect changes to the Code of Judicial Conduct and require a party to file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance. The Standing Committee briefly discussed similar potential changes to the Appellate Rules regarding disclosure of organizational victims. And the Advisory Committee discussed removing the word "supplemental" from the title and body of Rule 12.4(b) in order to avoid potential confusion.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 12.4 for publication for public comment.**

Information Items

Judge Molloy reviewed several of the pending items under consideration by the Advisory Committee. The Cooperator Subcommittee continues to consider the problem of risk of harm to cooperating defendants and the kinds of procedural protections that might alleviate this problem. The Subcommittee includes representatives from the Advisory Committee, Standing Committee, CACM, and the Department of Justice. The Advisory Committee has formed subcommittees to consider suggested amendments to Criminal Rule 16 dealing with discovery in complex criminal cases and Rule 5 of the Rules Governing Section 2255 Proceedings regarding petitioner reply briefs. And in response to an op-ed by Judge Jon Newman, the Advisory Committee will consider the wisdom of reducing the number of peremptory challenges in federal trials.

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REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Sandra Ikuta and Professors Gibson and Harner presented the report on behalf of the Advisory Committee on Bankruptcy Rules, which met on March 31, 2016, in Denver, Colorado. The Advisory Committee had nine action items, and sought final approval for three of the items: Rule 1001; Rule 1006, and technical changes to certain official forms.

Action Items

RULE 1001 – The first item was a request for final approval of Rule 1001, dubbed the "civility rule" by Judge Ikuta, which was published in August 2015 to track changes to Civil Rule 1. Judge Ikuta explained that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1001 for submission to the Judicial Conference for final approval.**

RULE 1006 – The second item was a proposed change to Rule 1006(b), also published for comment in August 2015. The rule explains how a person filing a petition in bankruptcy can pay

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the filing fee in installments, as allowed by statute. The proposed amendment clarified that courts may not refuse to accept petitions or summarily dismiss a case because the petitioner failed to make an initial installment payment at the time of filing (even if such a payment was required by local rule). Judge Ikuta said that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1006 for submission to the Judicial Conference for final approval.**

TECHNICAL CHANGES TO OFFICIAL FORMS – Judge Ikuta next described the Advisory Committee's recommendation for retroactive approval of technical changes to nine official forms. She explained that the Judicial Conference at its March 2016 meeting approved a new process for making technical amendments to official bankruptcy forms. Under the new process, the Advisory Committee makes the technical changes, subject to retroactive approval by the Committee and report to the Judicial Conference. Judge Sutton thanked Judge Ikuta for developing the new streamlined approval process for technical changes to official bankruptcy forms.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424, for submission to the Judicial Conference for final approval.**

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Judge Ikuta reported that the Advisory Committee had six additional action items in the form of six sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Committee.

Before focusing on these specific recommendations, however, Judge Ikuta first suggested that the Committee adopt a procedure for more systematically coordinating publication and approval of amendments that affect multiple rules across different advisory committees. The chair recommended that the Rules Committee Support Office lead the coordination effort over the next year and that the Committee then evaluate whether further refinement of the process is needed. Judge Ikuta next explained and sought approval for a package of conforming amendments:

RULE 5005(A)(2) – Judge Ikuta said that the proposed amendments to Rule 5005(a)(2) would make the rule consistent with the proposed amendment to Civil Rule 5(d)(3).

RULES 8002(C), 8011(A)(2)(C), OFFICIAL FORM 417A, RULE 8002(B), RULES 8013, 8015, 8016, 8022, OFFICIAL FORM 417C, PART VIII APPENDIX, AND RULE 8017 – Judge Ikuta next discussed proposed changes to Rules 8002(c), 8011(a)(2)(C), and Official Form 417A; Rule 8002(b) (regarding timeliness of tolling motions); Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (regarding length limits), and Rule 8017 (regarding amicus filings). The rule and form changes were proposed to conform to pending and proposed changes to the Federal Rules of Appellate Procedure.

RULE 8002(A)(5) – The new subdivision (a)(5) to Rule 8002 includes a provision similar to FRAP 4(a)(7) specifying when a judgment or order is "entered" for purposes of appeal.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the package of conforming amendments to Rules 5005(a)(2), 8002(C), 8011(a)(2)(C), Official Form 417C, Part VIII Appendix, Rule 8017, and Rule 8002(a)(5) for publication for public comment.**

RULES 3015 AND 3015.1 – Judge Ikuta explained that the Advisory Committee published the first version of the plan form and nine related rule amendments in August 2013. The Advisory Committee received a lot of comments, made significant changes, and republished in 2014. During the second publication, the Advisory Committee again received many comments, including one comment signed by 144 bankruptcy judges who opposed a national official form for chapter 13 plans. Late in the second comment period, the Advisory Committee received a comment proposing that districts be allowed to opt out of the national plan if their local plan form met certain requirements. Many of the bankruptcy judges who opposed a national plan form supported the "opt-out" proposal.

At its fall 2015 meeting, the Advisory Committee approved the national plan form and related rule amendments, but voted to defer submitting those items for final approval pending further consideration of the opt-out proposal. The Advisory Committee reached out to bankruptcy interest groups, made refinements to the opt-out proposal, and received support from most interested parties, including many of the 144 opposing judges.

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The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out provision. Rule 3015 would require that the national chapter 13 plan form be used unless a district adopts a local district-wide form plan that complies with requirements set forth in proposed new Rule 3015.1. The Advisory Committee determined that a third publication period would allow for full vetting of the opt-out proposal, but it recommended a shortened three-month public comment period because of the narrow focus of the proposed change. To avoid confusion, the Advisory Committee recommended that opt-out rules be published in July 2016, a month earlier than the rules and forms to be published in August 2016.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 3015 and 3015.1 for publication for public comment.**

RULE 8006 – The Advisory Committee proposed to amend subdivision (c) of Rule 8006 to allow a bankruptcy court, bankruptcy appellate panel, or district court to file a statement in support of or against a direct appeal certification filed by the parties.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8006 for publication for public comment.**

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RULE 8018.1 –This new rule would help guide district courts in light of the Supreme Court's *Stern v. Marshall* trilogy of cases (*Stern*, *Arkison* and *Wellness*). Proposed Rule 8018.1 would address a situation where the bankruptcy court has mistakenly decided a *Stern* claim by allowing the district court to treat the bankruptcy court's erroneous final judgment as proposed findings of fact and conclusions of law to be decided de novo without having to remand the case to the bankruptcy court.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed Rule 8018.1 for publication for public comment.**

RULE 8023 – The proposed amendment to Rule 8023 would add a cross-reference to Rule 9019 to remind the parties that when they enter a settlement and move to dismiss an appeal, they may first need to obtain the bankruptcy court's approval of the settlement first.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8023 for publication for public comment.**

OFFICIAL FORM 309F – Judge Ikuta said that the Advisory Committee recommended publication of amendments to five official bankruptcy forms. The first of the five forms was a proposed amendment to Official Form 309F. The form currently requires that a creditor who wants to assert that certain corporate and partnership debts are not dischargeable must file a complaint by a specific deadline. A recent district court decision evaluated the relevant statutory provisions and concluded that the form is incorrect and that no deadline should be imposed. The Advisory Committee agreed that the statute is ambiguous, and therefore proposed that Official Form 309F be amended to avoid taking a position.

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Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Form 309F for publication for public comment.**

OFFICIAL FORMS 25A, 25B, 25C, AND 26 – Four forms, Official Forms 25A, 25B, 25C (the small business debtor forms), and 26 (Periodic Report Regarding Value, Operations, and Profitability) were renumbered as 425A, 425B, 425C and 426 to conform with the remainder of the Forms Modernization Project, and revised to be easier to understand and more consistent with the Bankruptcy Code.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Forms 25A, 25B, 25C, 26 for publication for public comment.**

Information Items

Judge Ikuta, Professor Elizabeth Gibson, and Professor Michelle Harner discussed the Advisory Committee's two information items. The first item was about the status of the Advisory Committee's proposal to add a new subdivision (h) to Rule 9037 in response to a suggestion

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from CACM. Judge Ikuta and Professor Gibson explained that although the Advisory Committee approved an amendment, it decided to delay its recommendation for publication until the Advisory Committees for Appellate, Criminal and Civil Rules can decide whether to add a similar procedure to their privacy rules. Professor Harner summarized the second information item regarding the Advisory Committee's decision not to recommend any changes at this time to Rule 4003(c) in response to a suggestion.

REPORT OF THE ADMINISTRATIVE OFFICE

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Rebecca Womeldorf discussed the Executive Committee's *Strategic Plan for the Federal Judiciary* which lays out various goals and priorities for the federal judiciary. She invited members to review this report and offer any input or feedback that they might have to her or Judge Sutton for inclusion in communications back to the Executive Committee.

LEGISLATIVE REPORT – There are bills currently pending in the House of Representatives and Senate intended to prevent proposed Criminal Rule 41 from becoming effective. Members of the Rules Committee have discussed this proposed rule with various members of Congress to respond to their concerns and explain the purpose and limited scope of the proposed rule.

CONCLUDING REMARKS

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Judge Sutton thanked the Reporters for all their impressive work and Rebecca Womeldorf and the Rules Committee Support Office for helping to coordinate the meeting. Professor Coquillette thanked Judge Sutton again for all of his work as Chair of the Standing Committee over the past four years. Judge Sutton concluded the meeting. The Standing Committee will next meet in Phoenix, Arizona, on January 3–4, 2017.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

1 **Rule 4. Arrest Warrant or Summons on a Complaint**

2 **(a) Issuance.** If the complaint or one or more affidavits
3 filed with the complaint establish probable cause to
4 believe that an offense has been committed and that
5 the defendant committed it, the judge must issue an
6 arrest warrant to an officer authorized to execute it.
7 At the request of an attorney for the government, the
8 judge must issue a summons, instead of a warrant, to a
9 person authorized to serve it. A judge may issue more
10 than one warrant or summons on the same complaint.
11 If a<u>n individual</u> defendant fails to appear in response
12 to a summons, a judge may, and upon request of an
13 attorney for the government must, issue a warrant.<u> If</u>
14 <u>an organizational defendant fails to appear in response</u>

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

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15 to a summons, a judge may take any action authorized
16 by United States law.
17 * * * * *
18 **(c) Execution or Service, and Return.**
19 **(1)** ***By Whom.*** Only a marshal or other authorized
20 officer may execute a warrant. Any person
21 authorized to serve a summons in a federal civil
22 action may serve a summons.
23 **(2)** ***Location.*** A warrant may be executed, or a
24 summons served, within the jurisdiction of the
25 United States or anywhere else a federal statute
26 authorizes an arrest. A summons to an
27 organization under Rule 4(c)(3)(D) may also be
28 served at a place not within a judicial district of
29 the United States.
30 **(3)** ***Manner.***
31 (A) A warrant is executed by arresting the

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32 defendant. Upon arrest, an officer
33 possessing the original or a duplicate
34 original warrant must show it to the
35 defendant. If the officer does not possess
36 the warrant, the officer must inform the
37 defendant of the warrant's existence and of
38 the offense charged and, at the defendant's
39 request, must show the original or a
40 duplicate original warrant to the defendant
41 as soon as possible.

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42 (B) A summons is served on an individual
43 defendant:
44 (i) by delivering a copy to the defendant
45 personally; or
46 (ii) by leaving a copy at the defendant's
47 residence or usual place of abode with
48 a person of suitable age and discretion

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49 residing at that location and by
50 mailing a copy to the defendant's last
51 known address.
52 (C) A summons is served on an organization in
53 a judicial district of the United States by
54 delivering a copy to an officer, to a
55 managing or general agent, or to another
56 agent appointed or legally authorized to
57 receive service of process. ~~A copy~~If the
58 agent is one authorized by statute and the
59 statute so requires, a copy must also be
60 mailed to the organization~~organization's~~
61 ~~last known address within the district or to~~
62 ~~its principal place of business elsewhere in~~
63 ~~the United States~~.

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64 (D) A summons is served on an organization
65 not within a judicial district of the United
66 States:
67 (i) by delivering a copy, in a manner
68 authorized by the foreign
69 jurisdiction's law, to an officer, to a
70 managing or general agent, or to an
71 agent appointed or legally authorized
72 to receive service of process; or
73 (ii) by any other means that gives notice,
74 including one that is:
75 (a) stipulated by the parties;
76 (b) undertaken by a foreign authority
77 in response to a letter rogatory, a
78 letter of request, or a request
79 submitted under an applicable
80 international agreement; or

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81 (c) permitted by an applicable

82 international agreement.

83 * * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

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Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

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Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

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Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a

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managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

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Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable

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international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

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1 **Rule 41. Search and Seizure**

2 * * * * *

3 **(b)** ~~**Authority to Issue a Warrant**~~**Venue for a Warrant**

4 **Application.** At the request of a federal law

5 enforcement officer or an attorney for the

6 government:

7 * * * * *

8 **(6)** a magistrate judge with authority in any district

9 where activities related to a crime may have

10 occurred has authority to issue a warrant to use

11 remote access to search electronic storage media

12 and to seize or copy electronically stored

13 information located within or outside that district

14 if:

15 (A) the district where the media or information

16 is located has been concealed through

17 technological means; or

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18 (B) in an investigation of a violation of
19 18 U.S.C. § 1030(a)(5), the media are
20 protected computers that have been
21 damaged without authorization and are
22 located in five or more districts.
23 * * * * *
24 **(f) Executing and Returning the Warrant.**
25 **(1)** ***Warrant to Search for and Seize a Person or***
26 ***Property.***
27 * * * * *
28 (C) *Receipt.* The officer executing the warrant
29 must give a copy of the warrant and a
30 receipt for the property taken to the person
31 from whom, or from whose premises, the
32 property was taken or leave a copy of the
33 warrant and receipt at the place where the
34 officer took the property. For a warrant to

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35 use remote access to search electronic
36 storage media and seize or copy
37 electronically stored information, the
38 officer must make reasonable efforts to
39 serve a copy of the warrant and receipt on
40 the person whose property was searched or
41 who possessed the information that was
42 seized or copied. Service may be
43 accomplished by any means, including
44 electronic means, reasonably calculated to
45 reach that person.
46 * * * * *

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Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

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Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

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As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

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Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

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1 **Rule 45. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service.**
4 Whenever a party must or may act within a specified
5 ~~period~~ time after ~~service~~ being served and service is
6 made ~~in the manner provided~~ under Federal Rule of
7 Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving
8 with the clerk), ~~(E) or (F)~~ (other means consented to),
9 3 days are added after the period would
10 otherwise expire under subdivision (a).

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Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

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Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

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added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

3 **(1)** ***Nongovernmental Corporate Party.*** Any
4 nongovernmental corporate party to a proceeding
5 in a district court must file a statement that
6 identifies any parent corporation and any
7 publicly held corporation that owns 10% or more
8 of its stock or states that there is no such
9 corporation.

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10 **(2)** ***Organizational Victim.*** Unless the government
11 shows good cause, it must file a statement
12 identifying any organizational victim of the
13 alleged criminal activity.~~If an organization is a~~
14 ~~victim of the alleged criminal activity, the~~

[1] New material is underlined in red; matter to be omitted is lined through.

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~~government must file a statement identifying the victim~~. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time ~~for~~to File~~ing~~; ~~Supplemental~~Later Filing. A party must:

(1) file the Rule 12.4(a) statement within 28 days after~~upon~~ the defendant's initial appearance; and

(2) ~~promptly~~ file a ~~supplemental~~ statement at a later time promptly if the party learns of any additional required information or any changes in required information~~upon any change in the information that the statement requires~~.

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Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of

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Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has "an interest that could be substantially affected by the outcome of the proceeding." In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

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Because a filing made after the 28 day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have also been revised to refer to a later, rather than a supplemental, filing.

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1 **Rule 45. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time After Certain Kinds of Service.**
4 Whenever a party must or may act within a specified
5 time after being served and service is made under
6 Federal Rule of ~~Civil~~Criminal Procedure 49(a)(4)(C),
7 (D), and (E)~~5(b)(2)(C) (mailing), (D) (leaving with~~
8 ~~the clerk), or (F) (other means consented to)~~, 3 days
9 are added after the period would otherwise expire
10 under subdivision (a).[2]

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Committee Note

Rule 49 previously required service and filing "in a manner provided" in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain forms of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49.

[2] This rule text reflects amendments adopted by the Supreme Court and transmitted to Congress on April 28, 2016, which have an anticipated effective date of December 1, 2016.

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This amendment revises the cross references in Rule 45(c) to reflect this change.

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1 **Rule 49. Serving and Filing Papers**

2 **(a) Service on a Party.**

3 **(1) *What is*~~*When*~~ *Required.*** ~~A party must serve on~~

4 ~~every other party~~Each of the following must be

5 served on every party: any written motion (other

6 than one to be heard ex parte), written notice,

7 designation of the record on appeal, or similar

8 paper.

9 ~~**(b) How Made.** Service must be made in the manner~~

10 ~~provided for a civil action.~~

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11 **(2) *Serving a Party's Attorney.*** Unless the court

12 orders otherwise, ~~W~~when these rules or a court

13 order requires or permits service on a

14 party represented by an attorney, service must be

15 made on the attorney instead of the party~~, unless~~

16 ~~the court orders otherwise~~.

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17 **(3) *Service by Electronic Means.***

18 (A) *Using the Court's Electronic Filing System.*

19 A party represented by an attorney may

20 serve a paper on a registered user by filing

21 it with the court's electronic-filing system.

22 A party not represented by an attorney may

23 do so only if allowed by court order or local

24 rule. Service is complete upon filing, but is

25 not effective if the serving party learns that

26 it did not reach the person to be served.

27 (B) *Using Other Electronic Means.* A paper

28 may be served by any other electronic

29 means that the person consented to in

30 writing. Service is complete upon

31 transmission, but is not effective if the

32 serving party learns that it did not reach the

33 person to be served.

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34 (4) ***Service by Nonelectronic Means***. A paper may
35 be served by:
36 (A) handing it to the person;
37 (B) leaving it:
38 (i) at the person's office with a clerk or
39 other person in charge or, if no one is
40 in charge, in a conspicuous place in
41 the office; or
42 (ii) if the person has no office or the office
43 is closed, at the person's dwelling or
44 usual place of abode with someone of
45 suitable age and discretion who
46 resides there;
47 (C) mailing it to the person's last known
48 address—in which event service is
49 complete upon mailing;
50 (D) leaving it with the court clerk if the person
51 has no known address; or

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52 (E) delivering it by any other means that the
53 person consented to in writing—in which
54 event service is complete when the person
55 making service delivers it to the agency
56 designated to make delivery.
57 **(b) Filing.**
58 **(1) *When Required; Certificate of Service.*** Any
59 paper that is required to be served—together
60 with a certificate of service—must be filed
61 within a reasonable time after service. A notice
62 of electronic filing constitutes a certificate of
63 service on any person served by the court's
64 electronic-filing system.
65 **(2) *Means of Filing.***
66 (A) *Electronically.* A paper is filed
67 electronically by filing it with the court's
68 electronic-filing system. The user name
69 and password of an attorney of record,

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70 together with the attorney's name on a
71 signature block, serves as the attorney's
72 signature. A paper filed electronically is
73 written or in writing under these rules.
74 (B) *Nonelectronically.* A paper not filed
75 electronically is filed by delivering it:
76 (i) to the clerk; or
77 (ii) to a judge who agrees to accept it for
78 filing, and who must then note the
79 filing date on the paper and promptly
80 send it to the clerk.

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81 **(3) *Means Used by Represented and Unrepresented***
82 ***Parties.***
83 (A) *Represented Party.* A party represented by
84 an attorney must file electronically, unless
85 nonelectronic filing is allowed by the court
86 for good cause or is allowed or required by
87 local rule.

88 (B) *Unrepresented Party.* A party not
89 represented by an attorney must file
90 nonelectronically, unless allowed to file
91 electronically by court order or local rule.
92 **(4)** ***Signature.*** Every written motion and other
93 paper must be signed by at least one attorney of
94 record in the attorney's name—or by a person
95 filing a paper if the person is not represented by
96 an attorney. The paper must state the signer's
97 address, e-mail address, and telephone number.
98 Unless a rule or statute specifically states
99 otherwise, a pleading need not be verified or
100 accompanied by an affidavit. The court must
101 strike an unsigned paper unless the omission is
102 promptly corrected after being called to the
103 attorney's or person's attention.
104 **(5)** ***Acceptance by the Clerk.*** The clerk must not
105 refuse to file a paper solely because it is not in

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106 the form prescribed by these rules or by a local
107 rule or practice.
108 **(c)** **Service and Filing by Nonparties.** A nonparty may
109 serve and file a paper only if doing so is required or
110 permitted by law. A nonparty must serve every party
111 as required by Rule 49(a), but may use the court's
112 electronic-filing system only if allowed by court order
113 or local rule.
114 **(d)** **Notice of a Court Order.** When the court issues an
115 order on any post-arraignment motion, the clerk
116 must ~~provide notice in a manner provided for in a civil~~
117 ~~action~~ serve notice of the entry on each party as
118 required by Rule 49(a). A party also may serve notice
119 of the entry by the same means. Except as Federal
120 Rule of Appellate Procedure 4(b) provides otherwise,
121 the clerk's failure to give notice does not affect the
122 time to appeal, or relieve—or authorize the court to

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123 relieve—a party's failure to appeal within the allowed
124 time.
125 ~~**(d) Filing.** A party must file with the court a copy of any~~
126 ~~paper the party is required to serve. A paper must be~~
127 ~~filed in a manner provided for in a civil action.~~
128 ~~**(e) Electronic Service and Filing.** A court may, by local~~
129 ~~rule, allow papers to be filed, signed, or verified by~~
130 ~~electronic means that are consistent with any technical~~
131 ~~standards established by the Judicial Conference of~~
132 ~~the United States. A local rule may require electronic~~
133 ~~filing only if reasonable exceptions are allowed. A~~
134 ~~paper filed electronically in compliance with a local~~
135 ~~rule is written or in writing under these rules.~~

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Committee Note

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on

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filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

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Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, "Each of the following must be served on every party" restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the "unless" clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

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By listing service by filing with the court's electronic-filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

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Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic filing system.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

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Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing "in a manner provided for in a civil action" has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it is intended to have the same meaning as the Civil Rules provision from which it was drawn.

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The last sentence of subsection (b)(1), which states that a notice of electronic filing constitutes a certificate of service on a party served by using the court's electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing

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using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

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Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic

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confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word "party" changed to "person" in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

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The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided "in a manner provided for in a civil action" has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(d).

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MEMO TO:	**Criminal Rules Committee**
FROM:	**Professors Sara Sun Beale and Nancy King, Reporters**
RE:	**Report from 2255 Rule 5 Subcommittee**
DATE:	**September 1, 2016**

At its April 2016 meeting, the Committee discussed a letter from Judge Richard Wesley expressing concern about inconsistent district court interpretations of Rule 5(d) of the Rules Governing Section 2255 Proceedings. Rule 5(d) presently provides: "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." This subsection was added by amendment in 2004, and its legislative history suggests that it was intended to give all inmates who file an application for relief under Section 2255 the opportunity to file a reply to the government's responsive pleading. The opportunity to reply may be essential to applicants, particularly as some issues are first raised in the government's response. Several district courts, however, have read Rule 5 differently, as leaving the opportunity to file a reply up to the court's discretion.

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Committee Members discussed whether Rule 5(d) should be amended to make it even clearer that inmates are entitled to file a reply, whether to add to the Rule a presumptive deadline for filing a reply, and whether similar changes are needed in Rule 5(e) of the Rules Governing Section 2254 Proceedings, a provision added in 2004 contemporaneously with the addition of Rule 5(d) to the 2255 Rules. Judge Molloy appointed a Subcommittee with Judge Kemp as Chair to consider these matters further. The Subcommittee met by telephone on August 18, after receiving a Reporter's memorandum and research from the Rules Office. Members expressed doubt about whether an amendment was warranted, and the Subcommittee agreed that the reporters should explore steps other than amendment that might be available for addressing case law that has misinterpreted the rule. The Subcommittee also wanted to get input from the Committee at the September meeting. This memorandum summarizes the information provided to the Subcommittee, the Subcommittee's deliberations, and new information obtained following the telephone conference.

In light of the information in this memorandum and its attachments, the Subcommittee seeks feedback from the Committee regarding the following options: (1) proposing an amendment to Rule 5(d); (2) taking one or more steps other than amendment to address the decisions denying a right to reply; (3) placing the issue on the Committee's study agenda to evaluate again at a later time; or (4) taking no action.

Section I provides the essential background regarding both Rule 5 of the 2255 Rules and Rule 5 of the 2254 Rules, and the present application of these provisions. Section I A. discusses

their text and legislative history. Section 1B. reviews commentary and case law construing the relevant provisions. Section I C. summarizes research into the local rules and standing orders governing replies in 2255 and 2254 proceedings and the practices in various districts.

The remainder of the memorandum considers possible Committee action. Section II reviews the considerations for and against an amendment to Rule 5(d) that would clarify the right to reply. We also discuss several potential avenues to address inconsistent interpretation in the district courts that would not involve amending the Rule. Section III considers the features of a possible amendment that would clarify the right to reply, should the Committee decide to pursue an amendment. Finally, Section IV addresses whether the same treatment is warranted for Rule 5(e) of the Rules Governing Section 2254 Proceedings.

This memorandum does not address whether to include a new presumptive deadline for filing a reply as part of an amendment to Rule 5 or what that deadline might be. The Subcommittee chose not to discuss these issues, concluding that they were not relevant to the choice of action required to clarify the right to reply; they could be addressed later if the Committee chose to pursue an amendment.

I. Background on Rule 5 and the Division over its meaning.

A. The text, legislative history, committee note, and cases construing Rule 5(d)

The Subcommittee agreed that that the text, legislative history, and committee note all support the view that the current rule gives prisoners the right to file a reply.

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1. The text

Rule 5(d) presently provides (emphasis added): "The moving party *may submit* a reply to the respondent's answer or other pleading within a time fixed by the judge." The Federal Rules generally use the term "may" to indicate that the court or party has the authority to take some action. In the view of the style consultants, the text is now clear: it gives the prisoner a right to file a reply, and any effort to clarify the language would be problematic. In an email to the reporters, Professor Kimble explained:

> The style consultants agree that the rule should not be changed. The word "may" means that the party is permitted to do it. That's what "may" means. Lower courts that require the court's permission are acting contrary to what the rule says. What's more, changing this "may" has implications for other uses of "may." Now do we have to worry that all those other uses of "may" without some kind of intensifier don't really grant permission?

2. The legislative history of the 2254 and 2255 Rules

The legislative history of the rules provides strong support for the view that the Criminal Rules Committee and the Standing Committee intended the amendment to give prisoners the right to file a reply. These provisions were first proposed as amendments to the 2254 and 2255 Rules in 2002, by a Subcommittee of the Criminal Rules Committee chaired by Judge David Trager. Prior to the amendment, the 2254 and 2255 Rules made no mention of a reply (or traverse). The 2004 amendment added the provision addressing the reply, and changed the title of the rule from "Answer; contents" to "The Answer and the Reply."

When the 2004 amendments to 2254 Rule 5 and 2255 Rule 5 were originally proposed, committee members were divided on the question whether allowing prisoners to file a reply was a substantive change, but unanimous in concluding that prisoners "should be provided with that opportunity."[1] After discussion, the Committee voted unanimously to include the new provision in the amendment proposed for publication.[2]

At the Standing Committee meeting when the revisions to the habeas rules were proposed for publication, Judge Trager explained that "Rule 5 of both sets of rules would be amended to *give the petitioner or moving party a right* to reply to the government's answer or other pleading," which he said most judges already allowed (emphasis added).[3] The Standing Committee unanimously approved these provisions (along with all of the other changes to the habeas rules proposed at the same time).[4]

At the conclusion of the public comment period, the Committee revisited the parallel provisions in the 2254 and 2255 Rules, and the minutes explicitly recognize that the revised rules would give prisoners in both 2254 and 2255 cases a "right" to file a reply. The Committee first took up Rule 5(e) in the 2254 Rules. The minutes state (emphasis added):

> The Committee discussed proposed Rule 5(e) that would *provide the petitioner with the right to file a response* to the respondent's answer. Judge Miller moved, and Judge Trager seconded, a motion that *the rule remain as published, that is, petitioners would have the right to reply in all cases*. The motion carried by a vote of 5 to 3.[5]

The Committee then turned its attention to the 2255 Rules. The minutes state (emphasis added):

> The Committee had previously discussed the proposed amendment to *proposed Rule 5(e), of the § 2254 rules that would provide the petitioner with the right to file a response* to the respondent's answer. That proposal had been approved by a vote of 5 to 3, supra. *The Committee agreed that the approach should be applied to Rule 5(d) of the § 2255 rules.*[6]

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The Committee's view was informed by its comprehensive revision of the habeas rules, which also included the requirement that the government's answer raise procedural bars and the statute of limitations.[7] It is understandable that the Committee would want to guarantee the

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[1] In his report describing the work of the Habeas Corpus Subcommittee, Judge Trager stated that the subcommittee draft "provided that the petitioner or moving party may file a reply within a time fixed by the judge." Agenda Book, Criminal Rules Meeting, April 2002, at 164. He observed that he did not view this as a substantive change because most judges already provided this opportunity. But he also recognized that "some may feel otherwise." *Id*. The minutes of the Committee meeting report that Judge Bucklew did view this as a substantive change, but she stated that "the petitioner and moving party should be provided with that opportunity." Minutes of Advisory Committee on Criminal Rules, April 10-11, 2002, at 7.

[2] *Id.*

[3] Comm. on Rules of Practice and Procedure, Minutes, June 10-1, 2002, at 26-27.

[4] *Id.*

[5] Minutes of Advisory Committee on Criminal Rules, April 28-29, 2003, at 4.

[6] *Id.* at 6.

[7] In "Changes Made After Publication and Comments," the Committee observed that another revision to Rule 5 for the first time required an answer to address procedural bars and the statute of limitations:

opportunity to reply to new issues such as these that would be raised by the government's responsive pleading.

At no time during the process was there any suggestion made that these amendments did not grant a right to reply. The Rules' final progress through Conference, the Court, and Congress was uneventful.

3. The Committee Note

The Committee Note does not use the term "right." It refers, instead, to the movant's "opportunity to file a reply," stating:

> [R]evised Rule 5(d) adopts the practice in some jurisdictions *giving the movant an opportunity to file a reply* to the respondent's answer. Rather than using terms such as "traverse," *see* 28 U.S.C. Sec. 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses, and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

Judge Wesley's letter notes that in *Anderson v. United States*, 612 F. App'x 45 (2d Cir. 2015), the government in its brief maintained that Rule 5 does not give prisoners a right to file a reply brief, a claim the government argued was supported by case law as well as the Committee Note. The Subcommittee concluded that the portions of the Committee Note cited by the government in *Anderson*[8] do not support the government's interpretation. The quoted language fails as support for the government's interpretation of Rule 5 both because it appears in the Note accompanying the initial 1976 adoption of the Rule, not the 2004 provision, and also because it speaks only to whether the movant must file a reply in order to avoid dismissal,[9] not whether the court must permit a filing. In other words, the rule was intended to

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> "The Note was also changed to reflect that there has been a potential substantive change from the current rule, to the extent that the published rule now requires that the answer address procedural bars and any statute of limitations. The Note states that the Committee believes the new language reflects current law."

[8] The government quoted two passages: (1) "[t]here is nothing in 2255 which corresponds to the . . . requirement of a traverse to the answer. . . ." and (2) "As under rule 5 of the 2254 rules, there is no intention here that such a traverse be required, except under special circumstances." Br. for Gov't at 14–15, *Anderson v. United States*, 612 F. App'x 45 (2d Cir. 2015) (No. 13-934) (emphasis in government's brief) (quoting Advisory Committee Notes to Rule 5, Rules Governing Section 2255 Proceedings).

[9] Apparently, the issue that prompted the initial note language in the 2255 context was a statute that applied in 2254 cases at the time. Until the 2004 amendment to Rule 5, the 2254 rules "omitted any reference to a traverse or reply." RANDY HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 17.1 (7th ed. 2015). The 1976 Committee Note indicates that Rule 5 was intended to address the "difficulty" that had been caused by 28 U.S.C. §2248, which provided that "the allegations of a return [answer] . . *if not traversed*, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true." (emphasis added). Liebman and Hertz explain: "Although the Habeas Rules dispensed with the *requirement* of a traverse (except in successive petition situations), they did not forbid such a pleading, and the Advisory Committee Notes endorsed a traverse or amendment where 'it [would] serve a truly useful purpose' or was 'called for by the contents of the answer' filed by respondent." *See also* Charles Alan Wright, *Procedure for Habeas Corpus*, 77 F.R.D. 227, 242 (1978) (explaining that under Rule 5 "No traverse to the answer is required, and the former statutory rule that the allegations of the return are assumed to be true until impeached has been abandoned.").

clarify that an inmate was *not required* to file a traverse or reply; it said nothing about whether a court *must allow* a traverse or reply to be filed.

The Committee Note accompanying the 2004 addition of subsection (d) in 2255 Rule 5 is consistent with the intent of the Criminal Rules Committee, repeated several times during the drafting and adoption process, that the amendment was to confer the right to file a reply. The language of the Note even highlights that the amendment codified a practice not followed in every jurisdiction: "revised Rule 5(d) adopts the practice in some jurisdictions giving the movant an opportunity to file a reply to the respondent's answer."

B. Commentary and Cases Interpreting the Rule

1. Cases holding there is no right to reply in a 2255 case.

Several district court opinions holding that prisoners have no right to file a reply to the government's answer or responsive pleading in a 2255 case are collected in the government's brief filed in Anderson v. United States, 612 F. App'x 45 (2d Cir. 2015). That brief states:

> Numerous courts across the country have confirmed that Rule 5(d) does not require a judge to allow a Section 2255 movant to file a reply. *See, e.g.*, *Simmons v. United States*, 2014 WL 4628700, at *1 (E.D. N.Y. Sept. 15, 2014) (stating that the Rule's "plain language does not mandate a reply"); *Terrell v. United States*, 2014 WL 1203286, at *1 (W.D. N.C. Mar. 24, 2014) (stating that while a petitioner "may" file a reply, there is "no [such] absolute right . . . in an action brought under § 2255"). Instead, "[w]hether to allow the moving party to file a reply brief is within the Court's discretion." *United States v. Martinez*, 2013 WL 3995385, at *2 (D. Minn. Aug. 5, 2013). "When a court does not request, permit, or require the additional argument that would be contained in a reply brief, § 2255 petitioners are not prejudiced by denial of an opportunity to file such a brief." *United States v. Crittenton,* 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008). This principle holds even when a petitioner does not receive the Government's opposition. *United States v. King*, 184 F.R.D. 567, 568 (E.D. Va. 1999) (holding that though "neither [the petitioner] nor his attorneys were ever served with the government's response," no "mistake or excusable neglect occurred" because "a § 2255 petitioner has no right to file a reply to the government's response").

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Our research identified fifteen additional post-2004, district court decisions that state or hold that there is no right to file a reply under Rule 5(d).[10]

[10] Note that many of these decisions cite cases included in the government's brief in *Anderson*, quoted above in the text, especially *Crittenden* and *Martinez*. United States v. Griffin, 2015 WL 1925821, at *1 (D. Minn. Apr. 28, 2015) (following *Martinez* and *Crittendon*); Harris v. United States, 2015 WL 5714552 at *2 (W.D. N.C. Sept. 29, 2015) (stating that whether to allow reply is within court's discretion, finding "a Reply would not aid the decision-making process"); Nix v. United States, No. 1:15CV79-LG, 2015 WL 2137296, at *1 (S.D. Miss. May 7, 2015) (stating "while Rule 5(d) of the Rules Governing Section 2255 Cases states that a Petitioner *may* submit a reply, it does not require the Court to wait on a reply before ruling"); Sifford v. United States, 2014 WL 114671, at *1 n.1 (W.D.N.C. Jan. 10, 2014) (concluding that whether to allow reply is within court's discretion, denying Rule 59 motion); United States v. Benson, No. CIV. 13-1935 DSD, 2014 WL 1478438, at *1 n.1 (D. Minn. Apr. 16, 2014) (refusing to consider reply, citing *McElrath*); Argraves v. United States, No. 3:11CV1421 SRU, 2013 WL 1856527, at *2 (D. Conn. May 2, 2013) (noting reply briefs are not

There appear to be three principal rationales that judges have referenced when finding no right to file a reply in 2255 Rule 5(d) or 2254 Rule 5(e).

First, although most of these cases were decided after the 2004 amendment, some appear to have been influenced by pre-amendment law and policy.[11] It is possible that unrepresented inmates and boilerplate orders mean that some judges take longer to notice changes in 2254 and 2255 Rules, and continue to rely on outdated authority.

Second, several decisions relied on a local rule governing motions generally—rather than 2255 cases— that require a movant to obtain leave of court to file a reply.[12]

Finally, the phrasing of the rule also appears to be contributing to the confusion. By stating that applicant or petitioner "*may* submit a reply to the respondent's answer or other pleading *within a time fixed by the judge*," the rule could suggest that the judge has the discretion to determine whether to set any time for a reply, or to determine none is needed.[13] For example, after quoting Rule 5(e) adding emphasis to the word "may," one judge explained:

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required under general local rule); United States v. Dixon, No. CIV. 12-1914 JNE, 2013 WL 1408577, at *4 n.4 (D. Minn. Apr. 8, 2013) (quoting *Moreno and Crittendon,* concluding that a reply is not necessary and denying extension of time to file a reply); United States v. Sturgis**,** No. CIV. 13-945 JNE, 2013 WL 3799848, at *6 (D. Minn. July 22, 2013) (relying on *Crittendon*); United States v. Moreno, No. CIV. 12-2968 ADM, 2013 WL 1104766, at *1 (D. Minn. Mar. 18, 2013) (stating the Government's Response does not give the Defendant an automatic right to reply, relying on *McElrath*); Rosario v. Akpore, 967 F. Supp. 2d 1238, 1242 n.2 (N.D. Ill. 2013); United States v. Cleve-Allan George, No. CR 2003-020, 2011 WL 5110409, at *1 n.1 (D.V.I. Oct. 26, 2011) (considering untimely reply, but noting with approval the *Crittendon* court's statement "[w]hen a court does not request, permit, or require the additional argument that would be contained in a reply brief, § 2255 petitioners are not prejudiced by denial of an opportunity to file such a brief"); Coleman v. United States, No. CIV 09-6330, 2011 WL 149863, at *2 (D. N.J. Jan. 18, 2011) ("We join those courts in concluding that a petitioner does not have a right to submit a reply"); United States v. McElrath, Crim. No. 03–235(JNE), Civ. No. 08–5291(JNE), 2009 WL 1657453, at *2 (D. Minn. June 11, 2009) (denying opportunity to file reply brief, relying on *Crittenton* and pre-2004 authority); Arias v. United States, No. 06-381, 2007 WL 2119050, at *1 (M.D. FL July 20, 2007) (relying on general local rule that allows a reply by a movant with leave of court); Shi Arias v. United States, No. 06-381, 2007 WL 2119050, at *1 (M.D. FL July 20, 2007) (relying on general local rule that allows a reply by a movant with leave of court); Shipley v. United States, No. CIV 07-2051, 2007 WL 4372996, at *1 (W.D. Ark. Dec. 12, 2007) (§ 2255 petitioners are not prejudiced by denial of an opportunity to file replies when courts do not solicit such replies, grant leave to file such replies or find additional argument necessary to dispose § 2255 motions).

For similar statements in a dozen additional 2254 cases, see notes 36 & 37, *infra*.

[11] *E.g.,* United States v. McElrath, Crim. No. 03–235(JNE), Civ. No. 08–5291(JNE), 2009 WL 1657453, at *2 (D. Minn. June 11, 2009); and the three cases relying on *McElrath*: *Benson*, *Martinez*, and *Sifford*.

[12] Examples include United States v. Crittenton, 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008); Shipley v. United States, No. 07-2051, 2007 WL 4372996, at *1 (W.D. Ark. Dec.12, 2007); Arias v. United States, No. 06-381, 2007 WL 2119050, at *1 (M.D. Fla. July 20, 2007). *Arias,* relying on a local rule in M.D. Fla., was cited as authority in *Shipley* and *Crittendon*. *Crittendon* was cited as authority for finding no right to reply in a total of six cases: *McElrath*, *Martinez*, *Griffin*, *Sturgis*, *Dixon*, and United States v. Cleve-Allan George, No. CR 2003-020, 2011 WL 5110409, at *1 n.1 (D.V.I. Oct. 26, 2011) (considering untimely reply, but noting with approval the *Crittendon* court's statement "[w]hen a court does not request, permit, or require the additional argument that would be contained in a reply brief, § 2255 petitioners are not prejudiced by denial of an opportunity to file such a brief.")

[13] Examples of decisions emphasizing the word "may" when finding the rule grants discretion include Nix v. United States, No. 1:15CV79-LG, 2015 WL 2137296, at *1 (S.D. Miss. May 7, 2015) and Sifford v. United States, 2014 WL 114671, at *1 n.1 (W.D.N.C. Jan. 10, 2014) (whether to allow reply is within court's discretion, denying Rule 59 motion). *See also* United States v. Andrews, No. 12 C 6208, 2012 WL 6692159, at *2 (N.D. Ill.

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> It has never been clear whether that means a habeas petitioner has the right to submit a reply or whether it means that the judge may order such a reply as needed. In an abundance of caution this Court has most often proceeded with the former reading, but as the text reflects that does not appear to be called for here.

Rosario v. Akpore, 967 F. Supp. 2d 1238, 1242 n.2 (N.D. Ill. 2013).

2. Commentary

Treatises and commentary that discuss the amendment to 2255 Rule 5 and 2254 Rule 5 generally state or assume that the amended rules provide a right to reply.[14] The clearest statement is in WRIGHT, LEIPOLD, HENNING & WELLING, 3 FED. PRAC. & PROC. CRIM. § 633 (4th ed.): "A traverse or reply to the answer is not required, but Rule 5(d) was added in 2004 to require the court to accept such a reply if the applicant chooses to file one." The treatises do not generally highlight the division of authority in the district courts or critique decisions not permitting a reply. Indeed only one source we found indicated there was any potential dispute on this point.[15] We noticed, moreover, that one treatise continues to cite to some pre-2004 case law,[16] which might cause confusion.

II. Local Rules, Standing Orders, and Practices

At Judge Kemp's request, Julie Wilson and Bridget Healy from the Administrative Office of U.S. Courts examined local rules, standing orders, and docket entries in eight small, eight medium, and eight large districts, and they also surveyed pro se clerks and magistrate judges to learn more about their practices. Their results are provided in Tabs C.1, C.2, and C.3.

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In a memo summarizing their review of local rules, standing orders, and docket entries, Wilson and Healy concluded:

> "the majority of courts included in the sample permit petitioners to file reply briefs. Most courts permit reply briefs and set the time period with an order, although a minority of courts has a local rule permitting reply briefs. A review of the dockets of the sample courts shows that the order requiring the respondent to answer is the most common method of setting the time period for

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Dec. 19, 2012) (acknowledging it may have been error to rule on § 2555 motion without considering reply but citing authority permitting such a ruling when the government's answer is conclusive and a reply would be of no assistance).

[14] Several treatises state that the prisoner "may" file a reply. RANDY HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 17.1 (7th ed. 2015) ("n 2004, the Rules Governing Section 2254 Cases in the United States District Courts were amended to state explicitly that "[t]he petitioner may submit a reply" then quoting the rule and the Committee Note); BRIAN MEANS, POSTCONVICTION REMEDIES § 17:1 ("State prisoners proceeding under 28 U.S.C.A. § 2254 and federal prisoners proceeding under 28 U.S.C.A. § 2255 may file a reply to the respondent's answer"); BRIAN MEANS, FEDERAL HABEAS MANUAL § 8:35 (stating that Rule 5(e) and Rule 5(d) "authorize the petitioner's or movant's filing of a reply to the respondent's answer within a time fixed by the district court."); WEST'S FED. ADMIN. PRAC. § 6940 ("Amendments to Rule 5 … provide the petitioner with the chance to reply to respondent's answer.")

[15] 16A FED. PROC., L. ED. § 41:375 (noting a contrary decision with the signal "Caution").

[16] BRIAN MEANS, POSTCONVICTION REMEDIES § 17:1 n.2 ("Springs Industries, Inc. v. American Motorists Ins. Co., 137 F.R.D. 238, 240 (N.D. Tex. 1991) ('There will be instances, of course, when a movant should not be permitted to cure by way of reply what is in fact a defective motion or when an injustice will otherwise result to a nonmovant if a reply brief is augmented with new evidence')").

> a petitioner's reply, and that reply briefs are sometimes filed regardless of whether they are specifically permitted in an order."

Of these 24 districts, most appeared to recognize or assume that replies were permitted, although many districts' rules said nothing about replies in these cases. But at least one district's local rule continues to contemplate no entitlement to file a reply to a response to any motion without leave of court; 2255 cases are still termed motions, even though they are docketed as separate cases.[17]

In addition, Wilson and Healy also emailed the Pro Se Law Clerks' list and the Magistrate Judges Advisory Group asking for responses to the following questions:

(1) In your court, when a response if filed, is the moving party automatically given an opportunity to file a reply?

(2) What time period is given for filing a reply?

(3) Are extensions of that time period granted?

A chart recording the responses is provided at Tab C.3.[18] Respondents in the majority of districts stated that petitioners are automatically permitted to reply. But respondents in two districts stated that petitioners are not automatically given a right to reply,[19] and in seven additional districts, the response to this question was coded as "maybe" or judge specific.[20]

III. Amendment, Other Action, or Study Agenda?

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The Subcommittee agreed that 2255 Rule 5(d) and 2254 Rule (e) give prisoners a right to file a reply, that district courts that have concluded otherwise are in error, and that the denial of a right to file a reply affects the liberty interests of persons who are incarcerated. Given the nature of this interest, it is particularly important that prisoners be permitted to present their replies, if any, to the government's pleading before the district court rules.[21]

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[17] This district is Massachusetts, where Local Rule 7.1, which governs motion practice, provides that a reply brief may be permitted only with leave of the court. Wilson and Healy note, however, that although the general scheduling orders in the case documents they surveyed did not reference a petitioner's reply brief, petitioners in some cases did file reply briefs or supplemental memoranda.

[18] The period of time for filing a reply varied, and is not addressed in this memo.

[19] These districts are Hawaii and the Eastern District of Wisconsin.

[20] In both 2255 and habeas cases, the Administrative Office study coded the Eastern District of New York, the Middle District of Florida, and the District of Massachusetts as judge specific or maybe. It coded the Eastern District of Virginia and the District of Maryland as judge specific or maybe in 2255 cases, and the Eastern District of Louisiana and the Northern District of New York as judge specific or maybe in state habeas cases.

[21] The Eleventh Circuit, in a decision addressing a different issue (the need to serve on a petitioner not only the state's responsive pleading but also the exhibits referenced in that pleading), aptly explained the importance of the petitioner's reply (emphasis added):

> And in any event, *a habeas petitioner whose claims are thrown out on a procedural or jurisdictional ground deserves just as much of an opportunity to respond to the State's answer as the petitioner whose claims are dismissed on the merits. See* Rules Governing § 2254 Cases, Rules 5, 6 (establishing rules governing the filing and contents of pleadings as well as discovery without drawing any distinction based on the grounds on which a claim is likely to be decided). . . .

Although the Subcommittee agreed that both Rules 5 guaranteed a right to reply, members questioned whether an amendment was the best response to the present inconsistency in district court decisions. The Subcommittee briefly discussed several alternative responses, and it requested that the Reporters collect more information about these and other potential alternatives. This section presents the information collected and identifies factors that might, in this context, weigh for and against a clarifying amendment.

A. The Case for Amendment

As a preliminary matter, the Committee should consider whether the rule is clear and contrary decisions are simply wrong, or the text of the rule is not clear and its phrasing and/or structure is contributing to the inconsistency in interpretation. When the text of the rule itself creates ambiguity or inconsistency, an amendment may be an appropriate response. But erroneous interpretations of clearly stated rules are typically corrected over time by appellate review.

1. Textual Ambiguity

At least some judges who have denied the right to reply appear to find support for that reading in the phrasing of Rule 5. The text is susceptible to an interpretation that the court has discretion not only to set the time for a reply, but to determine whether a reply will be permitted. If the text is not entirely clear, that strengthens the case for an amendment.

It appears that the phrasing of the rule is at least partially responsible for some, but not all, of the decisions interpreting Rule 5 to authorize a judge to deny an opportunity to reply. Rather than emphasize the text, some of the decisions relied on outdated pre-amendment sources or on local rules governing motions that give the court discretion to determine when a litigant can file a reply. These reasons are consistent with the view that the text of the Rule is

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> *This distinction ignores the very real possibility—indeed, the probability—that the District Court would base even a jurisdictional or procedural ruling on documents filed alongside the State's answer (for example, trial transcripts showing that a claim is procedurally defaulted due to lack of a contemporaneous objection). If the State points to a document that purports to show that the petitioner did not exhaust his claim, or that it is procedurally defaulted, why should that petitioner not have a meaningful opportunity to review the document and explain to the District Court why the State's position is wrong? If we were to deny petitioners this opportunity, we would do so in the face of our experience that has repeatedly demonstrated that a petitioner must have a meaningful opportunity to challenge the propriety of rulings on procedural grounds. These cases often present close calls which are subject to debate. . . .*
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> *. . . Federal habeas corpus proceedings are the last chance a petitioner has to present arguable constitutional violations and errors to a court capable of correcting them. Therefore much rides on having an adversarial process structured in a way that best equips the District Court to get it right. See* Lonchar v. Thomas, 517 U.S. 314, 324, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1996) ("Dismissal of a *first* habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.").

Rodriguez v. Florida Dep't of Corr., 748 F.3d 1073, 1080 (11th Cir. 2014) (emphasis added). Consider also Fitzpatrick v. Bradshaw, No. 1:06-CV-356, 2006 WL 3591955, at *2 (S.D. Ohio Dec. 11, 2006) ("Because a respondent may be expected to raise new matters such as affirmative defenses in the answer, the petitioner may have new matter to plead in response, e.g., equitable tolling as a response to a statute of limitations defense or cause and prejudice or actual innocence as a response to a procedural bar claim.").

clear and these courts are simply mistaken. But a number of decisions denying the right to reply mention the text of Rule 5(b) as support. This reliance on the text adds support to the view that it is the language of the Rule, and not only mistaken reliance on outdated or inapplicable authority, that is causing the problem.

2. Appellate Correction

Even if the text is clear, some Subcommittee members have expressed concern that erroneous interpretations of 2255 Rule 5(d) and 2254 Rule 5(e) are significantly less likely to be corrected by appellate litigation than are erroneous decisions concerning other federal rules of procedure. If so, this may also weigh in favor of amending the rule or taking other corrective action rather than deferring to appellate review. Indeed, in the twelve years since the 2004 amendments added 2254 Rule 5(d) and 2255 Rule 5(e), there has been no appellate discussion of this issue in any case available through searches of Westlaw.[22]

Several factors could be contributing to the absence of appellate discussion. First, most prisoners seeking relief in these cases will be proceeding pro se,[23] with limited capacity to research, brief, and argue the issue. The vast majority of published and unpublished district court decisions available on Westlaw that rejected a right to reply after 2004 involved a 2255 applicant or 2254 petitioner without counsel.

Second, most inmates who lose in the district court do not seek appellate review, and those who do seek appellate review face an extra hurdle: a losing applicant or petitioner must secure a certificate of appealability.[24]

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[22] Only a handful of appellate cases even mention Rule 5(d). The Eleventh Circuit's opinion in *Rodriguez*, quoted in footnote 20, assumes there is a right to reply. *See also* White v. United States, 175 F. App'x 292, 293, 2006 WL 887743, at *1 (11th Cir. 2006) (stating in passing, citing Rule 5, that "After the government has responded, the movant has the opportunity to reply.") But two decisions note that the prisoner claimed he was denied the opportunity to reply, and each was resolved on a different ground without further discussion of Rule 5(d). The *Anderson* case discussed in the text accompanying notes 8 and 25. And in Cleaver v. Maye, 773 F.3d 230, 233 (10th Cir. 2014), the court refused to allow a prisoner who claimed district denied Rule 60(b) motion before he received the Government's response and could reply to invoke 2255(d)'s "savings clause" and Section 2241. In an earlier ruling, United States v. Cleaver, 319 F. App'x 728, 730–31, 2009 WL 903408, at *2 (10th Cir. 2009), the court held that because Cleaver could have, but did not, assert his Rule 5(d) objection in his Rule 59(e) motion to alter or amend the district court's judgment or in his direct appeal, he could not later argue that he was entitled to relief from the district court's judgment under Rule 60(b)(6)).

[23] An estimated 95% of non-capital 2254 cases are resolved in the district court without counsel for the petitioner. N. KING, F. CHEESMAN, & B. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS at 23 (2007) (reporting results of study of nearly 2400 non-capital 2254 cases filed in 2003 and 2004). Statistics on representation in 2255 cases are not readily available, but it is fair to assume that a significant proportion are resolved without representation for the applicant.

[24] *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b). *See also* Nancy King, *Non-Capital Habeas Cases after Appellate Review: An Empirical Analysis,* 24 FED. SENT. R. 308, 315 (2012) (following cases from study cited in note 23 through the courts of appeals, finding that in less than 40% was an appeal sought). The rate of appeal in 2255 cases is not available but caseload statistics suggest the appeal rate is similar. Between March 2014 and March 2015, there were about 7,000 Section 2255 applications terminated in the district courts, U.S. District Courts - Civil Cases Terminated, by Nature of Suit and Action Taken, compared to 2900 appeals from Section 2255 rulings filed in courts of appeals during the same period. U.S. Courts of Appeals - Civil and Criminal Cases Filed, by Circuit and Nature of Suit or Offense.

Third, when a prisoner's no-right-to-reply claim actually reaches an appellate court, it may be less likely to be addressed in the appellate court's decision than is a Criminal Rules claim raised on direct appeal. There are generally many alternative grounds on which to affirm a district court's decision to deny or dismiss a 2255 application or 2254 petition for relief. Post-conviction cases involve numerous procedural barriers to review such as the statute of limitations, exhaustion requirement, procedural default, and the successive petition bar. Indeed, a procedural barrier precluded the court from reaching the issue in the *Anderson* case, which was brought to the attention of the Committee by Judge Wesley. Although the issue of the right to file a reply was briefed in *Anderson*, the court of appeals did not address it, affirming the judgment below because the 2255 application was filed too late.[25]

A final factor regarding the capacity of further litigation to correct erroneous applications of 2254 Rule 5(e) and 2255 Rule 5(d) involves the potential skewing of the decisions that are available through legal research. One Subcommittee member suggested that decisions allowing a reply may be less likely to result in a written opinion than decisions denying or upholding the denial of a reply, and further that the opinions denying the right to reply are not flagged in Westlaw in a way that would suggest that holding is contested. Our Westlaw searches identified dozens of district court opinions since 2004 that noted in passing that there *is* a right to reply under Rule 5,[26] and hundreds more that set deadlines for the reply. But these opinions did not involve disputes over whether there was a right to reply, and most appeared to be boilerplate language repeated in all orders in such cases from that district or by that judge. If available legal research methods do disguise the balance of opinion on this issue, that too may delay the eventual correction of what the Subcommittee believes are erroneous interpretations of these rules.

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B. The Case Against Amendment

1. Negative implications for other rules.

The style consultants believe the language of Rule 5 is quite clear, and they fear that efforts to clarify would set a dangerous precedent, suggesting that other rules that use "may"

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[25] It stated:

> Anderson maintains that Rule 5(d) afforded him an absolute right to respond to the government's answer to his § 2255 petition before the district court ruled. We need not conclusively decide this issue because, given that Anderson's petition was untimely, any error the district court may have committed was harmless. Anderson has conceded the untimeliness of his petition on this appeal, and he has failed to show that he was prejudiced by any error the district court may have made in ruling on his § 2255 petition before he could respond to the government's answer to it.

Anderson v. United States, 612 F. App'x 45, 46, 2015 WL 5233406 (2d Cir. 2015).

[26] *E.g.*, Blake v. United States, No. 213CV02663JPMCGC, 2016 WL 4153618, at *3 (W.D. Tenn. Aug. 4, 2016) ("The movant is entitled to reply to the Government's response. Rule 5(d)"); United States v. Obaei, 2015 WL 1545019, at *1 (N.D. Ill. April 1, 2015) ("Rule 5(d) . . . gives Obaei the right to submit a reply to that response"); Poulsen v. United States, No. 2:06-CR-129, 2014 WL 7272228, at *7 (S.D. Ohio Dec. 18, 2014) ("Rule 5(d) permits the moving party to reply to the respondent's answer"); Baerga-Suarez v. United States, 30 F. Supp. 3d 91, 99 (D.P.R. 2014) ("the Court recognizes petitioner's right to submit an answer under Rule 5(d)").

are somehow deficient. Similar phrasing is used elsewhere in the rules to convey a right to take some action.[27]

But the phrasing in Rules 5 is not identical to that in the other Criminal Rules, and the extra clause regarding judicial discretion to set the time for reply that may be contributing to the disputed interpretation.

If the Committee pursues an amendment, some revisions would be less likely to raise concerns that the term "may" does not, by itself, clearly state an entitlement to act. We discuss some alternatives *infra* in Section III.

2. Scope of the problem.

Several Subcommittee members suggested that the problematic decisions were not sufficiently frequent or widespread to warrant any action on the part of the Committee. We cannot answer the question exactly how many cases are affected because many (perhaps most) district court rulings in 2254 and 2255 cases do not make it into the searchable legal research databases. Thus, even if research identifies a particular number of decisions stating that a reply could be disallowed at the judge's discretion, that research is not a reliable gauge of either the number or percentage of cases in which a reply is not permitted.

We do have information gathered by the Administrative Office about local rules and policies in a sample of districts. The Wilson and Healy survey of 24 districts indicates that the practice in the clear majority of those districts is to give all prisoners the right to reply. Even in the handful of districts where that is not the case, most courts permit prisoners to file a reply, a practice confirmed by respondents from those districts. Assuming that the sample of districts examined in the survey fairly represents the practices of remaining districts, the survey suggests that the percentage of judges denying an opportunity to reply is quite small.

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It is notable, however, that the post-2004 opinions we did find that contest the right to reply in either 2255 or 2254 cases were not limited to those with particularly small prisoner caseloads and include decisions by judges from the Middle District of Florida, the Eastern District of New York, the District of New Jersey, the Northern District of Illinois, and the Eastern District of Pennsylvania.[28]

3. Availability of Options Besides Amendment

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[27] *See* Fed. R. Crim. P. 30(a) ("[a]ny party may request in writing that the court instruct the jury on the law as specified in the request."); Fed. R. Crim. P. 32(f)(3) ("the probation officer may meet with the parties to discuss objections"); Fed. R. App. P. 28(c) ("[t]he appellant may file a brief in reply to the appellee's brief").

[28] Approximately 6,500 Section 2255 cases and 16,300 state prisoner habeas petitions were filed in district courts nationwide in the twelve months preceding March 31, 2015. U.S. DISTRICT COURTS, CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS, TABLE NO. C-3, CIVIL CASES FILED, BY JURISDICTION, NATURE OF SUIT, AND DISTRICT (2015), *available at* http://www.uscourts.gov/statistics/table/c-3/judicial-business/2015/09/30 . The number of 2255 and state habeas cases in these districts was as follows:

Court	2255	2254
M.D. FL	285	285
E.D.N.Y.	75	133
D.NJ	108	306
N.D.IL	116	199
E.D.PA	155	466

The Subcommittee was interested in what other options are available to address this division in the case law, other than amending the rule. Four options are examined below.

a. Letters to Chief Judges from Committee Chair or Rules Office

The Subcommittee requested information on possibilities for bringing inconsistent case law or local rules to the attention of some or all chief judges by means of a letter from either the Rules Office or the Chair of the Committee. The recent examples of such letters we found, however, occurred under circumstances somewhat different than those facing the Committee with Rule 5.

The first example involved letters from the Chair of the Standing Committee, Judge David Levi, to Chief Judges of various districts around the country. These letters were the final step in the Standing Committee's nationwide review of local rules for compliance with Fed.R.Civ.P. 83 and 28 U.S.C. § 2071, which prohibit local rules inconsistent with national law. The Standing Committee issued a report that put local rules it identified as "problematic" into four categories: (1) rules that directly conflicted with national law, (2) rules that arguably conflicted with national law, (3) rules that were outmoded because they regulate a practice that no longer arises in federal courts, and (4) rules that duplicate national law in a manner that may lead to inconsistency. Letters were sent to the Chief Judge of every district that had a local rule in any of these categories, providing the report, noting the problematic rules, and drawing "attention to these matters for whatever action you consider appropriate." Because these letters were the product of a national project by the Standing Committee, they do not seem apposite to the current situation.

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The second and third examples involved issues the Appellate Rules Committee decided to handle without amendment. In 2012, as Chair of the Committee, Judge Sutton wrote a letter to the chief judges of three circuits regarding the Appellate Rules Committee's consideration of a proposal to treat federally recognized Native American tribes the same as states for purposes of Appellate Rule 29's amicus-filing provisions.[29] Judge Sutton proposed this as an interim approach, explaining to these Circuits that the Committee thought the issue warranted serious consideration but that it was not sure that it was the time to adopt a national rule change on this issue, and that the Committee planned to revisit the issue in five years.[30] The Appellate Rules Committee also used a letter to deal with a suggestion that sealing and redaction practices in some circuits were causing difficulties for litigants. The Committee investigated the varied approaches to sealing and redaction on appeal, and debated their pros and cons. It then agreed unanimously not to pursue an amendment, but to have Judge Sutton write to the chief judge of each circuit, with copies to the circuit clerks, to advise them of the suggestion, the reasons for it, the Committee's findings concerning the circuits' varying approaches, and the rationale for the approach of the Seventh Circuit, which presumed materials would be unsealed absent specified action.[31] Members expressed the hope that this informational approach would generate dialogue and perhaps produce greater uniformity without rulemaking.[32]

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[29] The letter itself is in the Fall 2012 Appellate Agenda Book at Tab 2, available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-appellate-procedure-september-2012 .

[30] Minutes of Spring 2012 Meeting of Advisory Committee on Appellate Rules, April 12, 2012, at 10-12.

[31] In the course of this discussion, the Reporter noted, according to the minutes, two other instances of this "letter" approach. "The Reporter observed that after the Committee had circulated to the Chief Judges of each circuit Ms. Leary's 2011 report on the taxation of appellate costs under Rule 39, at least one circuit had changed its practices

Each of these situations was quite different from this one, and none involved an attempt by the Committee, its Chair, or the Rules Office to suggest to district judges that they were interpreting a rule incorrectly. An informational letter could focus on the variation in local rules and standing orders, providing the information gathered by the Administrative Office. The action of the Appellate Rules Committee provides some precedent for such a letter. But that approach would not squarely focus on the problem in the decisional law.

b. Federal Judicial Center Action - Mention in Benchbook or Training Materials

On more than one occasion in the past, the Committee has concluded that the more appropriate response to an issue was not to amend a rule, but instead to recommended to the Federal Judicial Center that it add language to the Benchbook addressing a particular subject to guide district judges. In 2011 the Committee followed this approach in lieu of proposing (1) an amendment to Rule 16 requiring pretrial disclosure of exculpatory evidence and (2) inclusion in Rule 11's plea colloquy of advice about the possibility of civil commitment for sex offenders.[33] Both subjects— pretrial disclosure and the plea colloquy—already appeared in the Benchbook, so that adding material would have been an incremental change. By contrast, the Benchbook does not say anything at all about Section 2254 or 2255 proceedings, other than a cross reference in the appendix to a pocket guide to capital habeas cases. It is doubtful that the right-to-reply issue will warrant its own mention in isolation, or justify the addition of an entirely new section. Thus this avenue does not appear promising.

The FJC also convenes meetings of the chief judges of all districts, and it carries on an extension program of education for all district judges. The Committee could prepare written materials for distribution at the chief judges' meeting or in general educational sessions for district judges. But any materials that argued Rule 5 is intended to give a right to file a reply would raise concerns about the role of the Advisory Committee. There is a strong norm that the Advisory Committees (and their chairs and reporters) do not provide advisory opinions on the meaning of the rules. The Committee can, of course, use the Committee Note to explain the purpose of an amendment and its intended effect. But once a rule is adopted, the Committee does not normally seek to advocate for a particular interpretation. That function passes to the courts (or to other groups, such as the Benchbook Committee). The Committee writing to explain or argue in favor of a particular interpretation of Rule 5 seems to be inconsistent with this norm.

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concerning costs." Minutes of Fall 2012 Meeting of Advisory Committee on Appellate Rules, Sept. 27, 2012, at 9. Later, the Reporter stated "that in fall 2006 Judge Stewart, as the Chair of the Committee, had written to the Chief Judge of each circuit to urge the circuits to consider whether their local briefing requirements were truly necessary and to stress the need to make those requirements accessible to lawyers." *Id.* Professor Coquillette also observed that in some instances, "committees have identified specific areas where local rule variation may be justified, and have merely circulated information about such local variations." *Id.* at 10.

[32] *Id.* at 9.

[33] *See* Minutes of Advisory Committee Meeting, April 11-12, 2011, at 4-5 (discussion and approval of language in letter from Committee Chair, Judge Richard Tallman, to the Federal Judicial Center requesting changes in the Benchbook concerning advice concerning collateral consequences of pleading guilty); *id.* at 15-17 (after vote not to proceed with amending Rule 16, Committee decided to pursue amendments to Benchbook to state best practices). *See also* Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 146–47 (2016) (noting that Advisory Committee's consideration of amendments to Rule 16 influenced a new section in the 2013 edition of the FJC's Bench Book covering *Brady* and *Giglio* obligations, which provides a wealth of relevant information for judges).

c. Department of Justice Action

As a stopgap or alternative to amending 2255 Rule 5(d), the Department of Justice could be requested to use its supervisory and educational authority to ensure that the government does not advance the argument that Rule 5 does not give prisoners a right to file a reply. For example, the Department might bar its attorneys from arguing on appeal that the Rule allows judges to deny the opportunity to reply (though that would not preclude an argument that denial was harmless error). It might ask its trial attorneys to request that district judges and magistrate judges provide each 2255 applicant with an opportunity to reply to the government's responsive pleading whenever that opportunity appears to have been forbidden or placed in doubt. If the Department were to undertake actions of this nature, it might reduce the problem in 2255 cases. But it would not address cases in which judges are denying the right to reply in cases seeking relief under Section 2254.

d. Clarifying Commentary

If there were a treatise that most judges consulted as guidance in these cases, it might be used to highlight this problem and clarify what the 2004 amendment was intended to achieve. There are indeed several habeas resources, but none so ubiquitous that it would reach the intended audience. Moreover, although several treatises already note Rule 5 creates a right to reply,[34] they have not prevented some courts from concluding to the contrary.

Another possibility might be an article in *Judicature*, a publication received by all federal judges. Although at first blush this option might seem appealing, there are several problems. The first is who could appropriately write such an article. The Committee Chair (and perhaps the reporters) are seen as authoritative, but they would be precluded from writing to advocate a certain view of the proper interpretation of Rule 5 by the norm noted above against advisory opinions on the meaning of the rules. It is also unclear how effective a *Judicature* article would be. It may not reach and persuade judges who now deny the opportunity to reply because they are using boilerplate language based on earlier cases in these orders, or are simply applying a local rule governing replies for motions generally.

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IV. Options for an Amendment

If the Subcommittee concludes that an amendment is needed, it will then consider how to clarify the text of the rule. (And, as noted, it will then turn to the questions whether to specify a default time period for replies, and whether to propose a parallel amendment to Rule 5 of the 2254 Rules.)

The style consultants, when pressed to suggest some language to clarify the rule, offered the following:

> **(d) Reply.** The moving party may submit a reply to the respondent's answer or other pleading ~~within a time fixed by the judge~~. Although the judge's permission is not required, the judge may fix a time for the reply.

But they reiterated their position that (1) no clarification is needed, and (2) such a clarification sets a dangerous precedent by suggesting that "may" does not mean that the court or party is permitted to take the action specified.

[34] *See* § I(B)(2), *supra*.

If the Committee decides to pursue an amendment, there are alternative formulations that may be less likely to be seen as setting a problematic precedent by qualifying the meaning of "may." Because the Subcommittee has not considered these alternatives—and the drafting issues are not now before the Committee— we offer these merely as illustrations of the possibilities:

- The petitioner may submit a reply to respondent's answer or other pleading. The reply must be submitted within the time fixed by the judge or by local rule.[35]
- The petitioner is entitled to submit a reply to the respondent's answer or other pleading. The reply must be submitted within the time fixed by the judge or by local rule.
- The petitioner is entitled to submit a reply to the respondent's answer or other pleading, but must submit that reply within the time fixed by the judge or by local rule.

Any amendment would, of course, be accompanied by a committee note that clearly stated the purpose of the revision.

V. Parallel Treatment for 2254 Rule 5(e)

The Subcommittee agreed that if an amendment to Rule 5(d) is proposed, a parallel change to the 2254 Rules should be proposed as well. The Committees that reviewed the 2004 amendments saw no reason to treat them differently on this issue. We found a division of authority in the 2254 cases similar to that in the 2255 cases, with some district courts recognizing an entitlement to file a reply within the time set by the judge,[36] and others stating that the right to file a reply is conditioned upon a judge's order.[37]

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[35] A variant of this version emphasizes that no permission is required:

> The petitioner may submit a reply to respondent's answer or other pleading, and need not obtain permission from the judge. The reply must be submitted within the time fixed by the judge or by local rule.

[36] Decisions interpreting 2254 Rule 5(e) as allowing a petitioner to file a reply brief as a matter of right include the following: McCauley v. Bowersox, No. 4:13-CV-872 NAB, 2015 WL 6955361, at *3 (E.D. Mo. Nov. 10, 2015) (stating "right to file" a reply is waived by failure to comply with timing requirement); U.S. *ex rel*. Gilzene v. Pfister, 45 F.Supp. 3d 854, 855, 2014 WL 4568133 (N.D. Ill. 2014) ("this Court followed its consistent practice of treating a Section 2254 petitioner as entitled to file a reply as a matter of right (see Rule 5(e)"); Miles v. Bradshaw, No. 5:13 CV 1078, 2014 WL 977702, at *13 (N.D. Ohio Mar. 12, 2014) (stating "a habeas petitioner may file a reply to the government's answer provided it is within a time frame ordered by the court"); "); Fischer v. Ozaukee Cty. Cir. Ct., 741 F. Supp. 2d 944, 961, 2010 WL 3835089 at *15 (E.D. Wis. 2010) ("The opportunity to reply to an answer to a petition is another distinguishing factor between the pleadings in a habeas petition and the ordinary civil case," denying state's motion to amend order granting writ, which state complained was issued too quickly after petitioner's reply received."); U.S. *ex rel.* Bell v. Mathy, No. 08 C 5622, 2009 WL 90078, at *1 n.2 (N.D. Ill. Jan. 14, 2009) (noting that though court had not also set a time for any filing, "Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts now permits petitioners to submit replies to respondents' answer"); Querendongo v. Tennis, No. CIV A 06-2925, 2007 WL 2142387, at *1 n.1 (E.D. Pa. July 23, 2007) (stating "petitioner requested permission from the court to file a response," but [s]uch permission is not required under the Rules Governing Section 2254 Cases in the United States District Court, Rule 5(e)"); Garner v. Morales, 237 F.R.D. 399, 400 n.1 (S.D. Tex. 2006) (distinguishing the general rule for civil cases, which allows a

Also, the reasoning in these Section 2254 cases mirrors the reasoning in the 2255 cases, with references to outdated authority,[38] local rules,[39] and emphasis on the word "may" in the text of the rule.[40]

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reply in some circumstances only when the court so orders with "the rule for state inmates seeking habeas relief, which allows a reply by a petitioner).

[37] Decisions interpreting 2254 Rule 5(e) as giving the court discretion to determine whether a reply may be filed include the following: Gilreath v. Bartkowski, No. CIV.A. 11-5228 MAS, 2015 WL 2365125, at *2 (D.N.J. May 15, 2015) ("Petitioner does not have an absolute right to file a reply in a habeas petition," citing pre-2004 Committee note; also stating the court allowed petitioner to file a reply but petitioner "simply did not"); Moore v. Coleman, No. CIV. 13-7031, 2015 WL 1073142 (E.D. Pa. Mar. 11, 2015) (no entitlement to file a reply in § 2254 cases); Stultz v. Giroux, No. CV 14-4570, 2015 WL 9273429, at *2 (E.D. Pa. Dec. 21, 2015) (finding that even if magistrate judge erred in not allowing petitioner time to respond, error was not prejudicial); United States *ex rel.* Taylor v. Williams**,** 2015 WL 6955495 at *1 (N.D. Ill. Nov. 10, 2015) (court denied petition finding "no need to bring Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts into play by calling for a reply"); Harris v. Wenerowicz, No. CIV.A. 11-7750, 2014 WL 4056953, at *2 (E.D. Pa. Aug. 14, 2014) ("a petitioner's reply is not a required element of the *habeas corpus* process in federal courts. Rule 5(e). . . provides that the 'petitioner *may* submit a reply to the respondent's answer or other pleading within a time fixed by the judge.' (Emphasis added)); Jackson v. Fortner, 2014 WL 3015265 at *3 (M.D. Tenn. July 2, 2014) ("counsel has not made any showing under Rule 5(e) that the reply would have served a 'truly useful purpose'"); Baker v. Cate, No. CV 09-7600 DDP FMO, 2012 WL 1940607, at *1 (C.D. Cal. May 29, 2012) (noting petitioner failed to show that any reply he could have filed would have raised a meritorious issue or substantively altered the court's decision); U.S. *ex rel*. Linton v. Battaglia, 416 F.Supp. 2d 619, 623 (N.D. Ill. 2006) (stating that because the exhibits provided a conclusive legal response to the petition, "no purpose would be served by calling for a reply as Section 2254 Rule 5(e) might otherwise permit"). *See also* Martinez v. Kansas, No. CIV.A. 05-3415-MLB, 2006 WL 3350653, at *2 (D. Kan. Nov. 17, 2006) (noting the 2254 Rules "suggest that there will ordinarily be no need for a reply (historically referred to as a traverse), but that one may be authorized by the court. Rule 5(e) & advisory committee's note ("Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances.")).

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[38] For example, several decisions appear to rely on the pre-2004 Committee Note. *E.g*., Jackson v. Fortner, 2014 WL 3015265 at *3 (M.D. Tenn. July 2, 2014) (finding no authority entitling petitioner to traverse or reply, citing 2254 Rule 5 and Advisory Committee Notes); Williams v. Cline, No. CIV.A.07-3036-MLB, 2007 WL 2174729, at *2 (D. Kan. July 27, 2007) (allowing reply, but stating "The rules suggest that there will ordinarily be no need for a reply (historically referred to as a traverse), but that one may be authorized by the court. *Id.,* Rule 5(e) & advisory committee's note ('Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances.'). The Court ordered such a traverse from petitioner here."); Housley v. Tennis, No. CIV.A. 04-658, 2004 WL 1737646, at *2 (E.D. Pa. July 30, 2004) (finding no authority entitling petitioner to file reply or traverse to answer, finding no prejudice, citing 2254 Rule 5 and cmt). Some more recent cases cite earlier authority that relies, in turn, on pre 2004 sources. *E.g.,* Armstrong v. Coleman, No. CIV.A. 11-4354, 2012 WL 1252570, at *3, *3 n.8 (E.D. Pa. Feb. 10, 2012) (rejecting claim as not challenging custody, rejecting right to reply in dicta, quoting *Housley*, and stating "Petitioner's alleged inability to file a reply did not prejudice his habeas rights"); Mills v. Poole, No. 06-CV-842A, 2008 WL 141729, at *5 n.1 (W.D.N.Y. Jan. 14, 2008) (stating that "the Section 2254 Rules suggest that, ordinarily, there will be no need for a Reply, which historically has been referred to as a Traverse, but that one may be authorized by the court," and citing Martinez v. Kansas, Civ. No. 05-3415-MLB, 2006 WL 3350653, at *2 (D. Kan. Nov.16, 2006), which in turn cited Rule 5(e) of the Section 2254 Rules & Advisory Committee's Note to Rule 5 of the Section 2254 Rules ("Rule 5 (and the general procedure set up by this entire set of rules) does not contemplate a traverse to the answer, except under special circumstances."). *See also* Moore v. Coleman, No. CIV. 13-7031, 2015 WL 1073142, *1 n.1 (E.D. Pa. Mar. 11, 2015) ("There is no entitlement to file a reply in § 2254 cases").

[39] It is possible there is some confusion about when local rules on civil case deadlines and pleadings apply in these cases. For example, in Garner v. Morales, 237 F.R.D. 399, 400, 2006 WL 2529609 at *1, (S.D. Tex. 2006), the court stated:

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Rule 7(a) establishes that plaintiffs may not file a reply to an answer except in specific circumstances . . . [footnote: This general rule for civil litigation is contrasted with the rule for state inmates seeking habeas relief, which allows a reply by a petitioner.]") (citing 2254 Rule 5(e)) *with* Davidson v. Morrow, No. 2:07-0047, 2008 WL 4065919, at *1–2 (M.D. Tenn. Aug. 27, 2008) (Petitioner stated the reason he failed to respond was "'the absence of a directive pursuant to [2254] rule 5(e) by the court' . . . However, a Motion to Dismiss is not a responsive pleading within the meaning of the Federal Rules of Civil Procedure, . . . and, in any event, Rule 5(a) which requires an Answer only upon order of a court 'does not address the practice in some districts, where the respondent files a pre-answer motion to dismiss the petition.' Rule 5, Rule Governing Section 2254 Cases, Adv. Comm. Notes, 2004 Amendments. In this case, Respondent did not file an Answer, but instead chose to file a Motion to Dismiss. Under this Court's Local Rule 7.01(b), any response to the Motion to Dismiss was due within ten days after service."

[40] Baker v. Cate, No. CV 09-7600 DDP FMO, 2012 WL 1940607, at *1 (C.D. Cal. May 29, 2012) (rejecting objection to decision before reply submitted to answer and stating "a reply is not required and the failure to file a reply does not disqualify a deserving petitioner from obtaining habeas corpus relief"); Harris v. Wenerowicz, No. CIV.A. 11-7750, 2014 WL 4056953, at *2 (E.D. Pa. Aug. 14, 2014) ('The petitioner *may* submit a reply to the respondent's answer ....')") (emphasis added by district court); Whitepipe v. Weber, 536 F.Supp.2d 1070, 1093 n. 2 (D.S.D. 2007) (stating that "Rule 5(e) of the § 2254 Rules contemplates that permission be granted and a time period be set by the reviewing court before a petitioner may file a reply to the respondent's answer").

TAB 4B

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

15-CR-F

RICHARD C. WESLEY
UNITED STATES CIRCUIT JUDGE

585-243-7910
FAX 585-243-7915

October 26, 2015

Honorable John D. Bates
Chair, Advisory Committee on Civil Rules
United States District Court
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I recently had a case that called into question the interpretation of Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts. Under this rule, it is unclear whether a 2255 petitioner has an absolute right to file a reply to a respondent's answer.

The full text of Rule 5 reads as follows (emphasis added):

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

RULE 5. THE ANSWER AND THE REPLY

(a) When Required. The respondent is not required to answer the motion unless a judge so orders.

(b) Contents. The answer must address the allegations in the motion. In addition, it must state whether the moving party has used any other federal remedies, including any prior post-conviction motions under these rules or any previous rules, and whether the moving party received an evidentiary hearing.

(c) Records of Prior Proceedings. If the answer refers to briefs or transcripts of the prior proceedings that are not available in the court's records, the judge must order the government to furnish them within a reasonable time that will not unduly delay the proceedings.

(d) Reply. The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge.

One plausible reading of subsection (d) is that a petitioner may submit a reply, provided that he or she wishes to do so. Another plausible reading is that a petitioner may submit a

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reply, provided that the judge allows the petitioner to do so. The ambiguity appears rooted in differing interpretations of the word "may." "May" could mean that a petitioner is permitted—but not required—to file a reply. Alternatively, "may" could mean that a petitioner is allowed—if granted permission by the court—to file a reply.

The federal district courts that have encountered this ambiguity are presently divided on its resolution. Several courts have concluded that Rule 5(d) affords a 2255 petitioner the absolute right to file a reply. *See, e.g.*, *United States v. Hosseini*, 2013 U.S. Dist. LEXIS 89148, at *2 (N.D. Ill. June 25, 2013) ("In accordance with Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts, [the petitioner] is entitled to file a reply to the government's detailed response if he desires to do so."); *United States v. Andrews*, 2012 U.S. Dist. LEXIS 179244, at *6 (N.D. Ill. Dec. 19, 2012) ("It is reasonable to read [Rule 5(d)] as requiring the district court to provide the petitioner with the opportunity to reply. If that is the correct reading, we may have erred in ruling on the § 2255 motion without considering a reply").

Other courts have concluded that a reply is not required under Rule 5(d). *See, e.g.*, *Simmons v. United States*, No. 12 Civ. 04693 (ILG), 2014 WL 4628700, at *1 (E.D.N.Y. Sept. 15, 2014) ("[Rule 5(d)]'s plain language does not mandate a reply."); *Terrell v. United States*, No. 3:12-cv-233-FDW, No. 3:09-cr-172-FDW-1, 2014 WL 1203286, at *1 (E.D.N.C. Mar. 24, 2014) ("There is . . . no absolute right for a Petitioner to file a Reply to the Government's Response in an action brought under § 2255."). At least some of these courts hold that whether a 2255 petitioner may file a reply depends on the circumstances or is a matter of discretion for the judge. *See, e.g.*, *United States v. Crittenton*, Crim. Act. No. 03-349-2, Civ. Act. No. 07-3770, 2008 WL 343106, at *2 (E.D. Pa. Feb. 7, 2008) ("No court has held that Rule 5(d) entitles a petitioner to submit a reply under all circumstances."); *United States v. Martinez*, Crim. No. 11-131(2) (SRN/AJB), 2013 WL 3995385, at *2 (D. Minn. Aug. 5, 2013) ("[W]hether to allow the moving party to file a reply brief is within the Court's discretion.").

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It is my view that Rule 5(d) entitles a petitioner to submit a reply regardless of a court's express permission. The confusion appears to be fueled at least in part by the portion of Rule 5(d) providing that the court will set a time limit for submission of the reply. The Advisory Committee Notes to the 2004 Amendment, however, help clarify that the court's discretion to set time limits does not grant the court discretion to deny entirely a 2255 petitioner's right to reply:

> [R]evised Rule 5(d) adopts the practice in some jurisdictions *giving the movant an opportunity to file a reply* to the respondent's answer. Rather than using terms such as "traverse," *see* 28 U.S.C. Sec. 2248, to identify the movant's response to the answer, the rule uses the more general term "reply." The Rule prescribes that the court set the time for such responses, and in lieu of setting specific time limits in each case, the court may decide to include such time limits in its local rules.

These Notes support a reading of Rule 5(d) that permits (but does not require) a petitioner to reply. Furthermore, the language of Rule 5(d) is strikingly similar to that of Federal Rule of Appellate Procedure 28(c), which provides that "[t]he appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed." Fed. R. App. P. 28(c). The language "appellant may file a brief in reply," which certainly entitles an appellant to reply, is parallel to "[t]he moving party may submit a reply" in Rule 5(d).

The broader jurisprudential question underlying this issue is whether parties to a 2255 proceeding are entitled to a full round of briefing. By denying a 2255 petitioner the right to reply, a court essentially assumes that nothing the petitioner might raise in reply could possibly change the outcome of the 2255 proceeding. This does not strike me as the Committee's intended result.

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I raise this matter with you for the Committee's consideration.

Sincerely,

Richard C. Wesley
United States Circuit Judge

Cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Professor Edward H. Cooper, Reporter, Advisory Committee on Civil Rules
Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules

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TAB 4C

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TAB C.1

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MEMORANDUM

TO: Nancy King and Sara Beale

FROM: Bridget Healy and Julie Wilson

DATE: August 4, 2016

RE: Survey of Response Times for Petitioner Reply Briefs

Attached to this memorandum is a spreadsheet detailing research regarding response times for petitioner reply briefs in actions commenced under 28 U.S.C. §§ 2254 and 2255. The research was completed in response to a suggestion from Judge Richard C. Wesley regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts. That rule, as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts, provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." After reviewing case law interpreting Rule 5(d), Judge Wesley pointed out that it is unclear whether a party who files a motion pursuant to section 2255 has an absolute right to file a reply to the respondent's answer or other pleading.

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A selection of small, medium, and large courts were included in the research to provide a fair sample of court practices. The determination of court size was based on each district's number of authorized federal judgeships as approved by Congress. The Federal Judicial Center has used these categories in their research, and it was adopted for purposes of this analysis. Where possible, anecdotal evidence from pro se law clerks and judges was included to further supplement the research on local rules and case docket reviews.

The result of the research is that the majority of courts included in the sample permit petitioners to file reply briefs. Most courts permit reply briefs and set the time period with an order, although a minority of courts has a local rule permitting reply briefs. A review of the

dockets of the sample courts shows that the order requiring the respondent to answer is the most common method of setting the time period for a petitioner's reply, and that reply briefs are sometimes filed regardless of whether they are specifically permitted in an order.

The time periods for replies vary, but are generally between 14 and 30 days after service of the respondent's answer, with some up to 60 days. From the information received from pro se law clerks, it seems that motions for extensions of time to file reply briefs are routinely granted, although some courts have a good cause requirement for an extension. A review of case dockets supports the law clerks' information.

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TAB C.2

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	SMALL COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Maine	There is no specific provision for reply briefs in the local rules, whereas responses to petitions are addressed (See Appendix III to Local Rules). Rules Governing Section 2254 and 2255 Cases Apply under Local Rule 72. From reviewing dockets, generally response times for the respondent's answer and petitioner's reply are provided in the Order to Answer. Average times given are 60 days and 30 days, respectively.	There is no specific provision for reply briefs in the local rules, whereas responses to petitions are addressed (See Appendix III to Local Rules). Rules Governing Section 2254 and 2255 Cases Apply under Local Rule 72. From reviewing dockets, response times for the respondent's answer and petitioner's reply are provided in the Order to Answer. Average times given are 60 days and 30 days, respectively.		
New York Northern	Local Rule 12.1(a) provides the general rules for criminal pleadings. It provides that reply briefs, if permitted, must be filed 11 days before the return date. From reviewing dockets, for 2254 petitions generally a Decision and Order is entered, providing a deadline for respondent's answer, but nothing as to petitioner's reply. In cases in which the petitioner requested the chance to reply, a time period was provided.	From reviewing dockets, it appears that there is little uniformity in section 2255 reply deadlines. The majority of cases are governed by an order entered after the initial motion is filed. These provide time periods for the response, and sometimes the time for a reply. In some cases replies were filed without any specific order, and in others, no order regarding scheduling is entered at all.		

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	SMALL COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
North Carolina Middle	Local Rule 12.1 addresses pre-trial motion practice generally. There is no specific rule regarding time for filing responses or replies to 2254 petitions, but subsection (b) provides the standards for granting an extension of time. From the dockets, it appears that in some cases an order sets the deadline for a response, but letters are also used. Often motion practice permitting petitioner to file additional documents.	Local Rule 12.1 addresses pre-trial motion practice generally. There is no specific rule regarding time for filing responses or replies but subsection (b) provides the standards for granting an extension of time. From reviewing the dockets, it appears that usually an order is entered in each case specify the respondent's response time (typically 40 days), but not the petitioner's reply brief deadline.	The moving party automatically gets to file a reply which is limited to matters newly raised in the response, the time for filing is 14 days, and parties can ask for extensions of time, which are ordinarily granted.	The moving party automatically gets to file a reply which is limited to matters newly raised in the response, the time for filing is 14 days, and parties can ask for extensions of time, which are ordinarily granted.
Mississippi Northern	The Northern and Southern Districts of Mississippi operate under the same local rules. There is no specific rule for petitions under section 2254, although Local Rule 47 governs motion practice. From reviewing case dockets, it appears that the reply/traverse deadline is provided in the order setting the respondent's answer deadline.	Local Rule 47(C)(1) governs responses to motions under section 2255 (response not required unless directed by the court).	Petitioners always have the opportunity to reply. Reply deadline (14 days) set in order requiring response to petition. Court is generous with requests for extension of time for replies.	Petitioners always have the opportunity to reply. Reply deadline (14 days) set in order requiring response to petition. Court is generous with requests for extension of time for replies.
Indiana Northern	Local Rule 47-2 provides 28 days after the answer is served for a petitioner's reply.	Local Rule 47-2 provides 28 days after the answer is served for a petitioner's reply.	Generally, extensions of time are requested in the same method that other requests for extensions of time are requested. The motions by petitioners are more likely to be granted (than other litigants) because there is usually no prejudice to the respondent by the delay.	Generally, extensions of time are requested in the same method that other requests for extensions of time are requested. The motions by petitioners are more likely to be granted (than other litigants) because there is usually no prejudice to the respondent by the delay.

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	SMALL COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Idaho	Local Rule 9.1 provides the general rules for section 2254 motion practice. It provides that a court must issue an order with a response deadline if, after an initial review, the court does not dismiss the petition. Local Rule 7.1 provides that moving parties have 14 days after service of the responding party's brief.	There is no local rule for motions filed under section 2255, but Local Rule 7.1 provides general rules for motion practice, including that the moving party has 14 days after service of the responding party's brief.	A general briefing order sets out schedule for all responses. Like all other criminal motions in the district, a reply is allowed but is not required to be filed by the moving party. The time for replies is 14 days after the respondent answers; this is 7 days longer than permitted for other criminal motions. Extensions of up to 30 days are routinely granted.	A general briefing order sets out schedule for all responses. Like all other criminal motions in the district, a reply is allowed but is not required to be filed by the moving party. The time for replies is 14 days after the respondent answers; this is 7 days longer than permitted for other criminal motions. Extensions of up to 30 days are routinely granted.
Minnesota	The guidebook for section 2254 petitions explains that petitioners may file a reply within the time period set by the court. See: http://www.mnd.uscourts.gov/Pro-Se/2254-PrisonerGuidebook.pdf. There is no specific local rule governing reply time periods. From reviewing case dockets, it appears that petitioner's generally receive 30 days from the date the answer is filed to file a reply, and that the deadline is set out in the case management order.	The guidebook for section 2255 motions explains that petitioners may file a reply within the time period set by the court. See http://www.mnd.uscourts.gov/Pro-Se/2255-PrisonerGuidebook.pdf. There is no specific local rules governing reply time periods. From reviewing case dockets, it appears that a petitioner's reply time is usually in an order that also sets the respondent's response time, and is typically 20-30 days.	All petitioners are given the chance to reply, except in cases in which the petition is dismissed before the time for a reply. Generally petitioners are given 30 days to reply. Extensions may be granted upon request.	All petitioners are given the chance to reply, and the usual response time is 20-30 days. Extensions may be granted upon request.
California Eastern	Local Rule 190 sets out the filing provisions for petitions under section 2254, but there is nothing addressing reply briefs.	Local Rule 190 sets out the filing provisions for motions under section 2255, but there is nothing addressing reply briefs.	Petitioners are automatically given the opportunity to reply, and are usually given 30 days. Extensions are routinely granted. There is no local rule but the standard briefing order contains these deadlines.	Petitioners are automatically given the opportunity to reply, and are usually given 30 days. Extensions are routinely granted. There is no local rule but the standard briefing order contains these deadlines.

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	MEDIUM COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Massachusetts	Local Rule 7.1, which governs motion practice generally, provides that reply briefs can be filed only with leave of court. There are no specific provisions for petitions under section 2254. From reviewing case documents, the general scheduling order used in cases does not reference a petitioner's reply brief, but in some cases, additional documents are filed by petitioners.	Local Rule 7.1, which governs motion practice generally, provides that reply briefs can be filed only with leave of court. There are no specific provisions for petitions under section 2255. From reviewing case documents, the general scheduling order used in cases does not reference a petitioner's reply brief, but in some cases, reply briefs and/or supplemental memoranda are filed by petitioners.		
Pennsylvania Western	Local Rule 2254 applies to petitions. LR 2254(e)(2) provides 30 days for petitioners to file a reply (or traverse). Any extension of that time must be requested by motion and good cause must be shown.	Local Rule 2255 applies to petitions. LR 2255(e)(2) provides 30 days for petitioners to file a reply (or traverse). Any extension of that time must be requested by motion and good cause must be shown.	Petitioners are given an automatic right to file a reply, 30 days after the date the respondent files its answer. A petitioner must file a motion for leave to file a reply later than the given time period, and must show good cause.	Petitioners are given an automatic right to file a reply, 30 days from the date the U.S. Attorney files its answer or response. Extensions to file replies are granted for good cause shown.

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	MEDIUM COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Virginia Eastern	Local Rule 7 provides the general rules for motion practice. Subsection 7(K) contains special rules for pro se parties. "Motions Against Pro Se Parties: It shall be the obligation of counsel for any party who files any dispositive or partially dispositive motion addressed to a party who is appearing in the action without counsel to attach to or include at the foot of the motion a warning consistent with the requirements of Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975). The warning shall state that: (1) The pro se party is entitled to file a response opposing the motion and that any such response must be filed within twenty-one (21) days of the date on which the dispositive or partially dispositive motion is filed; and (2) The Court could dismiss the action on the basis of the moving party's papers if the pro se party does not file a response; and 15 (3) The pro se party must identify all facts stated by the moving party with which the pro se party disagrees and must set forth the pro se party's version of the facts by offering	The same Local Rule applies in motions under section 2255.	Petitioners are generally permitted a reply, and the usual time period is 14 days from the date of the respondent's answer. This is set out in a scheduling order. The judge who responded specifically reference the case Roseboro v. Garrison (cited in Local Rule 7(K)).	No response was provided regarding motions under section 2255.

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	MEDIUM COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Georgia Northern	Local Rule 7.1 applies to motion practice generally, and provides that replies must be served within 14 days of service of a responsive pleading. In the court's instructions for filing habeas corpus motions or petitions, there is a specific reference to a petitioner filing a reply if the respondent files an answer, although no time period is provided. See http://www.gand.uscourts.gov/system/files/HabeasInstruct09_03_2015.pdf	Local Rule 7.1 applies to motion practice generally, and provides that replies must be served within 14 days of service of a responsive pleading. In the court's instructions for filing habeas corpus motions or petitions, there is a specific reference to a petitioner filing a reply if the respondent files an answer, although no time period is provided. See http://www.gand.uscourts.gov/system/files/HabeasInstruct09_03_2015.pdf	There is no local rule addressing reply briefs, but petitioners are generally given 20 days after the respondent files an answer to file a reply.	There is no local rule addressing reply briefs, but petitioners are generally given 20 days after the respondent files an answer to file a reply.
Texas Eastern	There is no local rule that addresses petitioner reply briefs.	There is no local rule that addresses petitioner reply briefs.	Petitioners are permitted a reply, and are generally given 30 days. Extensions are granted when requested.	Petitioners are permitted a reply, and are generally given 30 days. Extensions are granted when requested.
Ohio Southern	Local Rule 16 exempts habeas corpus proceedings from pre-trial scheduling requirements. Local Rule 67 applies to petitions in death penalty cases. From reviewing case dockets, it appears that a petitioner is often given time to reply in the order setting the time for respondent to answer. Typically 21-30 days.	Local Rule 16 exempts habeas corpus proceedings from pre-trial scheduling requirements. From reviewing case dockets, it appears that a petitioner is often given time to reply in the order setting the time for respondent to answer. Typically 21 or more days from date answer is filed.		

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	MEDIUM COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Missouri Eastern	There is no local rule that addresses petitioner reply briefs. There is a district Case Management Order that sets a reply deadline.	There is no local rule that addresses petitioner reply briefs. There is a district Case Management Order that sets a reply deadline.	Petitioners are usually permitted a reply, and while there is not local rule, the district's Case Management Order sets out deadlines and a reply is specifically included. The CMO gives 60 days as a default, although one law clerk stated that 45 days is also common. Extensions are granted with good cause shown.	Case Management Orders used in section 2255 cases do not always include a time period for replies, however, law clerks often wait the usual time period (45-60 days) for a reply, even if not in the CMO. If it is in the CMO, the time period is generally 45-60 days. Extensions are granted with good cause shown.
California Northern	Petitioner has 30 days to file a "traverse" to the respondent's answer in a non-capital case (See Habeas Corpus Local Rule 6).	No specific rule.	Per local rule, the petitioner has 30 days from the date of filing of the respondent's answer to the Order to Show Cause. Extensions of time can be granted upon request.	There is no local rule addressing reply briefs in section 2255 motions, but most judges in the district use a standard scheduling order that typically gives 30 days from the date the respondent's answer is filed for a reply. Extensions of time can be granted upon request.

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	LARGE COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
District of Columbia	Local Rule 9.2 governs the form of section 2254 and 2255 motions and petitions, and they are exempt from the general pre-trial procedure under Local Rule 16.5. From reviewing case dockets, an order to show cause is issued to direct a respondent to answer, and in some cases, an order to show cause is issued to direct petitioner to reply or supplement the record.	The same local rules apply to motions under section 2255. From reviewing case dockets, in most cases (unless the motion is dismissed outright), an order is entered setting a deadline for the respondent's answer. Some cases have additional orders permitting "supplemental filings" by the petitioner, and in others, the petitioners file replies without specific consent or deadlines.		

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	LARGE COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
New York Southern	Pursuant to Local Rules 6.1 and 16.1, petitions under 2254 and motions under 2255 are exempt from usual pre-trial scheduling. Local Rule 83.3 deals with habeas corpus petitions, but has nothing to do with motion practice. Most of the judges within the district have Individual Practices that set out standards for pre-trial practice, and sometimes motion practice. Often habeas corpus actions are excluded from pre-trial requirements, although some judges include the instruction that a scheduling order will be issued when a petition or motion for habeas corpus is filed. From reviewing case dockets, it appears that generally, an order to answer is entered setting a deadline for the respondent's answer and a deadline for petitioner's reply, if any, 30 days from the date of service of the answer.	Pursuant to Local Rules 6.1 and 16.1, petitions under 2254 and motions under 2255 are exempt from usual pre-trial scheduling. Local Rule 83.3 deals with habeas corpus petitions, but has nothing to do with motion practice. Most of the judges within the district have Individual Practices that set out standards for pre-trial practice, and sometimes motion practice. Generally, habeas corpus actions are excluded from pre-trial requirements although some judges include the instruction that a scheduling order will be issued when a petition or motion for habeas corpus is filed. From reviewing case dockets, it appears that generally, an order to answer is entered setting a deadline for the respondent's answer and a deadline for petitioner's reply, if any, 30 days from the date of service of the answer.		

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	LARGE COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
New Jersey	Unlike petitions under section 2255, there are no specific provisions for petitions under 2254. Under Local Rule 7.1(d), general motion practice measures answer and reply time periods from the noticed motion day (14 days from the day for answers and 7 days for the reply). From reviewing case dockets, it appears common for petitioners to be given 30 days following the filing of respondent's answer to reply. Rule 5(e) is sometimes cited.	Local Rule 81.2(d) provides the rules for motion practice in motions under section 2255. It states that respondents have "45 days from the date on which an order directing such response is filed with the Clerk, unless an extension is granted for good cause shown." There is no provision for a petitioner reply. (Local Rule 81.3 provides specific rules for motions in section 2255 cases involving the death penalty, and requires additional briefing by the petitioner). From reviewing case dockets, Orders to Answer often contain a provision permitting a petitioner to reply within 30 days of being served with the respondent's answer.		

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	LARGE COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Pennsylvania Eastern	Local Rule 9.4 governs petitions under section 2254, and provides that petitioners must file a memorandum in support of their petition within 60 days of filing the petition. Respondents are not required to respond until the memorandum is filed. Under Local Rule 9.4(7), a petitioner has 21 days after the filing of an answer to file a reply. Extensions may be granted for good cause.	Local Rules 9.3 and 9.4 govern motions under section 2255. Local Rule 9.3 sets out the format for any motion, and Rule 9.4 provides the contents and motion practice. There are specific carve outs for section 2255 motions for death penalty cases. In general, petitioners must file a memorandum in support of their petition within 60 days of filing the petition. Respondents are not required to respond until the memorandum is filed. Under Local Rule 9.4(7), a petitioner has 21 days after the filing of an answer to file a reply. Extensions may be granted for good cause.		
Texas Southern	There are no local rules setting reply times for petitioners. From reviewing case dockets, in appears that the standard order used some cases under section 2254 does not contain any language regarding petitioner's reply briefs, although the order to answer used in some cases does contain language permitting a petitioner reply, within 21 days of receiving respondent's answer. Regardless of the language in the order, petitioners file replies in cases, and other supplemental documents.	There are no local rules setting reply times for petitioners. In reviewing cases, often in the order to answer, the petitioner is given 30 days from service of the respondent's answer to file a reply, citing Rule 5(d).		

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	LARGE COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
Illinois Northern	Rule 81.3 provides the rule for petitions under section 2254 and 2255. Local Rule 16.1.1 exempts prisoner petitioners from the usual case scheduling practices. Local Criminal Rule 47.1 provides that reply briefs must be filed within 7 days of receipt of the answering brief. It is unclear if this rule applies to motions under section 2254. From a review of case dockets, a time for petitioner's reply is usually provided in the order setting the time for the respondent to answer. The time for reply is anywhere from 14-60 days from receipt of the respondent's answer. Occasionally, there were separate orders setting petitioners' reply times.	Rule 81.3 provides the rule for petitions under section 2254 and 2255. Local Rule 16.1.1 exempts prisoner petitioners from the usual case scheduling practices. Local Criminal Rule 47.1 provides that reply briefs must be filed within 7 days of receipt of the answering brief. It is unclear if this rule applies to motions under section 2255. From the case dockets, it appears that in the majority of cases, orders are entered setting the petitioner's reply brief response time (anywhere from 14-30 days) in the order setting the time for the respondent's answer. Occasionally, there were separate orders setting reply times.		

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	LARGE COURTS			
	Local Rule and Docket Information		Responses from Judges / Law Clerks	
District	Section 2254	Section 2255	Section 2254	Section 2255
California Central	Local Civil Rule 72.3 and 83.16 provide the general rules for petitions and motions under sections 2254 and 2255. The district has special rules for capital habeas cases (see Local Rule 83.17) that sets out specific briefing rules. In Appendix B to the Local Rules regarding Agreement on Acceptance of Service, it states that the court will enter an order with the deadline for a responsive pleading, if any. From reviewing case dockets, typically the court sets the time for a petitioner to file a reply in an order, either the order setting the time for respondent's answer or a separate order if an answer if filed. Typically 30 days from the date of service of respondent's answer.	Local Civil Rule 83.16 provides the general rules for petitions and motions under sections 2254 and 2255. In Appendix B to the Local Rules regarding Agreement on Acceptance of Service, it states that the court will enter an order with the deadline for a responsive pleading, if any. From reviewing court dockets, it appears that the time for a petitioner to file an "optional" reply brief in usually in the order setting the respondent's time to answer. Typically 30 days from service of the answer or 21 days from the return filing date.		
Florida Middle	There are no specific local rules setting reply times for petitioners. In reviewing case dockets, there is an order entered in most cases permitting a reply by petitioner, providing anywhere from 14-30 days.	There are no specific local rules setting reply times for petitioners. In reviewing case dockets, there is an order entered in most cases permitting a reply by petitioner giving anywhere from 14-30 days.	Generally a reply is permitted, although it is judge-specific. Petitioners are given anywhere from 14-21 days, occasionally 30 days. Extensions are granted when requested. One law clerk reported that her judge allows for 30 days after service of the respondent's answer. All law clerks cited the Rules Governing Section 2254 and 2255 Proceedings.	Generally a reply is permitted, although it is judge-specific. Petitioners are given anywhere from 14-21 days, occasionally 30 days. Extensions are granted when requested. One law clerk reported that petitioners are given 30 days after service of the government's response for 2255 motions. All law clerks cited the Rules Governing Section 2254 and 2255 Proceedings.

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Section 2255 Motions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
Alabama Middle		Yes				20 days	Yes
Arizona		Yes				30 days	Yes, if good cause is shown
California Eastern		Yes				30 days	Yes
California Northern		Yes			Standard order used by vast majority of chambers	30 days	Yes
California Southern		Yes				30 days	Yes
Delaware		Yes				21 days	Yes
Florida Middle	Ocala			Maybe	The primary District Judge does not typically include an opportunity for reply when ordering a response from the government)	N/A	N/A
Florida Middle	Tampa			Maybe	Generally, a reply is permitted	Generally ranges from 14 to 21 days, but 30 days is not unusual	Yes
Florida Middle	Jacksonville	Yes				30 days	Yes
Florida Middle	Ft. Myers			Maybe	A "floater" staff attorney indicated that petitioners are automatically given an opportunity to reply. There was variation among the responses we received.	Varies from judge to judge and according to the type of case.	Yes, two extension are automatically given.
Florida Northern	Gainesville - Judge Gary R. Jones	Yes				30 days	Yes
Florida Northern		Yes				30 days, but there are exceptions	Yes
Georgia Northern		Yes				20 days	Yes
Georgia Southern		Yes			This is a qualified "yes." The court permits parties to file as many briefs as they want, but they are on notice that the court can rule in the meantime (i.e., after a response brief has been filed). Local Rule 7.6 encourages reply briefers to inform the court of their intention to file.	No response.	No response.
Hawaii			No		The opportunity to reply is commonly requested and granted. Respondent states: "Our court has not ruled or proceeded on the assumption that Rule 5(d) provides an automatic right to file a reply to my knowledge. Instead it is left to the discretion of the court."	30 days	Yes
Idaho		Yes				14 days	Yes
Illinois Central		Yes				3 to 4 weeks	Yes
Illinois Southern		Yes				5 to 10 days	Yes
Indiana Northern		Yes				28 days	Yes
Indiana Southern		Yes				28 days	Yes
Kentucky Eastern		Yes			Treated the same as any civil action	14 days	Yes

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Section 2255 Motions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
Louisiana Eastern				Maybe	If the movant/petitioner sends in a reply/traverse, the clerk files it into the record even if leave is not requested.	If the movant/petitioner requests leave, the motion is addressed with a return period of 14 to 30 days given depending on the judge and the circumstances of the case, including the length of time that already has passed between the government's response and the filing of the request for leave.	If necessary, a brief extension may be granted depending on the judge and circumstances of the case.
Maine		Yes				30 days	Yes
Maryland				Maybe		It may differ among the judges. In the Johnson resentencing cases, 28 days are uniformly given for the reply.	Yes
Massachusetts	Eastern (Boston)			Maybe	Depends on the judge; varies between chambers		
Michigan Eastern		Yes				30 days	Yes
Minnesota		Yes			Respondent states that there have been exceptions at times	Varies from judge to judge, but 20 to 30 days is standard.	Yes
Mississippi Northern		Yes				14 days	Yes
Missouri Eastern		Yes				Can vary, but default is 60 days.	Yes, if good cause is shown
Missouri Western		Yes				30 days	Yes, if good cause is shown
Montana		Yes				21 or 30 days	Yes
Nebraska		Yes				30 days	Yes
New Jersey		Yes			This is a qualified "yes." The district has interpreted the rule as not mandating that a petitioner be permitted to file a reply.	30 days	Yes, but reviewed the same as any request would be
New York Eastern	Magistrate Judge Robert M. Levy			Maybe	No uniform practice, but Judge Levy says most, if not all, permit a reply.	30 days is typical period	Yes
New York Northern	Magistrate Judge David E. Peebles (one of two respondents)	Yes				No specific time limit is currently prescribed.	No response
New York Southern		Yes				30 days	Up to judge, but reasonable requests are typically granted
New York Western		Yes				30 days	Yes
North Carolina Middle		Yes				14 days	Yes
Ohio Southern	Eastern	Yes				14 or 15 days	Yes
Oklahoma Eastern		Yes				14 days	Yes
Oklahoma Western	Magistrate Judge Suzanne Mitchell	Yes				7 days	Yes

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Section 2255 Motions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
Pennsylvania Western		Yes				"30 days of the date the US Attorney files its Answer or other form of response"	Yes. "If the movant wishes to file a Reply after 30 days have passed, he or she must file a motion requesting leave to do so. An extension may be granted only for good cause shown."
South Dakota	Magistrate Judge Veronica L. Duffy	Yes				14 days (same rule for replies in all civil motions) "[B]ecause of the vagaries of prison mail systems, I don't hold pro se inmates to a strict 14-day time period. Generally, I will consider any reply that the inmate files before I turn my attention to the file to begin formulating an opinion."	Yes
Tennessee Eastern		Yes			This became the practice following the 2004 amendments	14 days (same rule that applies to any dispositive motion)	Yes (the 5th Circuit tends to reverse the District Court if the movant is not given at least one extension of time upon request)
Tennessee Western		Yes				28 or 30 days	Yes
Texas Eastern	Sherman	Yes				30 days	Yes
Texas Northern	Fort Worth (and another general response)	Yes				30 days	
Texas Southern	Corpus Christi	Yes				30 days	Yes
Texas Southern		Yes				30 days	Yes
Texas Western	Austin	Yes				20 days (except for one judge who gives 14 days)	Yes
Virginia Eastern				Maybe	No definitive response because varies by judge. Two respondents indicated that they are pretty confident that most permit a reply.	Likely depends on whether the defendant is represented by counsel	
Virginia Western		Yes			Roseboro notice	21 days for pro se petitioners; 14 days per local rule otherwise	Yes
Washington Western		Yes				22 to 25 days (based on reqt that response be noted for consideration per local rule)	Yes
Wisconsin Eastern	Career clerk to Judge Rudolph T. Randa		No			If a reply is allowed, 30-45 days	Yes
Wisconsin Western		Yes				10 days	Yes
Wyoming		Yes				21 days	Yes

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Habeas Petitions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
Alabama Middle		Yes				20 days	Yes
Arizona		Yes				30 days	Yes, if good cause is shown
Arkansas Eastern		Yes				30 days	Yes
California Eastern		Yes				30 days	Yes
California Northern		Yes			Per local rule and per standard OSC used by all chambers	30 days	Yes
California Southern		Yes				30 days	Yes
Delaware		Yes				21 days	Yes
Florida Middle	Ocala	Yes				45 days	Yes
Florida Middle	Tampa			Depends on the judge	Generally, a reply is permitted	Generally ranges from 14 to 21 days, but 30 days is not unusual	
Florida Middle	Ft. Myers			Maybe ("only when needed")	Respondent indicated that the staff attorneys and District Judge in charge changed procedure based on a reading of Rule 5. Previously, the standard order directed that the petitioner file a reply within so many days. The procedure was changed to only request a reply when "needed." If the order does not direct that a reply be filed, but the petition requests to file, the court construes as a motion seeking leave to file and grants the motion. Another respondent--a "floater" staff attorney indicated that petitioners are automatically given an opportunity to reply.	30 to 45 days	Yes. One respondent indicated that two extensions are automatically given.
Florida Northern	Gainesville - Judge Gary R. Jones	Yes				30 days	Yes

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Habeas Petitions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
Florida Northern		Yes				30 days	Yes
Georgia Northern		Yes				20 days	
Georgia Southern		Yes			This is a qualified "yes." The court permits parties to file as many briefs as they want, but they are on notice that the court can rule in the meantime (i.e., after a response brief has been filed). Local Rule 7.6 encourages reply briefers to inform the court of their intention to file.	No response.	No response.
Hawaii		Yes			Seemed to be a qualified "yes" in that respondent indicated "generally."	30 days	Yes
Idaho		Yes				14 days	Yes
Illinois Central		Yes				3 to 4 weeks	Yes
Illinois Southern		Yes				5 to 10 days	Yes
Indiana Northern		Yes				28 days	Yes
Indiana Southern		Yes				28 days	
Kansas		Yes				Traditionally 30 days; some judges have begun giving a shorter amount of time	Traditionally, yes; however the practice is being reconsidered
Kentucky Eastern		Yes			Treated the same as any civil action	14 days	Yes
Louisiana Eastern				Maybe	If the movant/petitioner sends in a reply/traverse, the clerk files it into the record even if leave is not requested.	If the movant/petitioner requests leave, the motion is addressed with a return period of 14 to 30 days given depending on the judge and the circumstances of the case, including the length of time that already has passed between the state's/government's response and the filing of the request for leave.	If necessary, a brief extension may be granted depending on the judge and circumstances of the case.

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Habeas Petitions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
Maine		Yes				30 days	Yes
Maryland		Yes				Typically 28 days. If, however, it is clear that further reply might jeopardize a petitioner (for instances, where the limitations period will soon expire, and it is clear the petitioner needs to complete post-conviction or appellate review in the state courts before coming to federal court), a decision may be rendered, even if the reply period has not run.	Yes.
Massachusetts	Eastern (Boston)			Maybe	Depends on the judge; varies between chambers		
Michigan Eastern		Yes				45 days	Yes
Minnesota		Yes				30 days	Yes
Mississippi Northern		Yes				14 days	Yes
Missouri Eastern		Yes				60 days	Yes, if good cause is shown
Missouri Western		Yes				30 days	Yes, if good cause is shown
Montana		Yes				21 or 30 days	Yes
Nebraska		Yes				30 days	Yes
Nevada		Yes				45 days	Yes
New Jersey		Yes			This is a qualified "yes." The district has interpreted the rule as not mandating that a petitioner be permitted to file a reply.	30 days	Yes, but reviewed the same as any request would be
New York Eastern	Magistrate Judge Robert M. Levy			Maybe	No uniform practice, but Judge Levy says most, if not all, permit a reply.	30 days is typical period	Yes
New York Northern	Magistrate Judge David E. Peebles (one of two respondents)			Maybe	Judge Peebles indicted that it was automatic; another respondent indicated that it was not	No specific time limit is currently prescribed. Ms. Albright indicated 30 days.	Yes, if needed/necessary
New York Southern		Yes				30 days	Up to judge, but reasonable requests are typically granted

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Habeas Petitions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
New York Western		Yes				30 days	Yes
North Carolina Middle		Yes				14 days	Yes
Ohio Southern	Eastern	Yes				14 or 15 days	Yes
Oklahoma Eastern		Yes				15 days	Yes
Oklahoma Western	Magistrate Judge Suzanne Mitchell	Yes				7 days	Yes
Pennsylvania Middle		Yes				14 days	Yes
Pennsylvania Western		Yes				"within 30 days of the date the respondent files its Answer"	Yes. "If the petitioner wishes to file a Reply after 30 days have passed, he or she must file a motion requesting leave to do so. An extension may be granted only for good cause shown."
South Dakota	Magistrate Judge Veronica L. Duffy	Yes				14 days	Yes
Tennessee Eastern		Yes			This became the practice following the 2004 amendments	14 days (same rule that applies to any dispositive motion)	Yes (the 5th Circuit tends to reverse the District Court if the movant is not given at least one extension of time upon request)
Tennessee Western		Yes				28 or 30 days	Yes
Texas Eastern	Sherman	Yes				30 days	

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Habeas Petitions

1. In your court, when a response is filed, is the moving party automatically given an opportunity to file a reply?

2. What time period is given for filing a reply?

3. Are extensions of that time period granted?

U.S. District Court	Division	1: Yes	1: No	1: Maybe/Judge-Specific	1: Narrative Response	2: Time period for filing reply	3: Extensions granted? (Yes/No)
Texas Northern	Fort Worth (and another general response)	Yes				30 days (One respondent indicated that, often, judges will allow 60 days simply because it often takes longer to get the state court records and this avoids dealing with a request for an extension of time by the State.)	Yes. One respondent answered that it more often the State that requests an extension of time.
Texas Southern		Yes				30 days	Yes
Texas Western	Austin	Yes				30 days (even if order does not specify a time period, they wait at least 30 days)	Yes
Virginia Eastern	Magistrate Judge Douglas E. Miller	Yes			Roseboro notice	21 days	Yes
Virginia Western		Yes			Roseboro notice	21 days for pro se petitioners; 14 days per local rule otherwise	Yes
Washington Western		Yes				18 to 21 days (calculation based requirement that response be noted for consideration per local rule)	Yes
Wisconsin Eastern	Career clerk to Judge Rudolph T. Randa		No			If a reply is allowed, 30-45 days	Yes
Wisconsin Western		Yes				20 days	Yes
Wyoming		Yes				14 days	Yes

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Local Rule, Standing Order, or Pro Se Guide?

4. Does your court have a local rule, standing order, or pro se guide that addresses Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts and/or Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts?

U.S. District Court	Division	4: Narrative Response
Alabama Middle		No
Arizona		No
Arkansas Eastern		No
California Eastern		No. Time limits set in screening orders.
California Northern		Yes. Habeas Local Rule 2254-6 provides that in Section 2254 cases, petitioner may serve and file a traverse within 30 days after the respondent has filed the answer. We do not have a similar local rule or standing order with regards to Section 2255 motions, but standard briefing order used by vast majority of chambers similarly provides that moving party may file a reply within 30 days after government has filed a response.
California Southern		No. A local rule only for capital cases.
Delaware		No. Time limits set forth in the court's service order.
Florida Middle	Ocala	Not directly, but MDFL Local Rule 4.14(a) states: (a) All proceedings instituted in this Court pursuant to 28 U.S.C. Sections 2254 and 2255, respectively, shall be governed by the Rules pertaining to such proceedings as prescribed by the Supreme Court of the United States, including the model forms appended thereto."
Florida Middle	Tampa	No
Florida Middle	Jacksonville	No
Florida Middle	Ft. Myers	Not directly. Standing orders that give guidance, but nothing that directly addresses Rule 5.
Florida Northern	Gainesville - Judge Gary R. Jones	No
Florida Northern		No
Georgia Northern		No
Georgia Southern		No response.
Hawaii		No
Idaho		No
Illinois Central		No
Illinois Southern		No
Indiana Northern		Yes. L. Cr. R. 47-2: "A party who files a petition under 28 U.S.C. 2254 or a motion under 28 U.S.C. 2255 must file any reply brief within 28 days after the answer brief is served."
Indiana Southern		No. Time limits set forth in the court's show cause order.
Kansas		No. Time limits set forth in the court's show cause order.
Kentucky Eastern		No. Governed by same rule as any civil action--LR 7.1(c)
Louisiana Eastern		No
Maine		No
Maryland		No
Massachusetts	Eastern (Boston)	No response
Michigan Eastern		No. Form orders set out time limits.
Minnesota		No
Mississippi Northern		No. Time limits set forth in standard order.
Missouri Eastern		No. Time limits set forth in Case Management Orders.
Missouri Western		No
Montana		No
Nebraska		No
Nevada		No. Time limits set forth in standard scheduling order.
New Jersey		No

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Survey Responses Regarding Petitioner Reply Briefs in 2255 Motions and Habeas Petitions

Local Rule, Standing Order, or Pro Se Guide?

U.S. District Court	Division	4: Narrative Response
New York Eastern	Magistrate Judge Robert M. Levy	No
New York Northern	Magistrate Judge David E. Peebles (one of two respondents)	No
New York Southern		No
New York Western		No. Time limits set forth in standard scheduling order
North Carolina Middle		No. Treated the same as any civil action; same time limits/procedure apply
Ohio Southern	Eastern	"Not that I'm aware of."
Oklahoma Eastern		No
Oklahoma Western	Magistrate Judge Suzanne Mitchell	No
Pennsylvania Middle		Yes, but the local rule does not address the time period for filing a response. LR 83.32.1 Form of Petitions and Motions.
Pennsylvania Western		Yes. The Western District of Pennsylvania has Local Rules for 2255 motions and 2254 cases that address the issue of filing a reply.
South Dakota	Magistrate Judge Veronica L. Duffy	"Our local rule setting the time for a reply is a civil rule of general application to all civil cases."
Tennessee Eastern		No (Note: we have a Local Rule CV-3 that includes content requirements and page limits, but the rule does not correspond to Rule 5(d) and Rule 5(e). It would be nice if the national rules included page limits.)
Tennessee Western		Standard order sets out time limits.
Texas Eastern	Sherman	No
Texas Northern	Fort Worth (and another general response)	No. Time limits set forth in the court's show cause order. One respondent indicated that the reply is limited to 10 pages.
Texas Southern	Corpus Christi	No. Time limits set forth in standard order.
Texas Southern		Response times are set in the preliminary order requesting the government to respond.
Texas Western	Austin	No
Virginia Eastern	Magistrate Judge Douglas E. Miller	No. Time limits set forth in standard order.
Virginia Western		No
Washington Western		No, but service order references Rule 5.
Wisconsin Eastern	Career clerk to Judge Rudolph T. Randa	No
Wisconsin Western		No
Wyoming		No

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TAB 5

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TAB 5A

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Rule 16 Subcommittee (16-CR-B)**

DATE: **August 31, 2016**

I. BACKGROUND

The New York Council of Defense Lawyers (NYCDL) and the National Association of Criminal Defense Lawyers (NACDL) proposed an amendment to Rule 16 that would impose additional disclosure obligations on the government in complex cases. In their submission, NYCDL and NACDL stated, p. 2, that there is "a growing problem in the defense of complex federal criminal cases nationwide." Defense counsel routinely receive "enormous amounts of information at the outset of the discovery process," often supplemented with "millions of pages of documentation and thousands of emails." Occasionally, they report, "more gigabytes of information will be dropped in defense counsel's laps on the eve of trial."

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The proposal was initially discussed at the Committee's April 2016 meeting. Several members questioned the need for an amendment, stating that it is better to leave these matters to judicial discretion, than to try to legislative with a detailed rule. Members stated that judges already have the necessary authority, and that they take the actions authorized by the proposed rule when appropriate. The Department of Justice stated that it favors developing best practices and guidance for judges and parties, rather than prescriptive rules. But a practitioner member whose practice regularly includes complex cases countered that in his experience some courts don't understand the defense perspective in cases with, for example, many thousands of emails or taped conversations. Those courts now take a one-size-fits-all approach, and that approach is simply to follow Rule 16. He argued that the Rule needs an escape clause for a small set of cases that require special treatment, not a routine application of Rule 16. He advocated for something "simple" that would recognize a category of complex cases that require different treatment (e.g., requiring the government to identify its exhibits in advance) and allow the defense adequate time for preparation, but also require reciprocal defense discovery. Another member urged consideration of the impact of complex cases on CJA lawyers, who do not have the resources of Federal Defender offices, noting that judges are not familiar with the situation CJA lawyers face in complex cases.

Judge Molloy appointed a subcommittee, chaired by Judge Raymond Kethledge, to consider the NYCDL/NACDL proposal.

II. SUBCOMMITTEE ACTIVITY

The Subcommittee has held two telephone conference calls.

In the first call, members agreed that they did not support the highly detailed and prescriptive amendment proposed by NACDL/NYCDL, and then turned to the question whether a consensus could be reached on a narrower amendment. There was considerable support for the idea even though a detailed and prescriptive rule was not warranted, a simpler rule might provide some benefit. It would serve as a stimulus to certain judges (perhaps those who had not previously presided over a complex case or who were, for some reason, disengaged) to consider making appropriate modifications in pretrial discovery and scheduling in complex cases. It would make explicit what many judicial members agreed is already implicit in the rules. This could be useful to judges who have not previously considered such modifications.

Accordingly, the reporters initially drafted two versions of a new rule, 16.1, for discussion during the Subcommittee's second call. The first, Tab C.1, lists considerations that a judge must take into account in determining whether a case is complex, the types of modifications that might be appropriate, and the sanctions for failure to comply. The alternative, Tab C.2, states only in very general terms that a court may consider "modification of the timing and format of pretrial disclosures required under these rules" in "cases of unusual complexity." Before the call, some members suggested it would be useful to have an option that fell in the middle between these two versions. In response, the reporters drafted Tab C.3, which provides general standards for the determination whether a case is complex, what adjustments are warranted, and any sanctions for failure to comply; examples of the factors to be considered and the adjustments that might be appropriate would be addressed in the committee note.

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During the Subcommittee's second call, members discussed the three options and concluded that they would like to review other more targeted approaches. The Department of Justice expressed concern with the breadth of the language in the three options. Ms. Morales expressed concern that each went beyond the initial concern that had generated the greatest degree of agreement–cases involving a large volume of electronically stored information–to "complex" cases. The Subcommittee agreed to consider other more targeted language;[1] the Department will prepare an alternative for discussion after consultation with its discovery experts.

The Subcommittee anticipates presenting a final recommendation at the April meeting.

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[1]One member suggested, for example, that the Subcommittee consider the following as an amendment to Rule 16:

> Unless good cause is shown, electronically-stored information subject to production must be produced in a reasonably usable format that conforms to industry standards and includes a suitable table of contents.

TAB 5B

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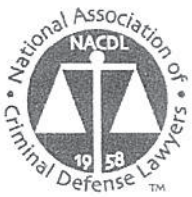

NEW YORK COUNCIL OF DEFENSE LAWYERS

Peter Goldberger, Esq.
William Genego, Esq.
Federal Rules Committee Chairs

Roland G. Riopelle
President

March 1, 2016

Hon. Donald W. Molloy
United States District Judge
Russell E. Smith Federal Building
201 East Broadway Street
Missoula, MT 59802

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Re: Enclosed Proposed Amendments to Rule 16

Dear Judge Molloy:

This letter is submitted to you on behalf of the New York Council of Defense Lawyers (the "NYCDL") and the National Association of Criminal Defense Lawyers ("NACDL"). We write to you in your capacity as Chair of the Advisory Committee on the Federal Rules of Criminal Procedure. We respectfully request that the Advisory Committee consider proposing to the Judicial Conference amendments to Federal Rule of Criminal Procedure 16. The NYCDL and NACDL support the proposed amendments for the reasons stated below.

The NYCDL is an organization comprised of more than 250 experienced attorneys whose principal area of practice is the defense of complex criminal cases in federal court and before New York courts and regulatory tribunals. Our membership includes numerous former state and federal prosecutors, and we regularly submit amicus curiae briefs on major questions of criminal law and advocate for reforms of penal statutes and procedural rules, both federal and state. Our members are among the most active trial lawyers in New York's federal courts, and in virtually any complex criminal case in New York City, a member of the NYCDL will appear for one or more of the defendants. Many of our cases are document-intensive "white collar" cases of the sort that require extensive and detailed preparation, such as insider trading, securities fraud and mail and wire fraud. Indeed, I believe it is fair to say that, given the location of the financial markets here, the Southern and Eastern Districts of New York are two of the principal venues where a large number of complex federal criminal cases are brought and tried.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Our members represent persons and entities in federal criminal cases throughout the country, and they frequently confront the difficulties of complex criminal cases with enormous amounts of discovery. NACDL is a longstanding participant in the Judicial Conference's rules promulgation process, sending a representative to attend meetings and regularly submitting comments on proposed changes of interest to the criminal defense bar.

The amendments we propose are enclosed with this letter. These amendments are meant to address a growing problem in the defense of complex federal criminal cases nationwide. It is now routine in many jurisdictions for defense counsel to receive enormous amounts of information at the outset of the discovery process, with relatively little guidance as to what might be relevant to the prosecution or defense of the charges contained in the indictment. In the 21st Century, defense counsel are often handed a computer hard drive at the first appearance in court, and told that it contains the government's first production of discovery, consisting of millions of pages of documentation and thousands of emails culled from the server of a client's employer. Thousands more pages of documentation and emails typically follow that first production, and, occasionally, more gigabytes of documentation will be dropped into defense counsel's laps on the eve of trial.

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In such cases, the indictment itself is often a fairly "bare bones" document, not revealing much about the government's theory of the case or the evidence the government intends to rely on Because the decisional law permits indictments to be pleaded sparsely, with relatively little factual description (indeed, many conspiracy statutes do not even require the pleading of "overt acts" committed in furtherance of the conspiracy), and because the decisional and statutory law also does not typically require the government to provide bills of particulars, defense counsel is left with little guidance as to the specific facts the government intends to prove or the documents the government intends to rely on at trial. Absent indices of the government's production, a listing of the exhibits the government intends to use at trial, or other guidance to defense counsel, it is virtually impossible for defense counsel to wade through the mountains of material produced by the government and identify the critical documents important to the defense of the case.

The experience of the federal courts in New York under district judges' pretrial orders shows that a rule-based solution for this nationwide problem is feasible. The enclosed proposals are based on the real experiences of our membership in complex cases. District Judges in the Southern and Eastern Districts of New York typically enter orders requiring procedures like those set forth in the enclosed proposals, because they recognize that without these procedures, the trial of a complex case cannot proceed smoothly and will not be fair to the defendants. If rules like those in our proposal are followed, the jobs of both the prosecution and the defense are made easier, because the defense gets an early glimpse at the government's proof, and knows where to focus in order to assess the strength of the government's case and mount a defense. These procedures also provide a significant benefit to the prosecution, because the defense's

identification of the evidence it will use gleaned from the government's own proof gives the government advance notice of the facts that will be disputed at trial, signals to the prosecution where the weaknesses in its proof may be and what the factual defenses are likely to be, and better enables the government to prepare its response. And with this pre-trial exchange of information, evidentiary issues and potential in limine motions are identified, and made easier for the Court to address before trial. We also observe that the procedures recommended in the enclosed proposals often encourage the early disposition of complex criminal cases, because it is easier for defense counsel to identify the relevant evidence, and defense counsel are therefore better able to counsel their clients on the strength of the government's case and the clients' defenses.

Finally, the Advisory Committee should know that even though procedures like those described in our proposed amendments are commonly adopted in the New York federal courts, we are unaware of any case in which these procedures have resulted in witness tampering or threats from the defendants. We have yet to see a case in which early disclosure of the sort advocated in the enclosed proposals resulted in obstruction of justice or other improper conduct. And if there were a complex case in which such issues were a valid concern, the Court would always be free to modify the procedures described in the enclosed proposals by way of protective order.

We appreciate the opportunity to submit the NYCDL's and NACDL's proposal to you, and are available to provide any additional information the Committee may require.

Very truly yours,

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Roland G. Riopelle
President, NYCDL

Peter Goldberger, Esq.
Chair, NACDL Federal Rules Committee

William Genego, Esq.
Chair, NACDL Federal Rules Committee

Cc: John Siffert, Esq.
Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice & Procedure
Prof. Sara Sun Beale, Reporter, Advisory Committee on Criminal Rules

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PROPOSED MODIFICATIONS TO RULE 16

RULE 16. Discovery and Inspection

(b) Government's Additional Disclosure in a Complex Case.

(1) Applicability. This subsection of the rule shall apply in any case in which the court finds that the case is complex for the purposes of discovery production and review. The time periods for production and scheduling set forth in this subsection are subject to the requirements of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., and scheduling orders pursuant to a finding of complexity under this rule must also include the requisite findings under that statute.

(2) Application for Finding of Complexity. The government or the defendant may make an application to the court for a finding that a case is complex for the purposes of discovery production and review, within 30 days of arraignment or at such other time as the court may require. The court may also make such a finding *sua sponte*.

(3) Complexity

A. Considerations.

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i. In determining whether a case is appropriate for treatment as a complex case under this Rule, the trial court shall consider the degree of difficulty of the case and the time needed for the government and defense to prepare adequately for trial and to ensure a fair trial for the defendant. Among other factors, the court should take into account the complexity of the subject matter, the technical difficulty to understand and analyze the evidence, the existence of scientific, economic or similarly technical evidence, the number of documents, the number of defendants, the number of witnesses and such other factors as may make it necessary to provide additional time for the parties to be prepared adequately for trial.

B. Presumption of Complexity. There shall be a presumption that a case is complex for the purposes of discovery, production and review:

i. if the government's obligation to disclose materials pursuant to this rule would require it to disclose or permit inspection of:

(1) more than 50,000 physical pages of material consisting of books, papers, documents, photographs or copies of those items;

(2) more than one gigabyte of data;

(3) more than 100 audio and visual recordings; or

ii. if more than 10 defendants are joined in a single indictment.

(4) Extended Period for Discovery. If the court finds that a case is complex for the purposes of discovery production and review:

A. the government shall be permitted to produce the materials required to be produced pursuant to section (a) of this rule over a period of up to six months following the arraignment of the defendant; and

B. the court shall not set any trial date until the certification described in sub-paragraph (5) below has been made.

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(5) Certification of Substantial Disclosure. In a complex case, the government shall certify that it has produced substantially all the materials or data it is required to produce pursuant to section (a) of this rule, no later than six months after the arraignment of the defendant. The government may continue to produce additional materials or data to the defendant after this date, upon a showing that the materials were only discovered or accessible to the government after the date of its certification that it has produced substantially all the materials or data it is required to produce pursuant to this rule.

(6) Trial Date. The court may not set a trial date that is earlier than 12 months from the date of the government's certification required by sub-paragraph (5) above, unless the defendant consents to such earlier date.

(7) Index. Simultaneously with the certification required by subparagraph (5), the government shall provide the defendant with an index of materials produced pursuant to section (a) of this rule. Such index shall include a

description of the following: (A) any books, papers, documents, photographs or copies of those items produced by the government; (B) the source from which the materials were obtained; (C) the location at which the items were acquired during the execution of a search warrant; (D) the date and time of any recordings; and (E) the names of the persons whose voices and/or images the government contends were recorded.

(8) Tentative Exhibit List, and Copies of Exhibits. At least six months before the trial date set pursuant to sub-paragraph (6) above, the government shall produce all exhibits the government intends to offer in evidence, together with a tentative exhibit list that cross-references the exhibits to the index described in sub-paragraph (7) above.

(9) Corrective Measures. In the event that the tentative exhibit list produced pursuant to sub-paragraph (8) above is materially incomplete, or misleading, or fails to provide sufficient notice as to which materials produced pursuant to section (a) of this rule the government intends to offer at trial, the court may take such corrective action as it deems just, including an adjournment of the previously scheduled trial date; preclusion of exhibits not included on the tentative exhibit list; a directive to provide adequate notice of the evidence the government will offer at trial; or such other remedy as may be required.

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(10) The Government's Right to Amend the Tentative Exhibit List and Index. The government shall have the right to amend the index and tentative exhibit list described in sub-paragraphs (7) and (8) above for any reason at any time until 90 days before the trial date set by the court pursuant to sub-paragraph (6) above. Thereafter, the government shall have the right to further amend the index and tentative exhibit list, upon a showing that the amendment to the index and tentative exhibit list relates to materials that were only discovered or accessible to the government after the date on which the index and tentative exhibit list were produced, or for other good cause shown. In the event the government amends the index and tentative exhibit list within 90 days of the previously set trial date, the court shall entertain an application by the defendant for an adjournment of the trial date. Such an adjournment shall be sufficient to allow the defendant to prepare for the newly identified items, but shall in no event be less than 30 days, unless the defendant so consents.

(11) Reciprocal Disclosure. In a complex case, the defendant shall produce to the government copies of those items from the government's index

produced pursuant to sub-paragraph (7) that the defendant intends to offer in evidence at trial, either through government or defense witnesses. The defendant shall also produce a tentative exhibit list of such materials. The defendant's production under this sub-paragraph shall be made the sooner of: (A) 30 days before the defendant's case in chief begins, or (B) the date the parties make their opening statements. The production of the defendant's tentative exhibit list and the copies of the defendant's exhibits does not require the defendant to call any witness or offer any exhibit during the trial, and the defendant is not required to produce any document or other material which the defendant only intends to use to impeach a government witness, and which the defendant does not intend to offer in evidence. The defendant's tentative exhibit list may be amended at any time upon a showing that newly designated materials were only discovered or accessible to the defendant after the date on which the defendant's tentative exhibit list was produced, or for other good cause shown. In the event that the tentative exhibit list produced by the defendant fails to provide sufficient notice as to what materials from the government's index the defendant intends to offer in evidence, the court may grant a continuance of the trial sufficient to allow the government to prepare for the newly identified items. The defendant shall not be required to include in its tentative exhibit list any item that is not contained in the government's production under Section (a) of this rule.

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TAB C.1

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Rule 16.1. Complex Cases: Pretrial Disclosure and Procedures.

(a) Determining Whether a Case Is Complex.

(1) Determination. Upon a party's motion filed within 30 days of arraignment, the court must determine whether the case is complex. The court may also make the same determination on its own motion at any time.

(2) Required considerations. In determining whether a case is complex, the court must consider the following:

(A) the complexity of the charged conduct and of any known defenses;

(B) the quantity of documents and other materials likely <u>to be disclosed under these rules</u>[1];

(C) the [technical] difficulty for the [receiving party] to review those materials; and

(D) any other consideration [identified by a party that may be[2]] relevant to a determination whether the case is complex.

(b) Determining Whether to Modify Disclosure and Change Schedules. If the court determines that a case is

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[1] The underlined phrase is intended to indicate that the proposed rule does not expand the scope of disclosures required by the Rules of Criminal Procedure. One question is whether it is too subtle to accomplish that goal. The second—and more significant--question is whether the proposal would expand pretrial discovery, since the Rules do not presently require pretrial provision of a list of exhibits and copies of those exhibits.

[2] A catch-all phrase is useful, but the combination of such an open-ended phrase and the requirement that a court "must consider" each factor could generate litigation about a court's failure to consider various issues, including issues not raised by the defense. If a catch-all is retained, the reporters think it should be limited to factors identified by a party. The Subcommittee might also consider whether it must be raised "on the record or in writing."

complex, the court must consider whether, in the interests of justice, to adopt measures to facilitate the parties' ability to prepare for trial. Such measures may include:

(1) extending the time for pretrial disclosures;

(2) requiring each party to provide

(i) an index to the materials disclosed by the party;

(ii) a searchable format for all or some of the materials disclosed by the party; or

(iii) a tentative list of the exhibits that the party intends to introduce as evidence at trial; and

(3) modifying the schedule for pretrial proceedings or trial.

(c) Other considerations. In considering whether to adopt measures to facilitate the parties' ability to prepare for trial, the court must also consider the safety of victims, witnesses, and the public.[3]

(d) Remedies for failure to comply. If a party fails to comply with an order entered under this rule, the court may

(1) grant a continuance;

(2) prohibit the party from introducing materials not disclosed at the time or in the format required by the court;

(3) prohibit the party from introducing exhibits not included on its tentative list; or

(4) enter any other order that is just under the circumstances.

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[3] Although the Subcommittee discussed putting national security interests in the text, we omitted them from this draft and referred more generally to the safety of the public. We think this includes, but is more encompassing, than national security. Because most prosecutions do not involve national security concerns, we were concerned that mandating consideration of those issues in every case might provide a basis for an appeal in cases where the court did not expressly consider them, even if they were not relevant. Although we think this would be harmless error in such cases, it could generate litigation.

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1 **Rule 16.1. Pretrial Disclosure and Procedures in**
2 **Complex Cases.** In cases of unusual complexity, the court
3 shall consider whether the interests of justice, including the
4 need for adequate pretrial preparation and the safety of
5 victims, witnesses, and the public, require modification of
6 the timing and format of pretrial disclosures required under
7 these rules.

8 **Committee Note**

9 The note could provide illustrative examples of
10 when a case is of unusual complexity, how the issue of
11 complexity may be raised, and what modifications of
12 timing or format might be helpful.

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Rule 16.1. Complex Cases: Pretrial Disclosure and Procedures.

(a) Determining Whether a Case Is Complex. Upon a party's motion filed within 30 days of arraignment, the court shall determine whether the case is complex. The court may also make the same determination on its own motion at any time.[1]

(b) Determining Whether to Modify Disclosure and Change Schedules. If the court determines that a case is complex, the court shall consider whether, in the interests of justice,[2] to adopt measures to facilitate the parties' ability to prepare for trial.[3]

(c) Remedies for Failure to Comply. If a party fails to comply with an order entered under this rule, the court may enter any order that is just under the circumstances.[4]

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[1] The Committee Note could include the considerations that were identified in the version previously circulated, which were:

(A) the complexity of the charged conduct and of any known defenses;

(B) the quantity of documents and other materials likely to be disclosed under these rules;

(C) the [technical] difficulty for the [receiving party] to review those materials; and

(D) any other consideration [identified by a party that may be] relevant to a determination whether the case is complex.

[2] This version omits section (c), which required consideration of the interests of the safety of victims, witnesses, and the public. These are included in the interests of justice, and the Committee Note could make that point.

[3] The Committee Note could include the options identified in the version previously circulated:

(1) extending the time for pretrial disclosures;

(2) requiring each party to provide

(i) an index to the materials disclosed by the party;

(ii) a searchable format for all or some of the materials disclosed by the party; or

(iii) a tentative list of the exhibits that the party intends to introduce as evidence at trial; and

(3) modifying the schedule for pretrial proceedings or trial.

[4] This version omits the remedies listed in the version previously circulated.

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **Cooperator Subcommittee**

DATE: **September 1, 2016**

Meeting by teleconference, the Subcommittee identified additional information and data that would be relevant to its charge:

- How large is the problem compared to the universe of cooperators?
- What kinds of cases give rise to problems?
- Is this truly a nationwide problem or are there significant geographic variations?
- How does the experience in districts which currently seal plea agreements differ, if at all, from the experience in other districts?

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The Subcommittee also requested that the reporters prepare a memorandum on the First Amendment issues raised by CACM's proposals. Finally, the Subcommittee requested that the Department of Justice provide the Subcommittee with (1) information regarding its practices and experience in the 10 largest districts as well as any other relevant districts and (2) its recommendations.

The following materials have been provided to the Subcommittee:

The Reporters' First Amendment Memorandum	Tab B
CACM Guidance, distributed June 30, 2016	Tab C
Federal Judicial Center Memorandum, May 18, 2016	Tab D
Federal Judicial Center Memorandum, July 7, 2016	Tab E
Chart of Local Rules and Standing Orders	Tab F
Department of Justice Memorandum, June 27, 2016	Tab G
Department of Justice Memorandum, May 31, 2016	Tab H
Department of Justice Memorandum, July 12, 2016	Tab I

At the September meeting, Judge Kaplan will provide an update on this agenda item.

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MEMORANDUM

TO: Cooperator Subcommittee
FROM: Sara Sun Beale and Nancy King
DATE: July 21, 2016 (revised)
RE: First Amendment Right of Access and CACM Guidance on Cooperator Safety

Introduction

This Memorandum evaluates the constitutional issues raised by the Committee on Court Management (CACM) proposal to protect cooperators by limiting access to court records and judicial proceedings in the following ways:

(1) Requiring all plea agreements to have a public portion and a sealed supplement that contains a description of the defendant's cooperation or states there was no cooperation;

(2) Requiring all sentencing memorandum to have a public portion and a sealed supplement that contains any references to the defendant's cooperation or states that there was no cooperation;

(3) Requiring all sentencing transcripts to have a sealed portion containing a conference at the bench that contains any discussion of the defendant's cooperation or states that there was no cooperation;

(4) Requiring all Rule 35 motions based on cooperation to be sealed; and

(5) Providing all documents or portions sealed pursuant to this policy to remain under seal indefinitely unless otherwise ordered by the court on a case-by-case basis.

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We begin with an overview of Supreme Court and circuit cases that define a First Amendment right of access to the courts, as well as other limits on closure arising from the Sixth Amendment right to a public trial right and the common law right to access judicial records. We then explore circuit-level cases that apply the doctrine in the plea and sentencing settings. We conclude with a brief analysis of some of the difficulties CACM's proposals may have passing constitutional scrutiny.

The First Amendment includes a qualified right of public access to criminal trials. The public and press enjoy a presumption of access to any proceeding, hearing, filing, or document within that right's scope. If a court denies public access, it must do so in a manner that is narrowly tailored to serve a compelling governmental interest. And the court must make specific findings on both the interest advanced and the alternatives considered and rejected as inadequate.[1] The First Amendment right of access complements other rights that protect open

[1] For an overview of the requirements and procedures for sealing court records and proceedings, see Robert Timothy Reagan, Federal Judicial Center, *Sealing Court Records and Proceedings: A Pocket Guide* (2010), http://www2.fjc.gov/sites/default/files/2012/Sealing_Guide.pdf.

access to criminal proceedings, including the Sixth Amendment right to a public trial and the common law right to access judicial records. The Sixth Amendment public-trial right requires justifications for denial of access that are similar to those required under the First Amendment.

Although the Supreme Court has never considered this issue, eight circuits have held or implied that the First Amendment right of access applies during plea proceedings, sentencing proceedings, or both. One other circuit found a Sixth Amendment right of access but has not reached the First Amendment issue, though it applied a similar analytical framework. In these nine circuits, the limitations recommended by CACM will likely face scrutiny as to whether they are narrowly tailored means of furthering a compelling governmental interest. The need to protect the lives and safety of cooperating defendants and their families is a compelling interest, but appeals courts have consistently followed Supreme Court precedent requiring that access be restricted only on a case-by-case basis, not in a broad categorical fashion. Additionally, three circuits have to date recognized a common law right of access to plea or sentencing proceedings or documents; two of those three circuits found it unnecessary to reach constitutional issues because the common law required access.

Several federal districts currently employ procedures that resemble the categorical approach in the CACM proposals. *See, e.g.*, E.D. Tex. Crim. R. 49. The current policies in each district are summarized in the Department of Justice chart "Local Rules and Standing Orders Regarding Sealing of Court Documents."[2] In general, these districts automatically seal similar portions of every case file in order to better conceal cooperators' identities. Indeed, the CACM proposal takes note of local rules such as these. It also references a recent order by Chief Judge Ron Clark of the United States District Court for the Eastern District of Texas, which evaluated default sealing practices on First Amendment grounds and determined that such restrictions survive constitutional scrutiny. *See United States v. McCraney*, 99 F. Supp. 3d 651, 660 (E.D. Tex. 2015) [hereinafter *Clark Order*]. On that decision's reasoning, protecting cooperators from harm requires sealing a portion of every plea agreement—even for non-cooperators—in order avoid "paint[ing] a bulls-eye on every defendant whose plea agreement was not unsealed." *Id.*

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I. First Amendment Right of Access—Overview

The public's qualified First Amendment right of access derives from the right to attend criminal trials, which the Supreme Court has said "is implicit in the guarantees of the First Amendment." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). Courts presume proceedings and documents that fall within the right's scope to be open. This constitutional "presumption of openness" may be overcome only if restrictions are essential to preserving a "compelling governmental interest, and [are] narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), 464 U.S. 501, 510 (1984) (citations omitted).

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[2] Note, however, that these policies may be modified in response to CACM's June 30, 2016 Memorandum "INTERIM GUIDANCE FOR COOPERATOR INFORMATION."

A. What is Covered by the First Amendment Right of Access: The "Experience and Logic" Test

The First Amendment right of access most obviously attaches during the proof phase of a criminal trial. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982) (invalidating state law that excluded the press and general public from the courtroom during underage sexual-offense victims' testimony). In addition to the trial itself, the right of access also applies to other stages of criminal adjudication. Whether a particular proceeding falls within the right's scope depends on a two-part inquiry that analyzes "considerations of experience and logic." *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 9 (1986). This test originated with Chief Justice Burger's plurality opinion in *Richmond Newspapers, Inc. v. Virginia*,[3] which explained that the public's right to attend criminal trials emanates from the longstanding Anglo-American tradition of holding open trials, 448 U.S. at 564–66, and the numerous salutary aspects of that practice, *id.* at 569. A majority of the Court reaffirmed the right of access and the "experience and logic" inquiry in *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 602, and applied it to extend the right of access to jury *voir dire* proceedings in *Press-Enterprise I*, 464 U.S. at 509, and to preliminary hearings in *Press-Enterprise II*, 478 U.S. at 13.

The "experience and logic" test asks: (1) "whether the place and process has historically been open to the press and general public" (experience) and (2) "whether public access plays a significant positive role in the functioning of the particular process in question" (logic). *Id.* at 8. In answering the first question, a court must "not look to the particular practice of any one jurisdiction, but instead 'to the experience in that *type* or *kind* of hearing throughout the United States.'" *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (emphasis in original) (quoting *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). In the second inquiry, the Court has emphasized the benefits of holding trials and other criminal proceedings openly, including "community therapeutic value," *Richmond Newspapers*, 448 U.S. at 570, "protect[ing] the free discussion of governmental affairs," *Globe Newspaper*, 457 U.S. at 604 (citations omitted), and enhancing the criminal process's actual and perceived fairness, *Press-Enterprise I*, 464 U.S. at 505–08.

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The Supreme Court has not addressed the question of whether the First Amendment right extends to documents as well, but with one exception,[4] nearly every circuit has held that the right

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[3] *Richmond Newspapers* involved a highly publicized Virginia murder case that had already seen one jury conviction overturned on appeal and two mistrials. 448 U.S. at 559. The judge cleared the courtroom out of concerns that publicity would taint the trial, and a newspaper challenged the judge's closure. *Id.* at 560. No opinion commanded a majority, but seven Justices agreed that the First Amendment protects the right of the public to attend trials. *See id.* at 580.

[4] We discuss *United States v. Hickey*, 767 F.2d 705 (10th Cir. 1985), in note 18, *infra*.

to access criminal proceedings extends to the documents filed in connection with those proceedings.[5]

B. Restrictions on the Right of Access: Heightened Scrutiny

If the right of access attaches to a particular proceeding or document, the right is not absolute; rather, the qualified right of access amounts to a "presumption of openness" that may be overcome if access restrictions are essential to preserving a "compelling governmental interest, and [the restrictions are] narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510 (citations omitted).[6] In *Globe Newspaper*, the Court explained in greater detail the appropriate circumstances for restricting public access. 457 U.S. at 607. There, the Court confronted a Massachusetts law that required judges in sexual-offense cases with underage victims to exclude the press and general public from the courtroom while the victim testified. *Id.* at 598. Echoing *Richmond Newspapers*, the Court stated that any attempt to restrict the right of access "must . . . show[] that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 607. Applying that standard, the Court conceded that victims' physical and psychological health was a compelling interest, but rejected the statute's categorical approach to closing all cases involving underage victims. *Id.* at 608. Instead, trial courts must make case-by-case determinations on whether closure is necessary to protect individual victims. *Id.*

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In *Press-Enterprise I*, the Court more clearly defined the narrow-tailoring inquiry. 464 U.S. at 513. There, members of news media sought to attend jury *voir dire* in a highly publicized rape and murder case. *Id.* at 503. The judge rejected the media's request out of fear prospective jurors' responses would lack candor were members of the press to attend. *Id. Voir dire* lasted six weeks. *Id.* at 510. Only three days of those six weeks were open. *Id.* The press also requested transcripts of the proceedings, but counsel for both the state and defense objected, citing jurors' privacy interests in keeping their *voir dire* responses confidential. *Id.* at 504. The judge agreed.

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[5] *See, e.g.*, *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (agreeing that the First Amendment right of access "appl[ies] to written documents submitted in connection with judicial proceedings that themselves implicate the right of access"); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("[T]he First Amendment right of access applies to documents filed in connection with [criminal hearings], as well as to the hearings themselves."); *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985) (applying First Amendment analysis to documents after finding "no reason . . . why th[at] analysis does not apply as well to judicial documents"); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them.").

[6] Like the "experience and logic" test, this variety of heightened scrutiny stems from Chief Justice Burger's plurality opinion in *Richmond Newspapers*, which stated that the presumption of openness can only be overcome by "an overriding interest articulated in findings." 448 U.S. at 581. The opinion left open exactly what circumstances justify closure, but noted that that "a trial judge [may], in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Id.* at 581 n.18.

Id. The Supreme Court first held that jury *voir dire* implicates the First Amendment, and then applied the compelling-interest test to the judge's six-week *voir dire* closure. *Id.* at 513. The Court concluded that the closure was unconstitutional. *Id.* The judge denied access to far more information than necessary to protect the interests involved. *Id.* And he did not articulate requisitely specific findings, nor did he consider alternatives to total closure. *Id*.

In *Press-Enterprise II*, the Court further explained the required relationship between a compelling interest and closure. 478 U.S. 14–15. There, a California trial judge had closed access to a preliminary hearing pursuant to a state statute that authorized excluding the press and public from criminal trials if there was a "reasonable likelihood" that publicity would substantially prejudice a defendant's right to a fair trial. *Id.* at 14. After holding that the right of access applies to preliminary hearings, the Court held that the statute's "reasonable likelihood" standard fell short of what the First Amendment requires. *Id.* at 14–15. If "fair trial" is the interest asserted to overcome the presumption of openness, the First Amendment requires a "substantial probability" of prejudice to the interest in a fair trial. *Id.*

The Court returned to preliminary hearings in *El Vocero de Puerto Rico v. Puerto Rico*, which addressed a Puerto Rico rule of criminal procedure that provided preliminary hearings "shall be held privately" unless the defendant requested otherwise. 508 U.S. at 148. Puerto Rico sought to justify the rule based on concerns that publicity would undermine the interest in a fair trial, but the Court rejected Puerto Rico's categorical closures and reemphasized that even legitimate concerns "must be addressed on a case-by-case basis." *Id.* at 151. Citing *Press-Enterprise II*, the Court reiterated that every closure requires specific findings that there is a substantial probability openness would harm a compelling interest, and that reasonable alternatives could not protect those interests just as well. *Id.*

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Narrow tailoring may also involve the duration of closure. In *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979), the Court upheld the closure of a suppression hearing when the trial court released the hearing transcript shortly after the defendants pleaded guilty, noting that "any denial of access in this case was not absolute but only temporary." *Id.* at 393. "Once the danger of prejudice dissipated, a transcript of the suppression hearing was made available." *Id.* Through the hearing transcript, "[t]he press and the public then had a full opportunity to scrutinize the suppression hearing." *Id.* In dissent, Justice Blackmun commented that "[p]ublic confidence cannot long be maintained when important judicial decisions are made behind closed doors and then simply announced in conclusive terms." *Id.* at 429 (Blackmun, J., dissenting) (quoting *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978)).

II. Other Limits on Closure: The Sixth Amendment and the Common Law

A. Sixth Amendment

In addition to the First Amendment right of public access, the Sixth Amendment guarantees the accused in criminal cases "the right to a speedy and public trial." U.S. Const.

amend. VI. Although the Supreme Court has not resolved the question whether the First and Sixth Amendments are coextensive,[7] there are significant similarities in the analysis. In *Waller v. Georgia*, 467 U.S. 39 (1984), which involved the closure of a lengthy suppression hearing,[8] the Court implied a close relationship between the two rights. *See id.* at 44. It stated that "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.* at 46. Citing *Richmond Newspapers* and its progeny as support, the Court concluded that, like the First Amendment right of access, the public-trial right applied to suppression hearings. *See id.* at 44–45 (citing *Richmond Newspapers*, 448 U.S. at 555; *Globe Newspaper*, 457 U.S. at 596; *Press-Enterprise I*, 464 U.S. at 501). It emphasized that interests advanced by opening trial—"ensuring that judge and prosecutor carry out their duties responsibly," encouraging witnesses to come forward, and discouraging perjury—"are no less pressing in a hearing to suppress wrongfully seized evidence." *Waller,* 467 U.S. at 46.

Having ruled that the right applied, the Court adopted *Press-Enterprise I's* heightened scrutiny to evaluate the closure's constitutionality, *id.* at 45, and articulated a four-factor test for closing a proceeding, *id.* at 48. First, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced." *Id.* Second, "the closure must be no broader than necessary to protect that interest." *Id.* Third, "the trial court must consider reasonable alternatives to clos[ure]." *Id.* And fourth, the court "must make findings adequate to support closure." *Id.* This articulation tracks the stages for evaluating closure in *Richmond Newspapers* and its progeny.

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Applying this test to the closed suppression hearing, the Court concluded that the closure contravened the Sixth Amendment's public-trial guarantee. *Id.* First, the prosecution's privacy arguments lacked specificity and the resulting trial-court findings were "broad and general, and did not purport to justify closure of the entire hearing." *Id.* Further, the court did not consider alternatives to entire and immediate closure. *Id.* Finally, the closure was far broader than necessary. *Id.* at 49. Even if the tapes implicated the interests at issue, playing them lasted fewer than three hours, which did not justify closing all seven days of pretrial hearings. *Id.*

Later precedent also suggests meaningful overlap between the First and Sixth Amendment rights and their application. In *Presley v. Georgia*, 558 U.S. 209, 213 (2010), the Court heard a defendant's challenge to closed jury *voir dire* proceedings. The Court concluded

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[7] *See Presley v. Georgia*, 558 U.S. 209, 213 (2010) ("The extent to which the First and Sixth Amendment public trial rights are coextensive is an open question . . . .").

[8] The trial court in *Waller* had accepted the government's arguments that an open suppression hearing could cause wiretap information to be inadmissible under Georgia's wiretap statute, and that publicly playing the recordings would compromise the privacy interests of uncharged third parties. 467 U.S. at 41–42. The closed hearing lasted seven days, even though playing the tapes of the intercepted phone conversations lasted fewer than three hours. *Id.*

that *Press-Enterprise I*'s holding—that the First Amendment public-access right extends to jury *voir dire*—dictated that the Sixth Amendment public-trial right covered jury selection as well. *Id.* at 213 ("[T]here is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has."). In particular, the *Presley* Court noted that *Waller* relied heavily on *Press-Enterprise I* and that the two decisions came down during the same term. *Id.* at 212.

Although the First and Sixth Amendment analyses are similar, challenges under the two rights differ in some meaningful ways. For example, the press and public can assert the First Amendment right, whereas the Sixth Amendment right belongs to the defendant. *See Gannett Co.*, 443 U.S. at 379–80 (1979) (citations omitted) ("[The Sixth Amendment's] guarantee . . . is personal to the accused. Our cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant.").[9] The remedies for a First Amendment right-of-access violation only involve the secrecy or openness of information, whereas Sixth Amendment violations have implications for the integrity and viability of a defendant's conviction. *See Waller*, 467 U.S. at 49–50 (discussing the appropriate remedy for the trial court's unconstitutional closure).[10] Because Sixth Amendment cases have important implications for

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[9] In *Gannett Co. v. DePasquale*, a case decided before *Richmond Newspapers* or *Waller*, the Supreme Court held that the Sixth Amendment did not afford the public or press a right to access a pretrial suppression hearing. 443 U.S. at 394. In a concurring opinion, Justice Powell agreed with the Court's Sixth Amendment conclusion, but argued that the press and public "ha[ve] an interest protected by the First and Fourteenth Amendments in being present at . . . pretrial suppression hearing[s]." *Id.* at 397 (Powell, J., concurring). The following term, the Court decided *Richmond Newspapers*, which limited *Gannett*'s holding to the Sixth Amendment and held that the public's right to attend criminal trials is "implicit in the guarantees of the First Amendment." 448 U.S. at 580.

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[10] One other difference deserves mention. The circuits have recognized a less demanding analysis under the Sixth Amendment for the exclusion of some but not all observers, and, in some courts, for "trivial" closures. As the Sixth Circuit explained in *United States v. Simmons*, 797 F.3d 409 (6th Cir. 2015), "courts of appeals that have distinguished between partial closures and total closures modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure." *Id.* at 414. The "modified *Waller* test" provides that:

(1) a party seeking a partial closure of the courtroom during proceedings must show a "substantial reason" for doing so that is likely to be prejudiced if no closure occurs;
(2) the closure must be no broader than necessary or must be "narrowly tailored";
(3) the trial court must consider reasonable alternatives to closing the proceeding; and
(4) the trial court must make findings adequate to support the closure.

Id. The Sixth Circuit joined other circuits in adopting the test for Sixth Amendment cases where district courts bar "some, but not all, spectators from the courtroom during the proceedings." *Id.* This lesser standard is based in part on an assessment that, because some members of the public retain access, "less than complete closure does not 'implicate the same secrecy and fairness concerns that a total closure does.'" Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin

First Amendment challenges to closed plea and sentencing proceedings and sealed plea agreements, lower court authority addressing Sixth Amendment challenges will be included in the analysis that follows.

B. Common Law

The First and Sixth Amendments are complemented by a common law public right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). The Supreme Court first addressed the right in *Nixon v. Warner Communications*, which involved media requests for copies of the Nixon White House tapes. *Id.* at 591. In the post-Watergate criminal trial of Nixon's aides, prosecutors played the tapes in open court for the jury, press, and observing public, but the court furnished observers with transcripts instead of copies of the actual tapes. *Id.* at 591–92.[11] The issue before the Court was whether the common law right to inspect judicial records required the district court to release audio format copies. *Id.* at 589.

The Court explained that the right emanates from citizens' interest in "keep[ing] a watchful eye on the workings of public agencies" and from the press's role in "publish[ing] information concerning the operation of government." *Id.* at 598. The *Warner Communications* opinion gave examples of access denials "where court files might have become a vehicle for improper purposes." *Id.*[12] But conceding the difficulty of defining the right and its appropriate

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S. Kerr, 6 *Criminal Procedure* § 24.1(b) (citations omitted). The willingness of appellate courts to accept this alternative test may also be related to the inability to apply harmless-error analysis to a Sixth Amendment public-access violation; any violation of this right requires relief, regardless of prejudice to the defendant. *See Carson v. Fischer*, 421 F.3d 83, 94 (2d Cir. 2005) (explaining the "very different" inquiries of harmless error and triviality); *see also* LaFave et al., *supra*, § 24.1(b) n.28 (collecting state court opinions rejecting this modification).

Because CACM's proposals require indefinite sealing, denying all public access, it is difficult to characterize these measures as either trivial or partial. The Supreme Court has not addressed whether a "partial" or "trivial" closure test is acceptable under either the First or Sixth Amendments. Only limited authority can be found applying such a test in a First Amendment challenge. *See United States v. Tsarnaev*, 2015 WL 631330, at *2 (D. Mass. Feb. 13, 2015) (rejecting newspaper challenge and finding "the current arrangements constitute at most a modest 'partial closure,' with proceedings that are substantially more open than they are closed"); *see also United States v. Smith*, 426 F.3d 567, 575 (2d Cir. 2005) (explaining that even assuming defendant could bring First Amendment claim, "[the court's holding] that the partial closure of Smith's trial was justified under *Waller* also resolves his First Amendment claim").

[11] After the defendants' convictions, the press sought audio copies of the tapes. *Warner Commc'ns*, 435 U.S. at 591. The judge denied the requests because the defendants had filed notices of appeal and the tapes' release might prejudice their appeal rights. *Id.* at 595. The judge also reasoned that the transcripts satisfied the public need for the tapes' content. *Id.*

[12] The Court did not define exactly what would constitute an "improper purpose," but gave several examples. *See id.* at 598. These examples were preventing publication of nasty divorce details to "gratify private spite or promote public scandal," and avoiding court files from

restrictions, the Court said access decisions are "best left to the sound discretion of the trial court . . . in light of the relevant facts and circumstances of the particular case." *Id.* at 599.

Since *Warner Communications*, the Supreme Court has not elaborated on the common law right, but there are several differences from the First Amendment. In contrast to the First Amendment, which protects the public's right to attend live events, the common law right is rooted in access to records, not proceedings. Second, the showing required to overcome the common law right may differ from that of the First Amendment. *Warner Communications* calls for balancing interests "in light of the relevant facts and circumstances of the particular case," 435 U.S. at 599, whereas the First Amendment requires a compelling interest and narrowly tailored restrictions, *see Press-Enterprise I*, 464 U.S. at 510. Some courts have concluded that the First Amendment right requires more exacting scrutiny,[13] but others have drawn close comparisons between the two inquiries.[14] Third, in terms of standards of review, appeals courts review the common law determination for abuse of discretion, whereas constitutional claims prompt *de novo* review. *See In re Providence Journal*, 293 F.3d 1, 10–11 (1st Cir. 2002); *In re State-Record Co., Inc.*, 917 F.2d 124, 127 (4th Cir. 1990). Finally, the common law right is subject to being superseded by statute, whereas the First Amendment right is not.[15] Nevertheless, the common law right overlaps with the First Amendment in application.

In sum, CACM's proposal implicates the common law right to access judicial records as well as the First and Sixth Amendments.

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III. Restrictions on Public Access to Pleas, Plea Agreements, and Sentencing

The CACM Report recommends measures that will restrict access to plea agreements, sentencing memoranda, transcripts of guilty pleas, sentencing hearing transcripts, and Rule 35 motions. Portions of the plea colloquy and sentencing hearing would take place at the bench, and those portions of the transcripts would be sealed. Although the press and public would not be

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"serv[ing] as reservoirs of libelous statements for press consumption or as sources of business information that might harm a litigant's competitive standing." *Id.*

[13] *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) (deciding that "the more stringent First Amendment framework applie[d]"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) ("The common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment.").

[14] *See, e.g.*, *In re Providence Journal Co., Inc.*, 293 F.3d 1, 10 (1st Cir. 2002) ("Although the two rights of access are not coterminous, courts have employed much the same type of screen in evaluating their applicability to particular claims."); *In re Associated Press*, 162 F.3d 503, 509 (7th Cir. 1998) (explaining that the common law right requires findings to support sealing).

[15] In *Warner Communications*, for example, the Court did not weigh the interests involved because it ruled Congress provided the appropriate procedure for releasing the tapes via the Presidential Recordings Act. *See* 435 U.S. at 603–04. Legislatures, of course, cannot supersede the Constitution, and the Court has invalidated legislative acts that contradict the First Amendment. *See Globe Newspaper*, 457 U.S. at 602; *El Vocero*, 508 U.S. at 151.

physically barred from the courtroom during this part of the proceedings, neither would be able to hear the conversation between the court, the government, and the defense.

The Supreme Court has not decided whether there is a qualified First Amendment right to access proceedings or materials beyond trials, preliminary hearings, and jury selection. But the circuits that have considered the First Amendment's application during the plea and sentencing phases have held that the right of access applies. *See infra* Part III.A.1.

If the recommended restrictions fall within the First Amendment's scope, they would trigger heightened scrutiny. Because the Supreme Court and circuit courts have to date rejected categorical, across-the-board closure policies and required case-by-case justifications, the courts would likely have to break new ground in order to conclude that a national default rule of sealing proceedings and documents passes constitutional muster.

A. Determining Whether the First Amendment Right of Access Applies

The Supreme Court has not addressed whether the First or Sixth Amendment protects public access to plea and sentencing proceedings, but, applying the "experience and logic" test, every circuit that has considered the issue has concluded that the right of access is applicable to pleas, plea proceedings, and sentencing proceedings. In contrast, courts of appeals have held that the right of access is not applicable to presentence reports (PSRs). Unlike plea and sentencing proceedings, PSRs traditionally have been confidential. Also, they differ from other motions and filings because probation officers, rather than parties, submit PSRs.[16] Similarly, the First and Sixth Amendment rights of access have been held not to apply to grand jury proceedings, which historically have been closed to the public, or to Title III applications and search warrant affidavits, for which there is no tradition of public access.

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1. Pleas, Plea Proceedings, and Sentencing

a. Plea agreements, plea hearings, and transcripts

Six circuits—the District of Columbia, Second, Fourth, Sixth, Seventh, and Ninth—have held that plea agreements, plea hearings, or plea hearing transcripts fall within the First Amendment's scope.[17] The Ninth Circuit has also held the right covers a plea agreement's

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[16] *See United States v. Santarelli*, 729 F.2d 1388, 1390 (11th Cir. 1984) ("[W]hen the probation department submits its probation report to the court for the purpose of sentencing it is a part of the judiciary, yet when the Government submits evidence . . . for the purpose of sentencing it is an adversary in a judicial hearing arising from the prosecution and conviction of the defendant.")

[17] *United States v. DeJournett*, 817 F.3d 479, 485 (6th Cir. 2016) ("[T]he public has a constitutional right to access plea agreements . . . ."); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) ("[T]here is a first amendment right of access to plea agreements . . . ."); *Oregonian Publ'g Co. v. U.S. District Court*, 920 F.2d 1462, 1466 (9th Cir. 1990) ("[T]he press and public have a qualified right of access to plea agreements and related documents . . . ."); *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989) ("[M]embers of

cooperation addendum. *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 (9th Cir. 2008). We found no contrary authority.[18]

Applying the "experience and logic" test, the courts have concluded that plea hearings traditionally have been open, and that their openness promotes effective and just functioning of the criminal adjudication process. In *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988), for example, the Second Circuit considered whether the right of access extends to plea agreements and plea hearings, and concluded that, under the "experience and logic" test, it does. *Id.* at 86. First, the court observed that plea hearings typically have been open to the public. *Id.* In terms of logic, the court reasoned that, as in the case of criminal trials, access to hearings and filings for criminal pleas allows public scrutiny of court and prosecutor conduct. *Id.* at 87. The court also noted that pleas bear particular importance because they are, by far, the most common form of criminal adjudication. *Id. Cf. Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citations omitted) ("[P]lea bargaining . . . is not some adjunct to the criminal justice system; it is the criminal justice system."); Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 Harv. L. Rev. 2173 (2014) (discussing the interaction of criminal cases' overwhelming disposition by guilty plea and public scrutiny of the criminal justice system).

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the public . . . may attend proceedings at which pleas are taken and inspect the transcripts, unless there is strong justification for closing them."); *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988) ("[W]e conclude there is a right of access to plea hearings and to . . . plea agreements."); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("[W]e hold that the First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves.").

[18] We note, however, that an early decision by the Tenth Circuit, *United States v. Hickey*, 767 F.2d 705 (10th Cir. 1985), rejected a claim that the First Amendment right applies to sealed plea bargain documents. The First Amendment was not the principal focus of the case. The court stated, *id*. at 706, that the question presented was whether the common law right of access to court records extends to the sealed plea bargain of a criminal defendant now enrolled in the witness protection program of the United States Marshal's Service. Acknowledging the common law right to inspect and copy judicial records, the majority concluded that the district judge had not abused his discretion in balancing the competing interests and striking the balance in favor of the defendant's safety. *Id*. at 708–09. Judge McKay dissented from this portion of the court's opinion, concluding that there had been no showing that the plea bargain would provide information about the defendant's current location, and thus the public's right of access had not been overcome. *Id*. at 711. But in a brief paragraph the court also rejected the defendant's constitutional arguments under the First and Sixth Amendments, noting that *Press Enterprise I* and *Waller* did not overrule or question *Nixon*, which it found to be the governing authority for court documents. *Id*. at 709. The *Hickey* decision, however, pre-dated *Press-Enterprise II* and the court reached its conclusion without applying the "experience and logic" test.

b. Sentencing

Six circuits—the Second, Fourth, Fifth, Seventh, Ninth, and Eleventh—have concluded or implied that the First Amendment right of access attaches during sentencing, including sentencing hearings, transcripts of those hearings, and associated sentencing memoranda.[19] The Ninth Circuit has also held that the right applies to motions for a reduction of sentence pursuant to Rule 35 of the Rules of Criminal Procedure. *CBS, Inc. v. U.S. District Court*, 765 F.2d 823, 825 (9th Cir. 1985). And two circuits—the Eighth and Ninth—have held that the Sixth Amendment protects public access to sentencing.[20] We found no contrary authority.

Courts applying the "experience and logic" inquiry to sentencing have found that the right applies for many of the same reasons that it applies to pleas. The Fifth Circuit's decision *In re Hearst Newspapers, LLC*, 641 F.3d 168 (5th Cir. 2011),[21] relied on the historical experience of publicly open sentencing proceedings. *Id.* at 177. As for logic, the court drew comparisons between trials and sentencings: like a public trial, a public sentencing builds public confidence in the criminal justice system, promotes accurate factfinding, informs discussion of governmental affairs, allows for "review in the forum of public opinion," *id.* at 179, and provides "community therapeutic value," *id.* at 180 (quoting *Richmond Newspapers*, 448 U.S. at 570). The court also

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[19] *In re Hearst Newspapers, LLC*, 641 F.3d 168, 176 (5th Cir. 2011) ("[T]he public and press have a First Amendment right of access to sentencing proceedings."); *United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (applying First Amendment closure analysis to sentencing hearing); *United States v. Alcantara*, 396 F.3d 189,199 (2d Cir. 2005) ("[A]s with plea proceedings, a qualified First Amendment right of public access attaches to sentencing proceedings."); *United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995); *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir. 1986) (remanding for tailoring findings where district judge closed sentencing proceedings); *In re Washington Post Co.*, 807 F.2d at 390. One D.C. Circuit opinion assumed without deciding that the right applies at sentencing. *United States v. Brice*, 649 F.3d 793, 794 (D.C. Cir. 2011).

[20] *E.g.*, *United States v. Thompson*, 713 F.3d 388, 394 (8th Cir. 2013); *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012) (holding that the Sixth Amendment right to a public trial attaches to sentencing proceedings, reasoning "we see no reason to give the public a greater right to insist on public proceedings than the individual for whose benefit the public trial right was created—the criminal defendant"). In *Thompson,* the Eighth Circuit, "informed by the Court's First Amendment public access jurisprudence," reasoned that "we must determine whether sentencing hearings are traditionally conducted in an open fashion, and whether public access operates to curb prosecutorial or judicial misconduct and furthers the public interest in understanding the criminal justice system," and found the right applies to sentencing. 713 F.3d at 393–94. It upheld the exclusion of the defendant's family during testimony of one witness who had expressed fear about testifying. *Id.* at 396. Judge Gruender concurred, finding that the defendant's right to a public sentencing is based in the Fifth, not Sixth Amendment. *Id.* (Gruender, J., concurring).

[21] *Hearst Newspapers* involved the sentencing of Oziel Cardenas-Guillen, former leader of the notoriously violent Gulf Cartel. 641 F.3d at 172. Based on safety concerns, the district court closed the sentencing hearing and sealed the filings and orders surrounding it. *Id.* at 173.

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noted that the right of access is particularly important in cases involving guilty pleas because no trial or jury regulates the adjudication. *Id.* at 177.

The First and Third Circuits avoided the constitutional issue by finding a common law right of access to sentencing documents.[22] In *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013), the First Circuit held that the common law right of access applied to sentencing memoranda and third-party letters filed with the court for sentencing. *Id.* at 57–58. As to sentencing memoranda, the court reasoned they "bear directly on criminal sentencing in that they seek to influence the judge's determination of the appropriate sentence," and that there was "no principled basis for affording greater confidentiality as a matter of course to sentencing memoranda than is given to memoranda pertaining to the merits of the underlying criminal conviction, to which we have found the common law right of access applicable." *Id.* at 56. It explained:

> Sentencing memoranda, which contain the substance of the parties' arguments for or against an outcome, are clearly relevant to a studied determination of what constitutes reasonable punishment. Thus, like substantive legal memoranda submitted to the court by parties to aid in adjudication of the matter of a defendant's innocence or guilt, sentencing memoranda are meant to impact the court's disposition of substantive rights."

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Id. It reasoned that public access to such memoranda "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system" and "may serve to check any temptation that might be felt by either the prosecutor or the court to seek or impose an arbitrary or disproportionate sentence; promote accurate fact-finding; and in general stimulate public confidence in the criminal justice system by permitting members of the public to observe that the defendant is justly sentenced." *Id.* at 56–57 (citations, internal quotation marks, and alterations omitted). It also ruled that letters—both those attached to sentencing memoranda and sent directly to the court by third parties—were presumptively accessible. *Id.* at 59. It remanded for a document-by-document balancing analysis and redaction if necessary. *Id.* at 60.

2. *PSRs and Other Exclusions from the First Amendment Right of Access*

Applying the experience and logic test, circuit courts have identified several exclusions[23] from the First Amendment right of public access in the context of criminal proceedings: grand

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[22] The First Circuit court avoided deciding the access issue on First Amendment grounds in *Kravetz*, 706 F.3d at 60–61, discussed in the text. The Third Circuit took the same approach in *United States v. Chang*, 47 F. App'x 119, 122 (3d Cir. 2002), and granted access to sentencing documents based on the common law right instead of addressing the constitutional issue.

[23] Additionally, two circuits avoided the question whether the First Amendment right of access applies to juvenile delinquency proceedings by construing the Juvenile Delinquency Act to

jury proceedings and investigations, affidavits supporting search warrants, Title III wiretap applications, and federal PSRs.

Grand jury proceedings are readily distinguishable from other aspects of criminal proceedings, including those implicated by the CACM recommendations. Because federal grand juries, like their English forebears, have operated as secret ex parte proceedings since the time of the founding,[24] experience and logic dictate that grand jury proceedings and records associated with grand jury investigations do not fall within the First Amendment right of access.[25]

Similarly, the appellate courts have generally found no tradition of public access and no First Amendment right to Title III wiretap applications and search warrant affidavits. *In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 (2d Cir. 2009),[26] the court found that Title III's legislative scheme created a strong presumption against public disclosure, reflecting "Congress's preferred policy of favoring confidentiality and privacy." *Id*. In essence, neither experience nor logic favored access. The circuits are split on the question whether a First Amendment right of access attaches to search warrant affidavits after the warrant has been executed. Although several circuits have held there is no right of access,[27] one circuit found that there is a right of access.[28] The circuits finding no right of access emphasized the lack

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authorize, but not mandate, juvenile delinquency proceedings. *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994); *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995). The courts noted that although juvenile proceedings, a relatively recent creation, do not have the same historical tradition of openness as criminal trials, many of the reasons for open criminal trials apply equally to juvenile proceedings. If interpreted to require closure, the Act would raise serious First Amendment concerns—concerns the courts deemed serious enough to justify construing the Act to authorize, but not mandate, closure in juvenile proceedings.

[24] *See generally* Sara Sun Beale et al., 1 *Grand Jury Law and Practice* §§ 5:1–5:3 (2d ed. 2015) (reviewing history of grand jury secrecy in England and United States).

[25] *See, e.g.*, *United States v. Smith*, 123 F.3d 140, 148 (3d Cir. 1997) ("Historically, [grand jury] proceedings have been closed to the public. Moreover, public access to grand jury proceedings would hinder, rather than further, the efficient functioning of the proceedings."); *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559, 1562 (11th Cir. 1989) (reasoning that "[n]either of the[] elements [experience and logic] is present in assessing access to grand jury proceedings" and holding that grand jury proceedings are outside the access right's scope).

[26] The court in *In re N.Y. Times Co. to Unseal Wiretap*, asked whether experience and logic suggested a right of access or whether the applications implicated attendance at some judicial proceeding. 577 F.3d at 410. The court determined that neither implied a right of access. *Id.*

[27] *In re Search of Fair Finance*, 692 F.3d 424, 433 (6th Cir. 2012); *Times Mirror Co. v. Copley Press, Inc.*, 873 F.2d 1210 (9th Cir. 1989).

[28] The Eighth Circuit found a right of public access because search warrant materials are routinely filed without seal and are also often disclosed. *In re Search Warrant for Secretarial Area*, 855 F.2d 569, 573 (8th Cir. 1988). The court also pointed to the right of access potentially "operat[ing] as a curb on prosecutorial or judicial misconduct." *Id.*

of any historic tradition of public access and the potential detriment to investigatory process.[29] As the Supreme Court has explained, search-warrant proceedings are "necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove the evidence." *Franks v. Delaware*, 438 U.S. 154, 169 (1978); *see also United States v. U.S. Dist. Court*, 407 U.S. 297, 321 (1972) ("[A] warrant application involves no public or adversary proceeding.").

Several circuit courts have held or noted in dicta that the First Amendment right of access does not apply to presentence reports.[30] The most fully developed analysis is in *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989), which applied the "experience and logic" test to PSRs and concluded that they fell outside the First Amendment's scope. *Id.* at 229. The court emphasized two factors. First, unlike other stages of criminal adjudication, PSRs have historically been kept confidential. *Id.* Indeed, initially even defendants could not access them. *Id.* Second, the reports' confidential nature improved adjudication and sentencing, and disclosure might hinder the probation office's mission of providing the sentencing court with a comprehensive analysis of an offender's character. *Id.* In contrast, the historical default for pleas and sentencing has been openness, and numerous courts of appeals have noted that the same salutary reasons for holding open trials apply to open plea and sentencing proceedings. *See supra* Part III.A.1 (discussing circuit cases); *see also U.S. Dep't of Justice v. Julian,* 486 U.S. 1, 12 (1988) (expressing reluctance to disclose reports to third parties in order to avoid chilling the individuals' willingness to contribute information; noting the courts have typically required some showing of special need before allowing third parties to obtain a copy of a presentence report; and holding FOIA requires a defendant's PSR be disclosed to that defendant).

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B. Determining Whether the Presumption of Openness Has Been Overcome

If the right of access attaches to a particular proceeding or document, the right is still not absolute; rather, it amounts to a "presumption of openness" that may be overcome if restrictions

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[29] In *Fair Finance*, the Sixth Circuit noted the lack of any historic tradition of public access and the potential "detriment[] to the search warrant application and criminal investigatory processes" that could occur as a result of public access. 692 F.3d at 433. These potential detriments included identification of wiretap and undercover information sources, witness safety, and the possibility of alerting future suspects of forthcoming prosecutions. *Id.* at 432. The court also noted that releasing affidavits would encourage the government to be "more selective in the information it disclosed." *Id.*

[30] Other courts have said in dicta that the First Amendment right of access does not apply to presentence reports. *See In re Hearst Newspapers, LLC*, 641 F.3d at 181 n.14 (citations and quotation marks omitted) ("We do not . . . call into question the practice of keeping presentence reports confidential . . . ."); *Alcantara*, 396 F.3d 189 at 197 n.6 ("Courts have generally held, however, that there is no First Amendment right of access to pre-sentence reports."); *CBS, Inc.*, 765 F.2d at 826 ("Our opinion is not to be read to disapprove the practice of keeping presentence reports confidential."). *Cf. In re Boston Herald, Inc.*, 321 F.3d 174, 188 (1st Cir. 2003) ("[P]resentence reports are presumptively confidential documents.").

are essential to preserving a "compelling governmental interest, and [are] narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510 (citations omitted). The heightened scrutiny inquiry largely tracks the process laid out in the Sixth Amendment context in *Waller*, 467 U.S. at 48. *See supra* Part II.A.

First, closure must serve an interest that is "compelling," *Globe Newspaper*, 457 U.S. at 607, or "overriding," *Richmond Newspapers*, 448 U.S. at 581, that "outweighs the value of openness," *Press–Enterprise I*, 464 U.S. at 509. Second, there must be a "substantial probability" that openness would undermine that interest and that closure would preserve it. *Press-Enterprise II*, 478 U.S. at 14. Third, closure is only appropriate if "reasonable alternatives" cannot protect the interest. *Id.* Finally, a court that ultimately decides a proceeding or document should remain secret must articulate the interest invoked and make "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.*

1. Compelling Interests

Many circuit courts have identified compelling interests that mirror the goals of CACM's cooperator-protection guidance: protecting witnesses, informants, and undercover agents, and law enforcement's interests in maintaining the integrity of ongoing investigations. Personal safety has been recognized as a compelling interest. *See, e.g.*, *United States v. Doe*, 63 F.3d 121, 127 (2d Cir. 1995) (recognizing "that a person's physical safety, among other things, could in certain instances justify a closure order"); *United States v. Simmons*, 797 F.3d 409, 414 (6th Cir. 2015) (noting that "the need to protect the safety of witnesses and to prevent intimidation satisfies the higher 'overriding interest' requirement in the standard *Waller* test").[31] Indeed, the *Clark Order* cited cooperator safety to justify the blanket closures at issue there. 99 F. Supp. 3d at 659. Courts also have highlighted the importance of maintaining the integrity of criminal investigations that rely on confidential sources and undercover agents. *Cf. Ayala v. Speckard*, 131 F.3d 62, 72 (2d Cir. 1997) ("The state interest in maintaining the continued effectiveness of an undercover officer is . . . extremely substantial . . . ."). Indeed, given cooperators' importance in investigations, courts often link cooperator safety with investigative integrity.[32]

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[31] *See* LaFave et. al, *supra* note 10, § 24.1(b) n.26 (collecting authority). Courts have also noted the importance of safety as part of the "experience and logic" inquiry, pointing out the logic of keeping grand-jury investigations closed, in part, to protect grand-jury witnesses. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1087 (9th Cir. 2014). ("[T]here are several compelling reasons why grand jury proceedings should be kept secret, including protecting the integrity of the grand jury investigation and the safety of witnesses."); *see also Corbitt*, 879 F.2d at 235 (citing informant safety and investigations as reasons justifying keeping PSRs secret).

[32] *CBS*, 765 F.2d at 826 ("[I]nformation relating to cooperating witnesses and criminal investigations should be kept confidential in some cases . . . ."); *United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) ("[W]e have recognized as additional sufficient reasons for closure and sealing those occasions where an ongoing government investigation may be jeopardized or where publicity might put at risk the lives or safety of government agents engaged in undercover

2. Tailoring

Although witness safety and investigative integrity are compelling interests and Judge Clark found that they justified a sealed portion of every plea agreement, research did not yield any circuit court authority endorsing safety or investigative integrity as justifying a default rule of across-the-board closure. Indeed, a number of opinions recognize the importance of protecting witnesses and investigations in general, but reject them as reasons for sealing or closure in a particular case.[33] Surviving First Amendment tailoring analysis could prove difficult for across-the-board closures. In light of the Supreme Court and circuit court precedents requiring case-by-case justification for restricting access when the First Amendment applies, the courts would likely have to break new ground in order to uphold the constitutionality of the national default rule of sealing proceedings and documents recommended by CACM.

The Supreme Court has described closure as a rare exception to openness, not a commonplace device: "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enterprise I*, 464 U.S. at 509; *see also Waller*, 467 U.S. at 45 (explaining that cases in which openness gives way to other interests "will be rare . . . and the balance of interests must be struck with special care"). Circuit courts have echoed that closure is an exceptional move. *See, e.g.*, *United States v. Cojab*, 996 F.2d 1404, 1405 (2d Cir. 1993) ("The power to close a courtroom where proceedings are being conducted during the course of a criminal prosecution and/or to seal the records of those proceedings is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons.").

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Two of the Supreme Court's right-of-access cases struck down rules or statutes that imposed across-the-board closure rather than providing for case-by-case determinations. In *Globe Newspaper*, the Court acknowledged that the psychological health of underage sexual assault victims is a compelling interest, but it nonetheless struck down the Massachusetts statute mandating courtroom closure during those victims' testimony because it did not provide for the constitutionally required specific, case-by-case interest balancing. 457 U.S. at 607–08. In *El Vocero*, the Court acknowledged that fair-trial interests are compelling, but struck down Puerto

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activities."); *Doe*, 63 F.3d at 127 (citations omitted) ("[Closure require showing] danger to persons, property, or the integrity of significant activities entitled to confidentiality, such as ongoing undercover investigations or detection devices.").

[33] In *CBS, Inc. v. U.S. District Court*, for example, the court sealed a cooperator's Rule 35 motion for a reduced sentence. 765 F.2d at 824. The Ninth Circuit conceded that the case implicated safety and investigative interests, but reasoned there was little likelihood that openness would harm those interests because most of the sealed information was already public record. *Id.* at 825. The court also reasoned that redaction and witness protection were other means that could adequately serve the asserted purposes. *Id.* at 826; *see also Robinson*, 935 F.2d at 291 (noting that closure may be appropriate if openness would "threaten an ongoing criminal investigation, or the safety of [a cooperating defendant] and his family," but that facts of witness's cooperation had already been publicly disclosed).

Rico's default closure rule because it obviated determinations of fair-trial needs in each individual case. 508 U.S. at 151.

Similarly, many cases in the courts of appeal have rejected blanket secrecy and required case-by-case determinations. The First Circuit has struck down several policies that provided for across-the-board closure or sealing. In *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), the First Circuit encountered a Massachusetts statute that provided for the automatic sealing of records in criminal cases ending in "not guilty" judgments or "no probable cause" dispositions. *Id.* at 505. Parties or members of the public could unseal the records under certain circumstances, but the default was sealing. *Id.* After determining that the First Amendment right of access applied to the records, the court ruled that such a blanket policy of sealing was unconstitutional. *Id.* at 509. The court acknowledged the weight of the privacy interests at stake, but reasoned there were less restrictive means of serving them—among them, allowing defendants to move for sealing at the end of their trial or probable-cause hearing. *Id.* at 507.

The First Circuit also invalidated the District of Rhode Island's "blanket nonfiling policy," which provided that legal memoranda submitted with motions were not placed in the record. *In re Providence Journal Co., Inc.*, 293 F.3d at 13. The court reasoned that the interests the policy sought to serve could be addressed "on a case-specific basis." *Id.* at 12; *see id.* ("Where a particularized need for restricting public access to legal memoranda exists, that need can be addressed by the tailoring of appropriate relief."). That reasoning contributed to the court's decision *In re Boston Herald, Inc.*, 321 F.3d 174 (1st Cir. 2003), which upheld the discretionary sealing of Criminal Justice Act eligibility forms, in part, because the discretionary regime was "not a blanket rule denying access." *Id.* at 181.

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In *New York Civil Liberties Union v. New York City Transit Authority*, 684 F.3d 286 (2d Cir. 2012), the Second Circuit invalidated the hearings policy of New York City's Transit Adjudication Board (TAB). *Id.* at 305. The TAB promulgates rules for the city's public-transportation services and adjudicates claims for individuals cited for violating those rules. *Id.* at 289. The TAB maintained a policy of closing hearings to the public unless the respondent consented to an observer being present. *Id.* at 292. After concluding that the First Amendment right of access applies to the hearings, the court ruled that the policy was unconstitutional because, by making closure the default, it avoided case-by-case "findings regarding the relative weight of the interests at stake." *Id.* at 305.

We found only two appellate decisions upholding categorical, across-the-board closure, both of which seem readily distinguishable from the procedures proposed by CACM. They upheld (1) temporary sealing for 60 days of qui tam actions filed under the False Claims Act (FCA), and (2) closure of certain deportation proceedings after the September 11, 2001 terrorist attacks. Neither decision appears to provide a firm basis for the procedures recommended by CACM.

In *ACLU v. Holder*, 673 F.3d 245 (4th Cir. 2011), the Fourth Circuit concluded that FCA's 60-day sealing period, which allows the government to investigate the relator's allegations and determine whether to intervene, was "narrowly tailored to serve the government's compelling interest in "protecting the integrity of ongoing fraud investigations." *Id.* at 253. Unlike this temporary short-term sealing, CACM recommends across-the-board sealing that is indefinite unless the court orders otherwise on a case-by-case basis.

One of two courts to consider the issue upheld an across-the-board closure policy for certain deportation hearings after the September 11, 2001 terrorist attacks,[34] but this decision offers little support for the CACM proposals. In *New Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002), the Third Circuit concluded that the First Amendment provided no right of access to administrative deportation proceedings conducted by the Executive Office for Immigration Review (EOIR), distinguishing them from proceedings in Article III courts. *Id.* at 209; *see also* 8 C.F.R. § 1003.0(a) (providing for the organization of the EOIR "[w]ithin the Department of Justice"). Accordingly, the court did not reach the question of tailoring.[35] In contrast, the Sixth Circuit held that the right of access applied to deportation proceedings, and it concluded that the post-9/11 closure directive was not narrowly tailored to achieve the national security interests it sought to serve. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 692 (6th Cir. 2002). In particular, the court saw "no persuasive argument as to why the Government's concerns cannot be addressed on a case-by-case basis." *Id.* Assuming arguendo that that Third Circuit's analysis of closing the deportation proceedings was correct, it provides little support for the CACM proposals. The court's reliance on the administrative nature of the proceedings makes its decision readily distinguishable from the context of pleas, plea proceedings and sentencing in the Article III courts. Further, it provides no basis for concluding that a case-by-case determination of the need for closure is not required in proceedings when the First Amendment right of access applies.

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As noted earlier, at least one district court has upheld a blanket sealing rule: the *Clark Order*, 99 F. Supp. 3d at 660. The procedures at issue there provide that every plea agreement include a sealed addendum that either details the defendant's actual cooperation or simply includes no additional information *Id.* Indeed, the procedures the *Clark Order* sanctions closely resemble the proposals in the CACM report. On the *Clark Order*'s reasoning, the court must seal a portion of every plea agreement, even when there is no articulable risk to the actual defendant

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[34] Shortly after 9/11, Chief U.S. Immigration Judge Michael Creppy issued a directive that designated certain deportation hearings as "special interest" based on a determination by the Attorney General that the hearings' subject may have connections to or knowledge of the 9/11 attacks. *N.J. Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 199 (3d Cir. 2002).

[35] The court, did, however, evaluate the wisdom of relegating national-security concerns to case-by-case determinations in the "logic" prong of its inquiry into the right itself. *Id.* at 200. Among other things, the court relied on testimony that immigration judges lack the capacity to evaluate the national-security implications of particular facts, which made closure on a case-by-case basis ineffective. *Id.*

or when the defendant did not even cooperate. *Id.* This is so because "[u]nsealing only those plea agreements that do not contain cooperating language would paint a bulls-eye on every defendant whose plea agreement was not unsealed." *Id.* And such a policy is narrowly tailored because "holding a hearing in every case to determine whether to seal a defendant's addendum is not practicable." *Id.*

Conclusion

The constitutional validity of the procedures CACM has recommended will most likely turn on the question whether they can meet the heightened scrutiny at the second step of the Supreme Court's First Amendment analysis. In most or all circuits, we expect that the courts will hold that the First Amendment right of access applies to the supplemental portion of each plea agreement concerning cooperation, the sealed portion of sentencing memoranda and transcripts, and cooperation-based Rule 35 motions. Some courts might also address the issue as a restriction on the common law right of access to court documents. It is less likely that the courts will face Sixth Amendment challenges, because most defendants will benefit from sealing and not seek to challenge it. On the other hand, some non-cooperating defendants might prefer disclosure and object to sealing on Sixth Amendment grounds. Both common law and Sixth Amendment challenges will be resolved using an analysis similar to that applied to First Amendment claims.

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If the recommended policies restrict the presumptive right of access under the First Amendment, they would trigger heightened scrutiny. Courts will likely agree that compelling interests motivate the procedures—that is, the interest in protecting personal safety and the government's interest in ongoing and future investigations. The much more difficult question is whether these compelling interests justify an across-the-board policy of sealing affecting every case in which there is a guilty plea, i.e., 97 percent of federal convictions. The Supreme Court and circuit courts have to date rejected categorical, across-the-board closure policies and required case-by-case justifications. These courts would have to break new ground in order to conclude that a default rule of sealing proceedings and documents passes constitutional muster. Judge Clark's decision is the only decision we have found upholding a blanket sealing policy. Although Judge Clark found that an across-the-board sealing was the only way to protect the health and safety of cooperators and prison staff, and to prevent the intimidation of others who might cooperate in the future, his opinion does not reflect consideration of a variety of other alternatives or any assessment of those alternatives' relative effectiveness.

A. Possible alternative measures

Based on the information we have collected, it is unclear whether it will be possible for a party defending the CACM procedures to meet the heightened constitutional standard, i.e., no less restrictive alternative or combination of less restrictive alternatives other than sealing can provide an acceptable level of protection to cooperators.

At present, districts employ a wide variety of procedures to protect cooperators. *See generally* U.S. Dep't of Justice, Chart of Local Rules and Standing Orders Regarding the Sealing

of Court Documents (Jun. 28, 2016); Federal Judicial Center, Survey of Harm to Cooperators: Final Report, page 26, Table 10 (June 2015) [hereinafter FJC Report]; Federal Judicial Center, Memorandum to Cooperators Subcommittee 6–10 (May 18, 2016) [hereinafter FJC May 18 Memo]. In evaluating constitutional challenges to the limits on access proposed by CACM, courts that conclude constitutional scrutiny applies will require that the party defending limits on access carry the burden of showing that those limits are narrowly tailored to address the risk of harm—i.e., that other less restrictive procedures will not provide constitutionally sufficient protection for cooperators. As there will often be alternative sources of information about cooperators, including out-of-court sources, limiting access to court proceedings and documents will never eliminate all risk of harm; the question is one of degree. Under narrow tailoring, the burden is showing that limits on access will reduce the incidence of harm more effectively than other less restrictive alternatives, and that the improvement is sufficient to justify those limits.

It appears that the FJC data provide no information that would assist a court in deciding this question. Although the original Table 9 of the FJC May 18 Memo reported the number of incidents of harm to cooperators in districts that included a particular limitation as part of their procedure, the FJC's data provide no basis for evaluating the effect on harm for any single procedure or combination of procedures As the FJC explained on page 1 of its July 21, 2016 Memorandum to the Cooperators Subcommittee (emphasis added; bold omitted):

> Because all districts responding to that section of the survey reported taking some steps to protect cooperators, and no two districts are using the same steps, *it is empirically impossible to identify the effect of any policy (individually or in combination with other policies) on the amount of reported harm to cooperators*.

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Because of the number of different combinations employed in various districts, statistical analysis pinning down the relative effect of one combination compared to another was not possible. The study does show that even with various combinations of existing limitations district judges are reporting harm, but it says nothing about the effect of any one policy (or combination of policies) on the frequency of harm.[36]

Thus the FJC study provides no statistical support for the claim that the limits proposed by CACM would do a better job of reducing incidents of harm than any other combination of less restrictive limitations, particularly if those less restrictive limitations were adopted on a national basis. On the other hand, the study provides no support for the claim that CACM's limits would be less effective. But the burden, if a constitutional challenge is raised, is not on the party seeking access. The burden of meeting the requirements of heightened scrutiny is on the party defending secrecy.

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[36] Districts that have already adopted the policies recommended by CACM may have experienced higher rates of harm and threat prior to their adoption of these policies, but that information is not available from the study.

For example, a court may wish to know whether limiting online access via PACER—alone or in combination with other procedures—would provide an acceptable level of protection for cooperators from risks arising from information in court records. It appears that online PACER access has been a significant factor in causing increased the harm to cooperators in recent years. Other alternatives include the various procedures outlined in Tables 7 and 8 of the FJC May 18 Memo, as well as limiting the sealing policy to cases involving gangs or organized crime, to offenders likely to be sentenced to high or medium security prisons,[37] or to sealing for only a limited period of time.[38] It is also possible that defendants accused of certain crimes may face a substantially lower risk than defendants accused of other crimes. [39]The FJC study cannot answer this question. Researchers specifically asked respondents that they not provide any information about the details of the case in order to avoid identifying individual cooperators. As a result, information on crime type was not collected. FJC May 18 Memo, at 2.

The effectiveness of the proposed procedures

Relative to alternatives. Even assuming that the adoption of a uniform, national policy will reduce the incidence of harm by lowering the number of times cooperation is mistakenly inferred based on inter-district variation in policy, it appears that there is very little if any information available to support or refute claims concerning the relative effectiveness of the proposed procedures as compared to other potential nationwide alternatives. The FJC found that most districts employed more than one procedure to protect cooperators, but still reported harm. *Id.* As noted earlier, the findings provide no information on the relative effectiveness of any existing procedure or policy, or combination of policies, in reducing the incidence of harm. They provide no information about what sort of effect, if any, the adoption nationwide of any existing procedure or policy, or combination of polices, would have on the incidence of harm. And they provide no information about what sort of effect, if any, the procedures recommended by CACM would have on the incidence of harm.

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The Department of Justice memorandum dated May 31, 2016, describes a variety of practices in the districts surveyed, and reports that prosecutors in districts that had implemented

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[37] We note that a Bureau of Prisons memorandum to the Subcommittee states:

> Currently, there are 22,561 inmates in private prisons, or about 11.57% of all federal inmates. Assault rates in private prisons are very low as they are mostly low security prisons. In calendar years 2014 and 2015 there were 2 serious assaults on inmates in private facilities.

Fed. Bureau of Prisons, Memorandum to Cooperators Subcommittee 2 (Jun. 27, 2016).

[38] U.S. Dep't of Justice, Memorandum to Cooperators Subcommittee 4 & nn. 2-4 (July 12, 2016) (noting several districts seal for specified periods on a case-by-case basis or for short periods such as two or four years).

[39] *But see* FJC July 7 Memo at 4-6 (finding no difference of reports of threat and harm among similarly sized districts based upon one the number of convictions for three categories of offenses).

some protective measure(s) were fairly satisfied, even if those measures—unlike CACM's recommended procedures—were "narrowly targeted to address only those cases that are likely to result in threats or harm." U.S. Dep't of Justice, Memorandum to Cooperators Subcommittee 6 (May 31, 2016) [hereinafter DOJ May 31 Memo]; *see also id.* at 5 ("The overall sense of the USAOs surveyed was that the measures employed had positive effects, and the more uniformly employed the better they worked."). The DOJ findings support the adoption of protective procedures within each district, and perhaps even a national policy. But they do not clearly support the particular procedures recommended by CACM.

Judge Clark's opinion did not consider whether the courts, the Department of Justice or the Bureau of Prisons might be able to implement other solutions that would have an equivalent impact, such as strengthening witness protection programs or providing separate prisons for cooperators. The Bureau of Prison memorandum of June 27, 2016, did not directly respond to the question whether such prisons would be feasible if deemed necessary to protect cooperators, instead stating that the Bureau presently protects them in other ways.

Other uncontrolled sources of information. In addition to examining whether CACM's proposed procedures improve protection as compared to less restrictive alternatives—including nationwide, uniform alternatives—we believe that courts are likely to evaluate the effectiveness of any limitation on access in light of other sources of information left uncontrolled by the proposed limitation. Judge Clark, in his opinion, did not consider the degree to which other means of accessing cooperation information would undermine the sealing policy's protective goals. For example, CACM's recommendation for requiring a bench conference in every case that would contain any discussion of cooperation (or a statement that there was none) overlooks the consequences of leaving in place the right of public access to the courtroom. It would be easy for a spectator to determine, with a high likelihood of correctness, whether a defendant has cooperated from observing such a bench conference. A variety of factors could reveal whether the defendant had cooperated, including the duration of the conference as well as the existence and apparent nature of any exchange (or the absence of an exchange) between the prosecutor and the defense lawyer. A short exchange between two lawyers differs significantly from a longer discussion in which one or both sides detail the nature, extent, and value of cooperation and discuss the extent of the departure or variance warranted by that cooperation. *See also* FJC Report, pp. 13-14, 18-19, 28 (reporting responses concerning other sources of information); *id.*, App. D ("Other Sources to Identify Defendants").[40]

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[40] The Report's conclusion on this point, p. 30, reads:

> The sources for identifying cooperation by defendants/offenders and witnesses also differed somewhat, according to our respondents. While court documents and proceedings were overwhelmingly the source for identifying both types of cooperators, the specific sources are different. Defendants/offenders were identified in plea agreements, 5K1.1 motions, or through general docketing

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Committee members have noted there are many ways prisoners determine who is cooperating, such as departures from the prison for proffer sessions when no proceedings in the prisoner's case are scheduled, or the receipt of a particularly favorable sentence. Respondents in the FJC study cited a wide variety of sources for information about cooperation, including live testimony, discovery, Jencks Act disclosures, evidence and transcripts from co-defendants' trials, police reports, modifications of pretrial conditions of release, PSRs, grand jury proceedings, search warrant affidavits, newspaper articles, observations of individuals speaking to agents, removal from custody for debriefing, and information from co-defendants. *Id.* Discovery was one of the most frequently cited sources. *Id.* In general, these sources of information would be unaffected by CACM's recommendations.

Indeed, because alternative sources of information may be more readily accessible in smaller districts, a court might very well conclude that alternative sources of information may be one explanation for the finding by the FCJ that the rate of harm to cooperators was somewhat higher in smaller districts. *See* FJC May 18 Memo, *supra*, at 5; Federal Judicial Center, Memorandum to Cooperators Subcommittee (Jul. 7, 2016).

B. The value of open judicial proceedings

We conclude with the observation that courts considering a First Amendment challenge might be affected by recent events that have eroded public confidence in the criminal justice system, leading many to believe that it systematically discriminates against people of color. As noted in Part I.A, *supra*, the Supreme Court has stated that the benefits of holding trials and other criminal proceedings openly include "community therapeutic value" and enhancing the perceived and actual fairness of the criminal process. The adoption of a categorical policy of sealing plea and sentencing documents and proceedings would make it difficult for individual defendants as well as the press and the public to assess whether there has been discrimination against defendants of color.

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practices, especially the presence of a number of sealed CM/ECF docket entries or a sentencing reduction. Respondents also reported discovery and testimony as common sources for identifying defendant/offender cooperators. We found that witnesses, while also identified through court documents, were often identified through witness lists, because they give testimony in open court, or through discovery.

TAB 6C

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Mark S. Miskovsky, Staff

June 30, 2016

MEMORANDUM

To: Chief Judges, United States District Courts
District Judges, United States District Courts
District Court Executives
Clerks, United States District Courts

From: Judge Wm. Terrell Hodges, Chair
Committee on Court Administration and Case Management

Judge Roger W. Titus, Chair, Privacy Subcommittee
Committee on Court Administration and Case Management

Cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

RE: INTERIM GUIDANCE FOR COOPERATOR INFORMATION

On behalf of the Committee on Court Administration and Case Management (CACM), we would like to share interim guidance that the Committee developed concerning the treatment of cooperator information in criminal cases. This guidance is "interim" because the issue has been referred to the Committee on Rules of Practice and Procedure for formal consideration. As discussed below, however, the Committee believes this is an issue of such importance that it requests each court to consider adopting the provisions of the guidance, in a manner consistent with local practice, applicable case law, and the court's rule-making authority, pending consideration through the Rules Enabling Act process.

Background

The CACM Committee has responsibility for issues relating to court operations, including the task of helping courts maintain their records in a way that protects both the public right of access to case filings and the legitimate privacy interests of litigants. Perhaps the most challenging example of this responsibility is balancing public access to criminal cases against the potential exposure of government cooperators. Remote electronic access dramatically increased

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the potential for illicit use of case information regarding cooperators, and it is largely for this reason that the Judicial Conference initially delayed public electronic access to criminal case files. This concern also prompted the Committee in 2008 to endorse practices aimed at minimizing the use of case documents to identify cooperators, and encourage all courts to consider their implementation. March 2008 Report of the CACM Committee to the Judicial Conference, pp.8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350.

Since then, the CACM Committee has continued to track the use of criminal case information to identify cooperators. Despite courts' individual efforts, the problem continues to grow. Based on increasing concerns expressed by judges about harm to cooperators, this Committee, in August 2014, asked the Federal Judicial Center (FJC) to survey judges, U.S. attorneys, federal defenders, Criminal Justice Act panel representatives, and probation and pretrial services chiefs to measure the scope and severity of the problem.

The FJC analyzed the responses to these surveys and collected its findings in a report entitled "Survey of Harm to Cooperators," which is now available on the FJC website at http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf ("FJC Report"). The FJC Report fully substantiates the concern that harm to cooperators persists as a severe problem. For example, district judge respondents reported 571 instances of harms or threats – physical or economic – to defendants and witnesses between the spring of 2012 and the spring of 2015, including 31 murders of defendant cooperators.

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

The Committee believes these threats and harms should be viewed in the context of a systemic problem of court records being used in the mistreatment of cooperators. The FJC Report presents 363 instances in which court records were known by judges to be used in the identification of cooperators. This is a particular problem in our prisons, where new inmates are routinely required by other inmates to produce dockets or case documents in order to prove whether or not they cooperated. If the new inmates refuse to produce the documents, they are punished. The FJC Report confirms the existence and widespread nature of this problem,[1] which is aggravated by prison culture and the prevalence of organized gangs.

The conditions cooperators face in prison also impact the sentences imposed by the judiciary. Multiple respondents in the FJC Report noted that cooperators' fear of harm is so great that some forgo the potential benefits of U.S. Sentencing Guidelines Manual § 5K1.1 out of fear that the related case documents will identify them as cooperators. If they are identified as cooperators after arriving in prison, in many cases the only effective protection available is to move the threatened inmate into a segregated housing unit or solitary confinement, with an attendant loss of the privileges that would otherwise be available to that inmate – an ironic and more onerous form of punishment not typically contemplated by the sentencing judge.

Chief Judge Ron Clark of the Eastern District of Texas recently held a hearing regarding a motion to unseal plea agreements that involved extensive factfinding on these issues.[2] The hearing involved the participation of the local United States Attorney's Office, the Office of the

[1] *See* FJC Report, Appendix I: Open-Ended Comments (discussing practices in BOP facilities).

[2] *United States v. McCraney*, 99 F. Supp. 3d 651 (E.D. Tex. 2015).

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Public Defender, counsel for five defendants, and counsel for the newspaper who had requested the unsealing, as well as an amicus filing by another newspaper. At the hearing, the court heard testimony from two Bureau of Prisons (BOP) representatives and a federal prosecutor concerning the experiences of cooperators in prison. Based on its factfinding, the court concluded that the disclosure of information in plea agreements that identifies cooperating defendants "puts those defendants at risk of extortion, injury, and death." It therefore found "an overriding interest in preventing disclosure of information that states or even hints that a defendant has agreed to be an informant or cooperating witness." The court's local rules regarding criminal case management were updated as a result, so that all plea agreements from that point forward include a sealed supplement containing any discussion of cooperation. *See* E.D. Tex. L. R. CR-49(c)-(d). The court found that this new procedure – which it applied to the case at hand – "balances the public's right of access against the higher need to protect the lives and safety of defendants" and other individuals, as well as "the need to encourage accused individuals to provide the truthful information that is crucial to the successful prosecution of serious offenses."

Certainly, U.S. attorneys and the BOP must continually strive to protect cooperators and ensure the safety of prisoners. The Committee believes, however, that the judiciary also has a role in finding solutions to these problems. Of particular concern for judges, apart from the need to protect the well-being of those we sentence, is the fact that our own court documents are being used to identify the cooperators who then become targets. In many instances these documents are publicly available online through PACER. Because criminal case dockets are being compared in order to identify cooperators, every criminal case is implicated.

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Guidance

The CACM Committee believes a nationwide, uniform solution providing for greater control over access to cooperator information is required to address this systemic national problem. It has therefore asked the Committee on Rules of Practice and Procedure to consider the issues described in the FJC Report and determine whether changes to the criminal rules are warranted as a long-term remedy. In the interim, the CACM Committee is also asking courts to consider taking more immediate steps at the district level to address this problem. **The Committee has developed the attached guidance for protecting cooperator information found in criminal case documents and recommends that each district adopt it via local rule or standing order.** The guidance is based on practices for protecting cooperators already used in a number of courts.[3]

The guidance recommends that, in all criminal cases, courts restructure their practices so that documents or transcripts that typically contain cooperation information – if any – would include a sealed supplement. Any discussion of defendants' cooperation – or lack thereof – would then be limited to these sealed supplements. For example, any plea agreement docketed in a criminal case would be accompanied by a separate, sealed supplement containing either discussion of cooperation or a simple statement that there was no cooperation. As a result, any member of the public who reviews the docket would be unable to determine, based on the plea agreement, whether a given defendant has cooperated. By adding standardized sealed material that will appear in every case, whether or not there is a cooperator, and placing all discussion of

[3] Thirty-three district courts, or over one-third, have already adopted local rules or standing orders to make all criminal defendants appear identical in the record to obscure cooperation information. FJC Report at 26.

cooperation under seal, adoption of these practices would inhibit identification of cooperators through dockets and case documents. The public, however, would continue to have access to key criminal case files – albeit without sensitive information regarding cooperation.[4]

Importantly, the government's disclosure obligations to opposing counsel would not be affected by implementation of this guidance, and the public would still have access to much of the plea and sentencing material that is now available.

Discussion

The CACM Committee would like to emphasize that, in recommending this guidance, its members understand and embrace our duty as judges to vigilantly safeguard the public's right to access court documents and proceedings pursuant to the First Amendment and under common law. Nonetheless, the Committee finds that the harms to individuals and the administration of criminal justice in this instance are so significant and ubiquitous that immediate and effective action should be taken to halt the malevolent use of court documents in perpetuating these harms, consistent with each court's duty to exercise "supervisory power over its own records and files."[5]

The Committee is also mindful of the high burden that must be met before shielding particular case information from the public's eye,[6] but notes that this should not be seen as an absolute bar to exercising authority over court records and proceedings. Indeed, there are many well-established restrictions on access to criminal case information that address compelling government interests.[7] The CACM Committee believes that the need in this instance is as great as, if not greater than, the needs that supported adoption of restrictions in the past.

Cited in USA v. John Doe, No. 15-50259 archived on September 18, 2017

[4] The guidance contains other provisions, including procedures for prisoners to access sealed case materials in a secure environment, consistent with local BOP policy and court rules. The Committee is in communication with the Executive Office for U.S. Attorneys and the BOP regarding the provisions and local implementation.

[5] *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("[A]ccess has been denied where court files might have become a vehicle for improper purposes.").

[6] *See Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509-13 (1984) (recognizing that, where right of public access applies, a court may close court proceedings or deny access to transcripts, but must articulate reasons for doing so in specific and reviewable findings demonstrating "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"). Several circuits also have issued decisions that may impact court efforts to implement this guidance. *See, e.g., United States v. DeJournett*, 817 F.3d 479 (6th Cir. 2016) (vacating policy-based order that sealed the entirety of a plea agreement without case-specific findings); *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008) (finding a public right of access to the cooperation addendum of a plea agreement, albeit with limited analysis of whether the right should apply); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (acknowledging that potential threats to criminal investigations or individuals "may well be sufficient to justify sealing a plea agreement," but vacating sealing of cooperator information as unwarranted where fact of cooperation was publicly known).

[7] *See, e.g.*, 18 U.S.C. § 3153(c) (making pretrial services reports confidential); Fed. R. Crim. P. 32 & 18 U.S.C. § 3552(d) (limiting distribution of presentence investigation reports); Fed. R. Crim. P. 49.1 (requiring redaction of personally identifiable information and minors' names); Fed. R. Crim. P. 49.1, 2007 Advisory Comm. Notes & *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 340 (categorizing as non-public a number of criminal case documents, including juvenile records); 18 U.S.C. § 5038 (making names and pictures of juveniles in delinquency proceedings non-public; safeguarding records from "unauthorized persons"); JCUS-MAR 01, p. 17 (dictating that statements of reasons are not to be disclosed to the public); 18 U.S.C. § 3662(c) (mandating that conviction records maintained by the Attorney General "not be public records").

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It is important to emphasize that, to the extent possible, broad adoption of the CACM guidance is key to its effectiveness at addressing the problems discussed above. If districts continue to take different approaches toward addressing this problem, there is a real risk that well-intentioned measures to protect cooperators in one court might result in criminal dockets that indicate cooperation, rightly or wrongly, when compared to those of another court. The inadequacy of a patchwork approach to sealing cooperator-related material is highlighted in Chief Judge Clark's opinion and referenced by a number of responses in the FJC Report. It is for this reason that the Committee has requested the Committee on Rules of Practice and Procedure to consider this issue for national application.

Finally, in drafting and recommending this guidance, the CACM Committee emphasizes that it has acted to the best of its ability to narrow the scope of the proposed measures. The Committee also thoroughly considered other potential options for addressing this issue in each district, such as those it recommended for potential adoption in 2008.[8] These options, however, suffer from either failing to move the judiciary toward a uniform approach or by making a greater volume of case information unavailable to the public. For example, some courts presently seal the entirety of all plea agreements in an attempt to prevent identification of and harm to cooperators. By implementing the attached guidance and sealing only cooperator information, as the CACM Committee recommends, these courts may actually increase the amount of criminal case information available to the public.[9]

The CACM Committee believes that the misuse of court documents to identify, threaten, and harm cooperators is a systemic problem, and can only be addressed through a more uniform approach toward public access to cooperator information. To that end, the Committee believes uniform implementation of the attached guidance at the local level -- pending consideration of a national rule -- would be an important, measured step toward that goal, and one which is appropriately tailored to address the significant interests involved.

cited in United States v. John Doe, No. 15-50259 archived on September 8, 2017

Thank you for the thoughtful consideration we know you and your colleagues will give to this issue.

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[8] *See* March 2008 Rep. of the CACM Committee to the Judicial Conf., pp. 8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350 (listing as potential measures (1) shifting cooperation information into non-case file documents, (2) sealing plea agreements, (3) restricting access to plea agreements, (4) redacting all cooperation information, (5) restructuring case records so that all criminal cases appear identical, and (6) delaying publication of plea agreements referencing cooperation).

[9] The CACM Committee recognizes that there is no complete or perfect solution. If a cooperator testifies during a trial, for example, or is sentenced below a statutory mandatory minimum where the "safety valve" does not apply (18 U.S.C. § 3553(f)), his cooperation is apparent. This obviously does not mean, however, that solutions should not be adopted for those cases in which they are available and can be effectively applied.

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If you have any questions or concerns, please feel free to contact either of us, Judge Terry Hodges (Chair, CACM Committee) or Judge Roger Titus (Chair, CACM Committee's Privacy Subcommittee). You can also contact Sean Marlaire, Administrative Office Policy Staff, Court Services Office, at 202-502-3522 or by email at Sean_Marlaire@ao.uscourts.gov.

Attachment

cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Chief Probation Officers
Federal Public and Community Defenders
CJA Panel Attorney District Representatives

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

Guidance on Access to Plea Agreements and Other Documents That May Reveal Cooperation

A. On the basis of the following findings of the Court Administration and Case Management Committee, arrived at in consultation with the Criminal Law Committee and Defender Services Committee (which takes no position on the proposed guidance), the Committee recommends prompt local adoption of the guidance set forth in subsection (b) by each district court via local rule or standing order.

1. As indicated by the Survey of Harm to Cooperators: Final Report prepared by the Federal Judicial Center in June 2015, and the findings contained in the memorandum order of Chief Judge Clark of the Eastern District of Texas dated April 13, 2015 (Case No. 14-CR-80), there is a pervasive, nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families.

2. The problem has been exacerbated by widespread use of PACER and other systems that provide ready public access to case information, including documents containing cooperation information and criminal dockets indicating whether cooperation did or did not occur in a case.

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3. The problem threatens public safety. It also interferes with the gathering of evidence, the presentation of witnesses, and the sentencing and incarceration of cooperating defendants, and therefore poses a substantial threat to the underpinnings of the criminal justice system as a whole. The Court Administration and Case Management Committee agreed that there is a compelling government interest in addressing these issues.

4. Other possible less-restrictive alternatives have been considered before selecting this guidance and, to the greatest extent possible, the guidance has been narrowly tailored. To be effective, any action intended to address these issues must be implemented universally across all criminal cases; any rules, standing orders, or policies that provide for case-to-case variation in the treatment of criminal documents for cooperators and non-cooperators are ineffective and may compound the problem.

5. Uniform nationwide measures regarding access to particular criminal court documents and transcripts are necessary in order to prevent the improper use of those documents to harm or threaten government cooperators in the long term. As a result, the Committee will continue to work with other committees of the Judicial Conference, and in particular the Committee on Rules of Practice and Procedure, along with the Department of Justice and the Bureau of Prisons, in

order to investigate and establish nationwide measures that are most effective at protecting cooperators while avoiding unnecessary restrictions on legitimate public access.

B. Recommended Document Standards to Protect Cooperation Information

1. In every case, all plea agreements shall have a public portion and a sealed supplement, and the sealed supplement shall either be a document containing any discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement. There shall be no public access to the sealed supplement unless ordered by the court.

2. In every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant's cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court.

3. All transcripts of guilty pleas shall contain a sealed portion containing a conference at the bench that will either contain any discussion of or references to the defendant's cooperation, or simply state that there is no agreement for cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

4. All sentencing transcripts shall include a sealed portion containing a conference at the bench, which reflects either (a) any discussion of or references to the defendant's cooperation, including the court's ruling on any sentencing motion relating to the defendant's cooperation; or (b) a statement that there has been no cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.

5. All motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court.

6. Copies of presentence reports and any other sealed documents, if requested by an inmate, shall be forwarded by the Chief Probation Officer or the Clerk of the Court to the warden of the appropriate institution for review by the inmate in an area designated by the warden and may neither be retained by the inmate, nor reviewed in the presence of another inmate, consistent with the institutional policies of the Bureau of Prisons. Federal court officers or employees (including probation officers and federal public defender staff), community defender staff, retained counsel, appointed CJA panel attorneys, and any other

person in an attorney-client relationship with the inmate may, consistent with any applicable local rules or standing orders, review with him or her any sealed portion of the file in his or her case, but may not leave a copy of a document sealed pursuant to this guidance with an inmate.

7. Clerks of the United States district courts, when requested to provide a copy of docket entries in criminal matters to an inmate or any other requesting party, shall include in a letter transmitting the docket entries, a statement that, pursuant to this guidance, all plea agreements and sentencing memoranda contain a sealed supplement which is either a statement that there is cooperation, including the terms thereof, or a statement that there is no cooperation, and, as a result, it is not possible to determine from examination of docket entries whether a defendant did or did not cooperate with the government.

8. All documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis.

9. Nothing contained herein shall be construed to relieve the government in any case of its disclosure obligations, such as those under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Jencks v. United States*, 353 U.S. 657 (1957) (as codified at 18 U.S.C. § 3500).

10. Judicial opinions involving defendants or witnesses that have agreed to cooperate with the government, where reasonably practicable, should avoid discussing or making any reference to the fact of a defendant's or witness's cooperation.

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Federal Judicial Center

MEMORANDUM

DATE: May 18, 2016

TO: Members of Cooperators Subcommittee of the Advisory Committee on Criminal Rules

FROM: Margaret S. Williams

SUBJECT: Responses to Four Questions

In April of 2016, following the Advisory Committee on Criminal Rules (Committee) meeting, the Reporters to the Committee sent an email asking the FJC to follow up on four questions regarding the recently completed study of Harm to Cooperators. The four questions were:

- How large is the problem compared to the universe of cooperators?
- What kinds of cases give rise to problems?
- Is this truly a nationwide problem or are there significant geographic variations?
- How does the experience in districts which currently seal plea agreements differ, if at all, from the experience in other districts?

cited in USA v. John Doe, No. 15-50259 archived on September 6, 2017

The FJC agreed to provide the requested assistance. At the outset, we want to emphasize that not all of these questions can be answered with the data available from the 2016 FJC survey as explained below. To the extent we can answer the questions, we do so and also provide the necessary caveats where appropriate.

How large is the problem compared to the universe of cooperators?

We believe the universe of cooperators may be an unknown number. While DOJ may be able to obtain information on the number of defendants whose cases contain plea agreements or 5k.1.1 motions for downward departure, this is likely a fraction of all cooperators. Those arrested but never charged because they cooperated, for example, would not be included in the total. Only those in the executive branch would have information on how often they rely on information provided by cooperators. The FJC did not ask respondents to estimate the total universe of cooperators as that was not the question at issue in the 2016 study. Instead, the focus of that analysis was to answer the question asked by the Court Administration and Case Management Committee in its August 2014 letter, specifically "the number of offenders harmed or threatened with harm because they cooperated, or were suspected of cooperating, with the government."[1] To answer this question, we constructed five questionnaires to gather information on harm to cooperators provided by District Judges, Chief District Judges, U.S. Attorneys, Federal Defenders and CJA District Panel Representatives, and Probation and Pretrial Services Officers.

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[1] Williams, Margaret S., Donna Stienstra, and Marvin Astrada, Survey of Harm to Cooperators: Final Report (Federal Judicial Center, 2016).

What kinds of cases give rise to problems?

In constructing the questionnaires for such a wide group of respondents, we took a number of precautions to ensure we gathered the best information possible on this highly sensitive subject while also eliciting a high response rate. While we asked respondents if they knew of harm, and the details of the incident if they did, we specifically asked that they **not** provide any information about the details of the case so they did not risk identifying the cooperator. As a result of these instructions, some respondents provided less detail than others about the circumstances under which harm or threats occur, including on the nature of the case itself. When respondents did discuss the type of case at issue, they most often noted that these were cases involving drugs and/or gangs, but this information was not consistently sought. Therefore, we cannot provide a complete picture of the types of cases where harm to cooperators is most likely to occur.

Is this truly a nationwide problem or are there significant geographic variations?

There are two ways to answer whether the problem is national or if there is geographic variation. First, we can consider if there is circuit variation to the problem, based, for example, on differences in circuit law related to the information provided in criminal cases. Secondly, we can consider district level variation, where greater differences based on urbanization may drive differences in harm or threat. We consider each below.

Circuit Variation

Initially, we begin by looking at the variation in harm by circuit. Overall, we find no differences in the level of harm by circuit. Any differences that appear below are more likely to be a function of the size of the response category than meaningful circuit differences.

cited in USA v. Johnson, No. 15-50259 archived on September 8, 2017

There are several ways to examine circuit differences in the survey results. The first is to consider whether the amount of harm reported varied significantly by circuit, shown in Table 1 below. Totaling the number of instances of harm, and looking at the percentage of harm reported in each circuit, we found the numbers shown in column 2 of Table 1 below. While there are differences in the amount of harm reported in each circuit, these are likely due to the workload of the circuit (larger circuits reported more harm because there were more cases where harm could occur). If we look at the distribution of authorized district judgeships by circuit (a measure of the size of the circuit) we find that the percentage of harm reported is remarkably similar to the size of the circuit. These results suggest that the percentage of harm reported does not vary meaningfully by circuit.

Table 1 – Of All Instances of Harm Reported, Percentage Reported by Circuit

Circuit	Instances of Harm or Threat Reported		Authorized Judgeships	
	Number	Percentage	Number	Percentage
DC	11	1.9%	15	2.2%
1	18	3.2%	29	4.3%
2	62	10.9%	62	9.2%
3	40	7.0%	61	9.1%
4	64	11.3%	56	8.3%
5	68	12.0%	83	12.3%
6	48	8.4%	62	9.2%
7	34	6.0%	47	7.0%
8	46	8.0%	42	6.2%
9	84	14.8%	112	16.6%
10	33	5.8%	39	5.8%
11	61	10.7%	69	10.3%
Total	569		677	

We could also consider whether the type of harm reported varied significantly by circuit. The three largest categories of harm reported by all groups included threats of physical harm, threats to friends or family, and actual physical harm including murder. Table 2 shows the variation in the percentage of each type of harm reported by circuit compared to the percentage of authorized judgeships in the circuit. While threats of physical harm and threats to friends and family are similar to the percentage of authorized judgeships, the numbers for actual physical harm or murder vary more by circuit. These differences are likely due to the small number of instances in the category overall (only 133 instances of actual physical harm or murder were reported by judges across all cases) and should be interpreted with caution.

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

Table 2 – Type of Harm Reported by Judicial Respondents, by Circuit

	Threats of Physical Harm		Threats to Friends/Family		Physical Harm or Murder		Authorized Judgeships	
Circuit	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
DC	7	2.1%	7	3.2%	0	0.0%	15	2.2%
1	8	2.4%	5	2.3%	4	3.0%	29	4.3%
2	23	6.8%	17	7.7%	5	3.8%	62	9.2%
3	30	8.9%	16	7.2%	6	4.5%	61	9.1%
4	40	11.8%	29	13.1%	15	11.3%	56	8.3%
5	36	10.6%	26	11.8%	28	21.1%	83	12.3%
6	28	8.3%	20	9.1%	12	9.0%	62	9.2%
7	16	4.7%	4	1.8%	4	3.0%	47	7.0%
8	33	9.7%	20	9.1%	19	14.3%	42	6.2%
9	53	15.6%	31	14.0%	19	14.3%	112	16.6%
10	21	6.2%	13	5.9%	12	9.0%	39	5.8%
11	44	13.0%	33	14.9%	9	3.0%	69	10.3%
Total	339		221		133		677	

Lastly, Table 3, below, shows whether the type of court document used to identify cooperators varied by the circuit. Once again, because the categories here are small (ranging from a high of 134 reported instances to a low of 71 instances) the circuit variation is more likely because of the small numbers than real differences in the circuits.[2]

Cited in U.S. v. John Doe, No. 15-50259 archived on September 8, 2017

Table 3 – Document Used as Reported by Judicial Respondents, by Circuit

	Reporting Use of Plea Agreement		Reporting Use of 5k1.1 Motion		Reporting Use of Sentencing Memo		Authorized Judgeships	
Circuit	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
DC	1	0.8%	0	0.0%	1	1.4%	15	2.2%
1	4	3.0%	3	2.7%	2	2.8%	29	4.3%
2	6	4.5%	4	3.6%	3	4.2%	62	9.2%
3	13	9.7%	11	10.0%	4	5.6%	61	9.1%
4	18	13.4%	11	10.0%	5	7.0%	56	8.3%
5	13	9.7%	16	14.6%	9	12.7%	83	12.3%
6	15	11.2%	10	9.1%	10	14.1%	62	9.2%
7	7	5.2%	4	3.6%	3	4.2%	47	7.0%
8	7	5.2%	8	7.3%	3	4.2%	42	6.2%
9	24	17.9%	16	14.6%	20	28.2%	112	16.6%
10	14	10.5%	12	10.9%	1	1.4%	39	5.8%
11	12	9.0%	15	13.6%	10	14.1%	69	10.3%
Total	134		110		71		677	

[2] Respondents could also report the number of instances where Rule 35 motions were used to identify cooperators. Judges reported 36 such instances. Because this option was given so infrequently across any circuit, we do not include it in Table 3.

District Variation

In addition to the potential for circuit variation, there is also the possibility of district variation. Before we can begin to examine the district variation in the instances of harm or threat reported by judges we must first note a restriction on answering such a question. It is the policy of the Judicial Conference of the United States not to identify a specific judge for their decision making.[3] This includes answers to surveys. Because a number of the districts have only one judge, and reporting the amount of harm for that district would identify the judge, we cannot provide a list of the instances of harm or threat in each district as reported by every judge. We can, however, group the districts by the number of authorized judgeships to determine if instances of reported harm or threat are localized to larger, more metropolitan areas, or if such instances of harm and threat are spread across districts of all sizes. Table 4 shows the number of instances of harm or threat across districts of varying sizes.

Table 4 – Instances of Harm or Threat by District Size (Authorized Judgeships)

District Size	Instances of Harm or Threat Reported		Authorized Judgeships	
	Number	Percentage	Number	Percentage
1-3	82	14%	63.5	9.4%
3.5-5	94	17%	110	16.2%
5.5-10	157	28%	166.5	24.6%
11-28	236	41%	337	49.8%
Total	569		677	

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Further, as Table 4 shows, the variation in the frequency of harm or threat is not necessarily a problem faced only by large courts in urban areas. In fact, the amount of reported harm in smaller districts is somewhat larger than the share of judgeships in smaller districts, though the differences are not substantial. Overall, Table 4 shows that harm or threats to cooperators is not specific to large courts nor is it disproportionately a problem facing larger urban areas. Harm occurs in courts of all sizes at substantial rates.

Table 5 examines the variation in the type of harm reported by judges based on the size of the district. Once again, while smaller districts are less likely to report each type of harm (relative to larger districts), the percentage of each type of harm does not increase as the size of the district increases, suggesting the types of harm are not necessarily related to district size.

Table 5 - Type of Harm Reported by Judicial Respondents by District Size (Authorized Judgeships)

District Size	Threats of Physical Harm		Threats to Friends/Family		Physical Harm or Murder		Authorized Judgeships	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
1-3	50	14.7%	29	13.1%	20	15.0%	63.5	9.4%
3.5-5	55	16.2%	33	14.9%	18	13.5%	110	16.2%
5.5-10	112	33.0%	72	32.6%	50	37.6%	166.5	24.6%
11-28	122	36.0%	87	39.4%	45	33.8%	337	49.8%
Total	339		221		133		677	

[3] JCUS-MAR 95, pp. 21-22, reaffirmed JCUS-SEP 95, pp. 87-88 and JCUS-MAR 03, p. 20.

Table 6 examines the type of court document used to identify a cooperator by district size. Some interesting patterns appear in the data. While again larger districts show more frequent use of each document, the frequency is not consistent with the district size as a percentage. Plea agreements are more common in districts with 5.5-10 authorized judgeships than we would expect given the district size, and 5k1.1 motions and sentencing memos are more common in the smallest districts. Once again, the data show the problem of the use of court documents (here for three specific court documents) is not localized to districts of a particular size.

Table 6 – Court Document Used to Identify Cooperators as Reported by Judicial Respondents by District Size (Authorized Judgeships)

District Size	Reporting Use of Plea Agreement		Reporting Use of 5k1.1 Motion		Reporting Use of Sentencing Memo		Authorized Judgeships	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
1-3	13	9.7%	16	14.5%	12	16.9%	63.5	9.4%
3.5-5	28	20.9%	17	15.5%	13	18.3%	110	16.2%
5.5-10	52	38.8%	37	33.6%	17	23.9%	166.5	24.6%
11-28	41	30.6%	40	36.4%	29	40.8%	337	49.8%
Total	134		110		71		677	

How does the experience in districts which currently seal plea agreements differ, if at all, from the experience in other districts?[4]

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Lastly, we examined whether the amount of harm or threat to cooperators differed by districts with specific policies to protect cooperators. In the survey of Chief District judges we asked what steps, if any, districts were taking to protect cooperator information. Eighty-two percent of the Chief District judges completed the survey, and all those responding reported their district taking at least one of the ten steps we listed. Table 7 below replicates the results from Table 10 of the 2016 report, here sorting the responses by their frequency. Chief District judges reported that their districts took between one and seven of the steps listed below.

[4] As discussed in the final report, the variation in policies across districts is seen as a problem by many groups we surveyed. This variation allows cooperators to be identified because not all courts use sealed entries or gaps in docket sequence numbers to protect cooperator information, making cooperation more obvious when such practices are used, for example. Specific courts may require these measures and still report higher than average instances of harm for any number of reasons (e.g., these steps were recently put in place to reduce the frequency of harm and have not had a chance to reduce the amount of harm occurring, or, because not all courts take these steps, defendants from some locations are harmed more often because they are more easily identified). These results should not be interpreted to mean that these efforts are not working, or that a national policy would be ineffective. Quite simply, we cannot answer those policy questions with this data. We neither asked districts when they began their policies to protect cooperating information (though the harm they report is from the last three years) nor their thoughts on a national policy specifically.

Table 7 – District Efforts to Protect Cooperation Information

Method of Protecting Cooperation Information	Frequency of Selection
Sealing documents containing cooperation information at the request of the parties	66
Sealing documents containing cooperation information *sua sponte*	37
Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)	33
Restricting remote access of documents containing cooperation information	29
Requiring the entry of documents containing cooperation to be private entries in CM/ECF	21
Ordering parties to redact cooperation information from documents	19
Removing documents containing cooperation information from public files	19
Allowing public access of documents containing cooperation information only in the courthouse or clerk's office	9
Other (please specify) _____	7
None of the above	0

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Many districts adopted multiple policies to protect cooperating information. The average number of policies adopted was three. Table 8 below shows the most commonly occurring pairs of policies adopted. The highlighted cells show the number of districts adopting each policy (replicating the results from Table 7). The numbers in cells below the highlighted diagonal show the frequency with which districts adopted both policies to protect cooperating information.

Table 8 – Frequencies of District Adopting Pairs of Policies

	Sealing documents containing cooperation information at the request of the parties	Sealing documents containing cooperation information *sua sponte*	Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)	Restricting remote access of documents containing cooperation information	Requiring the entry of documents containing cooperation to be private entries in CM/ECF	Ordering parties to redact cooperation information from documents	Removing documents containing cooperation information from public files	Allowing public access of documents containing cooperation information only in the courthouse or clerk's office	District (Other)
Sealing documents containing cooperation information at the request of the parties	**66**								
Sealing documents containing cooperation information *sua sponte*	32	**37**							
Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)	29	22	**33**						
Restricting remote access of documents containing cooperation information	26	17	14	**29**					
Requiring the entry of documents containing cooperation to be private entries in CM/ECF	21	14	11	12	**21**				
Ordering parties to redact cooperation information from documents	18	16	12	10	9	**19**			
Removing documents containing cooperation information from public files	17	9	7	7	9	7	**19**		
Allowing public access of documents containing cooperation information only in the courthouse or clerk's office	8	4	5	7	2	4	0	**9**	
Other (please specify)	2	3	2	2	1	3	2	0	**7**

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As Table 8 shows, some combinations of policies occurred more frequently than others. Sealing documents at the request of the parties often occurred in conjunction with another policy—either sealing documents *sua sponte* or making cases appear identically on CM/ECF. The three most frequently occurring policies—sealing at the request of the parties, sealing *sua sponte*, and making cases appear identically—not surprisingly provide the most frequent pairings. Not only do these three policies frequently appear together, they are also more likely to be paired with one of the less frequent policies adopted by courts. In fact, only two districts adopting more than one policy did not include either sealing measure or making cases appear identically in the two policies they adopted. Given the number of efforts taken by districts to protect cooperating information, it is important to consider if these efforts appear to have an impact on the frequency of harm.

To gain a sense of the experiences of districts with harm or threat for those with and without policies in place to protect cooperators, we examined the amount of harm or threat reported by district judges in their district based on whether or not the district adopted one of the practices listed in Table 7 above. Two caveats should be noted. First, if the Chief Judge for the district did not respond to the survey, we do not know if the district adopted each practice, and we must exclude them from the analysis. Second, because the Chief District judges could select all the steps that applied to their district, the total number of instances of harm is the same each time we examine the amount of harm relative to each policy. In the districts where the policies are known, Chief District judges reported 431 instances of harm or threat of harm to a cooperator. Statistically significant differences between districts with and without the policy are in bold.

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Table 9 – Amount of Harm Reported by District Judges in Districts with Each Type of Policy

Method of Protecting Cooperation Information	Reported Harm to Cooperator	
	Policy Adopted	Policy Not Adopted
Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)	168	263
Sealing documents containing cooperation information *sua sponte*	187	244
Sealing documents containing cooperation information at the request of the parties	**381**	**50**
Ordering parties to redact cooperation information from documents	**90**	**341**
Restricting remote access of documents containing cooperation information	185	246
Allowing public access of documents containing cooperation information only in the courthouse or clerk's office	**41**	**390**
Removing documents containing cooperation information from public files	**90**	**341**
Requiring the entry of documents containing cooperation to be private entries in CM/ECF	**120**	**311**
Other (please specify) _____	**68**	**363**

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For all policies mentioned in the survey responses, except that of sealing documents containing cooperator information at the request of the parties, districts that adopt a policy see less harm than those who do not. The differences, however, are not always statistically significant. Interestingly, district with a policy of relying on the parties to request sealing see more harm than when that policy is not adopted. Ten of the 66 district adopting this policy used it alone to protect cooperating information, and these districts accounted for 19% of the 431 instances of harm or threat reported but only 12% of all authorized judgeships—suggesting a greater frequency of harm relative to what one might expect in the population. This result is even more interesting when we consider another district policy placing the burden on parties to protect cooperating information—requiring the parties to redact information themselves. When districts require parties to redact information, they see substantially less harm than those districts that do not. Of course, only 19 districts require parties to redact cooperation information.

Table 9 also shows that three of the more restrictive policies—allowing access only through the clerk's office, removing cooperator information from public files, and requiring private entries in CM/ECF—all show the largest differences in the amount of harm reported by the districts. Of course, since relatively few of the districts responding to the survey take these steps, this result should be interpreted with caution. Overall, however, the results suggest that districts adopting steps to protect cooperating information often seen lower rates of harm than those that do not.

Conclusion

While we cannot provide specific information on the amount of harm relative to the total universe of cooperators or on the types of cases giving rise to harm, we can provide information for the last two questions. We do not find meaningful differences, either at the circuit or district level, in the amount of harm or threat, type of harm or threat, or type of document from which cooperators were identified. While judges from large districts tend to report more harm, the differences in the size of caseloads account for some of the variation, but not all. It would be incorrect to conclude that harm to cooperators is a problem faced only by large districts (or circuits). Harm or threat occurs across courts of all sizes.

It is perhaps because so many courts face the issue of harm or threat to cooperators that a substantial number of the districts (all those responding to the Chief District judge version of the survey) take some steps to protect cooperator information. The most common steps are sealing documents at the request of the parties, sealing documents *sua sponte*, and making all criminal cases appear identically on CM/ECF, and typically these steps are taken together. Generally, where courts take these steps, they see lower rates of harm—unless the only step the court takes is sealing at the request of the parties. Where this policy is used in isolation, instance of harm or threat are more frequent than one would expect. When courts combine this policy with others, they see lower rates of harm or threat to cooperators. Given that the average number of policies courts adopted was three, it appears they have concluded the best way to protect cooperator information is to adopt multiple policies at once.

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Federal Judicial Center

MEMORANDUM

DATE: July 7, 2016

TO: Members of Cooperators Subcommittee of the Advisory Committee on Criminal Rules

FROM: Margaret S. Williams

SUBJECT: Responses to Additional Questions from Reporters re: Survey of Harm to Cooperators

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In May of 2016, the FJC sent a memo to the Members of the Cooperators Subcommittee of the Advisory Committee on Criminal Rules (Subcommittee) answering four questions posed by the Subcommittee regarding the study of harm to cooperators. In June of 2016, the Reporters for the Advisory Committee on Criminal Rules (Committee) contacted the FJC, asking for additional analyses of the survey results based on the following characteristics of the respondents' districts:

- Number of criminal prosecutions (or convictions);
- Types of cases, such as drug prosecutions; and
- Measure or level of gang activity;

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The FJC agreed to provide the requested assistance, but before we could move forward we needed to obtain information from the Administrative Office of the U.S. Courts (AO) and the Department of Justice (DOJ). The AO publishes district-level information on the number of defendants in criminal cases terminated by year[1], which is necessary to include in the analyses. The DOJ agreed to provide data regarding the number of convictions in the three categories of cases they felt were most likely to involve cooperation (drug trafficking, continuing criminal enterprise, and RICO) between 2013 and 2015.[2] Lastly, the DOJ provided data on the number of 5k1.1 reductions for defendants convicted under one of the three categories of cases noted above, as well as the total number of Rule 35 sentence reductions for defendants convicted in all criminal cases for the period of 2013-15[3].

At the outset, we want to emphasize again that not all of these questions can be answered with the data available from the 2016 FJC survey as explained below. To the extent we can answer the questions, we do so and also provide the necessary caveats where appropriate. We focus on the variation in results at the district level as this was the focus of the second set of questions from the Reporters.

Overview of Results of Additional Analyses of Responses to 2016 Survey of Harm to Cooperators

- Our additional analyses of the survey responses found weaker correlations between the amount of harm reported by respondents and each measures of district size used here (criminal defendants

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[1] The D table in the Judicial Business Report provides the number of defendants filed, terminated, or pending by district and 12-month reporting period.

[2] The guidelines included in these categories are 2D1.1 (drug trafficking), 2D1.5 (continuing criminal enterprise), and 2E1.1 (RICO).

[3] While this analysis was not included in the most recent request from the Reporters, it is directly relevant to the question about the universe of cooperators included in our original memo that we were unable to answer at the time, and so it is included in the analysis presented in this memo.

terminated, conviction in three specific categories, and defendants received sentencing reductions). Authorized judgeships continues to predict best the amount of harm reported in each district.

- Across all measures of district size, larger districts report more harm than smaller districts, though smaller districts report more harm than would be expected for a district of that size. The problem of harm to cooperators occurs in districts of all sizes.
- These results hold as we consider other measures, including the type of harm or the source used to identify a cooperator.
- In the time available to complete the additional analyses, we could not find or construct a reliable measure of district-level gang activity and, as such, our follow up analyses did not address the relationship between this measure and the extent to which respondents' identified instances of harm to cooperators.

Summary of Prior Results

Before delving too deeply into the results here, it is important to remember the findings from the original memo. While larger districts tended to report harm to cooperators more often than smaller districts, we concluded that the problem was not unique to large districts. In fact, looking at the size of the district (as measured by the number of authorized judgeships) showed that harm occurs across districts of all sizes. Moreover, while larger courts reported more instances of harm or threat, the amount of harm reported did not correspond precisely to the size of the district. Stated differently, we found more harm in smaller districts than we would expect given the district's number of authorized judgeships. These results led us to conclude that "[it] would be incorrect to conclude that harm to cooperators is a problem faced only by large districts (or circuits). Harm or threat occurs across courts of all sizes."[4]

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Instances of Harm or Threat by District Size (Authorized Judgeships)[5]

District Size	Instances of Harm or Threat Reported		Authorized Judgeships	
	Number	Percentage	Number	Percentage
1-3	82	14%	63.5	9.4%
3.5-5	94	17%	110	16.2%
5.5-10	157	28%	166.5	24.6%
11-28	236	41%	337	49.8%
Total	569		677	

The remaining tables and discussion below cover the additional analyses requested.

Number of criminal prosecutions (or convictions)

In an attempt to better understand the distribution of harm to cooperators across the country, the Reporters asked us to consider other ways of categorizing the districts by their size. For example, the size of a district's criminal caseload is related to, but not the same as, the number of authorized judgeships (the measure of court size used in the previous memo). To consider possible differences in the amount of harm reported in the survey by criminal caseload of the respondents' district, we needed to find a measure

[4] Memo from the Federal Judicial Center to Members of Cooperators Subcommittee of the Advisory Committee on Criminal Rules (May 18, 2016), Pp. 11.
[5] Memo from the Federal Judicial Center to Members of Cooperators Subcommittee of the Advisory Committee on Criminal Rules (May 18, 2016), Table 4.

of the criminal docket at the district level. The AO's Judicial Business Report provides information on the number of criminal defendants terminated each 12-month period. We totaled the number of defendants terminated between CY 2013 and 2015 (the same time period covered by the FJC survey of district judges) and report the amount of harm to cooperators by the total number of defendants terminated. The results are shown in Table 1. As with the prior memo, we grouped the districts by the size of their criminal docket, reporting the results by quartile.[6]

Table 1 – Instances of Harm or Threat by District Size (Number of Criminal Defendants Terminated CY 2013-2015)[7]

Criminal Defendants Terminated	Defendants Terminated		Instances of Harm or Threat Reported	
	Number	Percentage	Number	Percentage
Small	15,355	6.0%	73	12.8%
Medium	30,202	11.8%	113	19.9%
Large	48,188	18.8%	131	23.0%
Very Large	162,151	63.4%	252	44.3%
Total	255,896		569	

There is more variation in the number of criminal defendants terminated by district than in the number of authorized judgeships. While the range for court size using authorized judgeships was between about 5% and 50%, here the range is from 6% to over 60%. Despite that greater range, the instances of threat or harm reported in the survey do not follow the same pattern. As Table 1 shows, the reported instances of threat or harm are more evenly distributed across districts than the number of criminal defendants terminated, suggesting that the reports of harm to cooperators are not as closely related to this measure of court size as our prior analysis of authorized judgeship showed.

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Table 2 considers the type of harm or threat reported by district judges relative to the number of criminal defendants terminated in the district in which they sit. Once again, while the range of court size is greater (small court terminated between 0 and 1,085 defendants while very large courts terminated between 2,528 and 21,851 defendants) the type of harm reported in the survey does not closely follow the pattern for district size. Larger courts see more of each type of harm, but not as much as we would expect based on the number of defendants terminated.

[6] As with the prior memo, dividing the courts into quartiles allows us to show the variation in district size without identifying any district or judge. To make the tables easier to understand, we refer to the quartiles as small, medium, large and very large, and the footnotes explain the actual differences in size across these courts for each measure included here.

[7] Small districts terminated between 0 and 1,085 defendants, medium districts terminated between 1,097 and 1,548 defendants, large districts terminated between 1,553 and 2,521 defendants, and very large districts terminated between 2,528 and 21,851 defendants from 2013 through 2015.

Table 2 – Types of Harm or Threat by District Size (Number of Criminal Defendants Terminated CY 2013-2015)

Criminal Defendants Terminated	Defendants Terminated		Threats of Physical Harm		Threats to Friends/Family		Physical Harm or Murder	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Small	15,355	6.0%	44	13.0%	29	13.1%	22	16.5%
Medium	30,202	11.8%	69	20.4%	34	15.4%	16	12.0%
Large	48,188	18.8%	83	24.5%	56	25.3%	36	27.1%
Very Large	162,151	63.4%	143	42.2%	102	46.2%	59	44.4%
Total	255,896		339		221		133	

Table 3 reports the variation in the types of documents used to identify cooperators by the number of criminal defendants terminated in the district of the respondent. Once again, districts that are larger by this measure see fewer instances of these documents identifying cooperators than we would expected given the district size.

Table 3 – Documents Used to Identify Cooperators by District Size (Number of Criminal Defendants Terminated CY 2013-2015)

Criminal Defendants Terminated	Defendants Terminated		Reporting Use of Plea Agreement		Reporting Use of 5k1.1 Motion		Reporting Use of Sentencing Memo	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Small	15,355	6.0%	22	16.4%	20	18.2%	13	18.3%
Medium	30,202	11.8%	27	20.1%	22	20.0%	14	19.7%
Large	48,188	18.8%	31	23.1%	19	17.3%	18	25.4%
Very Large	162,151	63.4%	54	40.3%	49	44.5%	26	36.6%
Total	255,896		134		110		71	

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Overall, it does not appear that measuring district size by the number of criminal defendants terminated better explains the variation in the amount of harm, type of harm, or source of court information identifying cooperators than our original measure that relied on the district's authorized judgeships. **Our further analyses continue to point to the conclusion that survey respondents in districts of all sizes reported harm, and therefore the problem of harm to cooperators is not unique to large courts. In fact, our analysis of the relationship between reports of harm and the number of criminal defendants terminated in districts reveal a weaker relationship with district size than that of a district's authorized judgeships**.

Type of Criminal Case

In addition to an analysis of the relationship of the amount of harm reported in the survey to the number of criminal convictions in the respondents' districts, the Reporters asked that we consider the any relationship in the survey results across districts based on specific types of convictions. DOJ provided information on the number of convictions in three areas (drug trafficking, continuing criminal enterprise, and RICO) that they considered the most likely to involve cooperation. We totaled the number of convictions each year from 2013 to 2015 and used this as another indicator of district size, with groups of districts ranging from those having the smallest number of convictions (between 0 and 294) to the largest (between 706 and 4,472). Table 4 reports the results of our analyses of the instances of harm or threat reported by this measure of district size.

Table 4 - Instances of Harm or Threat by District Size (Number of Convictions in Three Categories CY 2013-2015)[8]

Drug, Criminal Enterprise, or RICO Convictions	Three Categories of Conviction		Instances of Harm or Threat Reported	
	Number	Percentage	Number	Percentage
Small	4,109	6.5%	77	13.5%
Medium	8,462	13.4%	103	18.1%
Large	13,359	21.2%	142	25.0%
Very Large	37,149	58.9%	247	43.4%
Total	63,079		569	

Given that convictions in these three offense categories are a subset of the terminations shown in Tables 1-3, it is not surprising that the results here are not substantially different from those reported above. Once again, the size of the district shows a greater range than the instances of harm or threat, suggesting that larger districts (by this measure) do not necessarily see more harm than smaller districts. Harm continues to be more evenly distributed across court size than convictions in these three categories.

Table 5 - Types of Harm or Threat by District Size (Number of Convictions in Three Categories CY 2013-2015)

Drug, Criminal Enterprise, or RICO Convictions	Three Categories of Conviction		Threats of Physical Harm		Threats to Friends/Family		Physical Harm or Murder	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Small	4,109	6.5%	41	12.1%	21	9.5%	16	12.0%
Medium	8,462	13.4%	65	19.2%	46	20.8%	21	15.8%
Large	13,359	21.2%	93	27.4%	57	25.8%	34	25.6%
Very Large	37,149	58.9%	140	41.3%	97	43.9%	62	46.6%
Total	63,079		339		221		133	

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Table 5 examines the types of harm by court size, here measured as convictions in three categories. Once again, we find that the largest districts do not see as much harm, regardless of the type of harm, as we would expect based on this measure of size. Each type of harm appears to be more evenly distributed across districts than the percentage of convictions in these categories would predict.

[8] Small districts ranged from 0 to 294 convictions, medium districts ranged from 295 to 415 convictions, large districts ranged from 430 to 699 convictions, and very large districts ranged from 706 to 4,472 convictions between 2013 and 2015 for the three categories identified by DOJ.

Table 6 - Documents Used to Identify Cooperators by District Size (Number of Convictions in Three Categories CY 2013-2015)

Drug, Criminal Enterprise, or RICO Convictions	Three Categories of Conviction		Reporting Use of Plea Agreement		Reporting Use of 5k1.1 Motion		Reporting Use of Sentencing Memo	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Small	4,109	6.5%	19	14.2%	19	17.3%	12	16.9%
Medium	8,462	13.4%	23	17.2%	18	16.4%	13	18.3%
Large	13,359	21.2%	37	27.6%	22	20.0%	18	25.4%
Very Large	37,149	58.9%	55	41.0%	51	46.4%	28	39.4%
Total	63,079		134		110		71	

Table 6 reports the frequency with which three types of documents were used to identify cooperators by district size, measured here in convictions for drug trafficking, continuing criminal enterprise, and RICO. Once again, the larger districts do not report use of documents at the level expected by their court size if we use convictions to distinguish among the courts.

Overall, we see, once again, that while larger districts continue to report more instances of harm, particular types of harm, and the use of specific documents, using convictions in these three categories does not fit the pattern of report as well as our original measure of district size.

Gang Activity

We know of no district-level measure of gang activity, and so are unable to answer this question.

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Reductions in Sentences for Cooperation

Lastly, we consider the variation in district judge responses by the distribution of cooperation across the country. DOJ provided the number of defendants receiving 5k1.1 motions for downward departure (if they were convicted of drug trafficking, continuing criminal enterprise, or RICO) as well as the number of defendants receiving Rule 35 sentence reductions regardless of the guideline under which they were convicted. Both measures were provided from 2013 through 2015, and together, they begin to shed further light on the total universe of cooperators. One might expect that respondents in districts with more defendants receiving these two types of reductions would be more likely to see greater instances of harm to cooperators simply based on the number of cooperators. It should be noted, however, that the FJC survey asked respondents to report harm to defendants who cooperated **or were suspected of cooperating** with the government and so would include more defendants than in the numbers provided by DOJ. This caveat should be kept in mind when reviewing the results below.

Table 7 – Instances of Harm or Threat by District Size (Number of Defendants Receiving Sentence Reductions CY 2013-2015)[9]

Defendants Receiving Sentencing Reductions	5k1.1 from three categories OR any Rule 35 Motion		Instances of Harm or Threat Reported	
	Number	Percentage	Number	Percentage
Small	1,127	5.4%	76	13.4%
Medium	2,977	14.3%	122	21.4%
Large	5,090	24.4%	127	22.3%
Very Large	11,625	55.8%	244	42.9%
Total	20,819		569	

Unlike the two prior measures reported above, using the number of cooperators in a district more closely matches the instances of harm reported by the districts. Nonetheless, as Table 7 shows, we continue to find more harm in smaller districts than would be expected given the number of defendants receiving sentencing reductions. While this finding may seem counterintuitive at first, the fact that the survey asked respondents to report harm to those suspected of cooperating (not just those who did cooperate) the greater frequency of harm in smaller districts is not surprising. Harm continues to occur across districts of all sizes.

Table 8 – Types of Harm or Threat by District Size (Number of Defendants Receiving Sentence Reductions CY 2013-2015)

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Defendants Receiving Sentencing Reductions	5k1.1 from three categories OR any Rule 35 Motion		Threats of Physical Harm		Threats to Friends/Family		Physical Harm or Murder	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Small	1,127	5.4%	43	12.7%	24	10.9%	14	10.5%
Medium	2,977	14.3%	70	20.6%	45	20.4%	24	18.0%
Large	5,090	24.4%	91	26.8%	58	26.2%	39	29.3%
Very Large	11,625	55.8%	135	39.8%	94	42.5%	56	42.1%
Total	20,819		339		221		133	

Table 8 reports the variation in the types of harm by district size. While the differences are not likely to be statistically significant (due to group size), it is interesting that using this measure of district size shows the most even distribution of threats of physical harm across all districts of any of the measures considered here. Overall, we again find more harm in small districts than district size (here measured in the number of cooperators) would predict.

[9] Small districts saw 0-81 sentencing reductions, medium courts saw 89 to 156 sentencing reductions, large courts saw 165 to 282 sentencing reductions, and very large courts saw 286-1037 sentencing reductions between 2013 and 2015.

Table 9 - Documents Used to Identify Cooperators by District Size (Number of Defendants Receiving Sentence Reductions CY 2013-2015)

Defendants Receiving Sentencing Reduction	5k1.1 from three categories OR any Rule 35		Reporting Use of Plea Agreement		Reporting Use of 5k1.1 Motion		Reporting Use of Sentencing Memo	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Small	1,127	5.4%	22	16.4%	18	16.4%	13	18.3%
Medium	2,977	14.3%	30	22.4%	25	22.7%	15	21.1%
Large	5,090	24.4%	36	26.9%	29	26.4%	18	25.4%
Very Large	11,625	55.8%	46	34.3%	38	34.5%	25	35.2%
Total	20,819		134		110		71	

Lastly, Table 9 considers the types of documents used to identify cooperators. Regardless of district size, the use of each type of document is more frequent in smaller districts than we would otherwise expect.

Conclusion

While the focus of the second set of Reporters' questions was to consider alternate ways of thinking about variation in the districts, overall we find that our original measure of district size (number of authorized judgeships) most closely approximates the distribution of harm, the type of harm, and the frequency of sources used to identify cooperators across the country. All three of the measures considered here (criminal defendants terminated, number of convictions for drug trafficking, continuing criminal enterprise, and RICO, and number of defendants receiving sentencing reductions in those categories plus those receiving Rule 35 sentence reductions) would over-predict harm in large districts and under-predict harm in smaller districts.[10] Consistent with our findings in the last memo, while larger districts report more harm, **harm to cooperators occurs across districts of all sizes. While larger districts see more harm, the problem of harm to cooperators is national in scope.**

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[10] Looking at the Pearson correlation between the instances of harm and our four measures of district size, we find the following: authorized judgeships (.6911), defendants receiving sentencing reductions (.5364) drug trafficking/criminal enterprise/RICO convictions (.4896), and criminal defendants terminated (.4053). All correlations are significant at the $p<0.01$ level. Number of authorized judgeships continues to be the best predictor of the amount of harm reported. That said, as the results from the May 18, 2016 memo show, **harm to cooperators occurs across all districts.**

TAB 6F

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Local Rules and Standing Orders Regarding Sealing of Court Documents

Circuit	District	Authority	Page No. (If Applicable)	Relevant Text	Summary
9	AK	L.Cr.R 11.2(e); 32.1.	pg. 4; 6-7	**L.Cr.R.11.2 (e) Plea Agreement Supplement;** In each case, a "Plea Agreement Supplement" must be filed under seal in conjunction with every Plea Agreement.(1) If a criminal defendant has agreed to cooperate, the Plea Agreement Supplement must contain the cooperation agreement. (2) If the criminal defendant and the United States have not entered into a cooperation agreement, the Plea Agreement Supplement must indicate that no such agreement exists. **L.Cr.R.32.1(e)** Sentencing Memorandum Supplement. In each case in which a sentencing memorandum is filed, a "Sentencing Memorandum Supplement" must be filed under seal. (1) If the criminal defendant has agreed to cooperate, the Sentencing Memorandum. Supplement must include any relevant or pertinent discussion of the cooperation agreement, including its affect on the sentence to be imposed. (2) If the criminal defendant and the United States have not entered into a cooperation agreement, the Sentencing Memorandum Supplement must indicate that there is no cooperation agreement. **L.Cr.R. 32.2. Rule 32.2 Disclosure of Pretrial Services and Presentence Reports (a) General Rule of Confidentiality.** (1) The pretrial services, presentence and probation reports and records, including the notes, recordings, memoranda, interviews, and statements, maintained by the probation and pretrial services office of this court, and correspondence to the United States Probation and Pretrial Services Office for the District of Alaska or to the court, relative to a charged defendant, are hereby declared to be confidential records of the court.	Supplements attached to every plea agreement and sentencing memo; presentence reports confidential
11	ALM	L.Cr.R 32.1	pg. 39	**L.Cr. R. 32.1 Disclosure of Presentence Reports or Probation Records.** (a) No confidential record of this Court maintained by the Probation Office, including presentence and supervision records, shall be disclosed except as provided by Fed. R. Crim. P. 32, and as provided by this local rule.	Presentence reports kept confidential
11	ALS	L.Cr.R 32(d)	pg. 68	**Rule 5.2 (2)** No publicly filed motion or order under this Rule is required for sealing the following: (A) Motion by the United States for a downward departure or reduction of sentence in a criminal case, with leave of Court upon a showing of particular need in an individual case to prevent serious harm; or **Criminal L.R. 32. Sentencing and Judgment (d) Confidentiality of Presentence Reports.** Confidential records of this Court maintained by the Probation Office, including presentence investigation reports and probation supervision records, may not be disclosed except upon written petition to the Court establishing with particularity the need for specified information contained in such records. No disclosure shall be made except upon Court order.	Downward departure or reduction in sentence motions filed under seal without a motion; presentence reports sealed
9	AZ	General Order 11-09 eff. 7/1/2011		**General Order 11-09 The Filing of Documents Related to Plea Agreements Involving Cooperation;** It is ordered that certain documents filed in criminal cases involving a defendant's cooperation with the government are eligible for filing under seal without motion: 1. Cooperation Plea Addendum; 2. USSG 5K1.1 Motion for Departure for Substantial Assistance to the Government; 3. Any Sentencing Memoranda that reference the defendant's cooperation directly or by inference [...]	Supplements to plea agreements, 5K1.1 motions and sentencing memoranda referencing cooperation automatically sealed without a motion
9	CAC	L.Cr.R. 49.1-2	pg. 19	**L.Cr.R. 49.1-2 Exceptions**. The documents listed below are not to be included in the public case file, and are therefore excluded from the redaction requirements of F.R.Crim.P. 49.1 and L.Cr.R. 49.1-1: (3) Presentence investigation reports;... **(3) Under-Seal and In-Camera Documents, and Other Documents Excluded from the Public Case File**.5 Applications and proposed orders to seal or file in camera, along with the document for which protection is sought, and any documents for which under-seal or in-camera filing is authorized by statute, rule, or prior court order must be presented for filing in paper form. Unless the documents are subject to L.Cr.R. 49-1.2(b)(4), or the Court orders otherwise, the original and the judge's copy of the documents must be submitted for filing in separate sealed envelopes, with a copy of the title page attached to the front of each envelope, and must be accompanied by a PDF version of the documents on a CD.	Presentence reports sealed; other documents sealed upon request

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9	CAE	L. Cr.R. 406 and 141	pg. 163	**RULE 460 DISCLOSURE OF PRESENTENCE REPORTS, PRETRIAL SERVICES REPORTS AND RELATED RECORDS** (a) Confidential Character of Presentence Reports, Pretrial Services Reports, and Related Records. The presentence reports, pretrial services reports, violation reports, and related documents are confidential records of the United States District Court. Unless further disclosure is expressly authorized by order of the Court or this rule, such records shall be disclosed only to the Court, court personnel, the defendant, the defendant's counsel, the defense investigator, if any, and the United States Attorney's Office in connection with the sentencing, detention/release, or violation hearing. **RULE 141. (a) Sealing Documents:** General Principles. Documents may be sealed only by written order of the Court, upon the showing required by applicable law. To ensure that documents are properly sealed, specific requests to seal must be made even if an existing protective order, statute, or rule requires or permits the sealing of the document. Notice that a request to seal has been made will typically be filed in the publicly available case file. Unless the Court orders otherwise, court orders sealing documents will also be filed in the publicly available case file and will not reveal the sealed information. Access to all documents filed under seal will be restricted to the Court and authorized court personnel.	Presentence reports sealed; others documents sealed by motion and court order
9	CAN	L.R. 32-5 (c)-(d)		**L.Cr.R. 32-5. Final Presentence Report *Commentary:*** With the prior approval of the Court, the sentencing memorandum may be filed under seal. **(a) Sealing Documents:** General Principles. Documents may be sealed only by written order of the Court, upon the showing required by applicable law. To ensure that documents are properly sealed, specific requests to seal must be made even if an existing protective order, statute, or rule requires or permits the sealing of the document. Notice that a request to seal has been made will typically be filed in the publicly available case file. Unless the Court orders otherwise, court orders sealing documents will also be filed in the publicly available case file and will not reveal the sealed information. Access to all documents filed under seal will be restricted to the Court and authorized court personnel.	Presentence reports, sentencing memoranda and responses may be filed under seal with prior court approval. But request to seal is publically available her documents also upon court order
9	CAS	General Order 514-C		**General Order 514-C Adopting A Policy on Privacy and Public Access to Electronic Case Files:** Without a court order, the court shall not provide public electronic access to the following documents: [...] d. presentence reports and all sentencing materials including the statement of reasons related to the judgement of conviction. Only the judgment of conviction will be scanned.	Presentence reports, and all sentencing materials public electronic access.
10	CO	L.R 47.1 on sealing documents	pg. 34	**L. Cr. R. 32. (d) Restricted Access:** Unless otherwise ordered, a motion for a departure or variance shall not be filed as a restricted document. **L.Cr.R 47.1 PUBLIC ACCESS TO CASES, DOCUMENTS, AND PROCEEDINGS;** (1) Documents that shall be filed with Level 2 restriction (access limited to the filing party, the affected defendant(s), the government, and the court): (A) presentence reports and addenda and related documents, including correspondence or other documents related to sentencing, including letters, reports, certificates, awards, photographs, or other documents pertaining to the defendant; ...	Presentence reports restricted to parties and the court; motions for departure or variance not filed as restricted unless by court order
2	CT	L. Cr. R. 32 (m) and 57(b)(7)(a)	pg. 124; pg. 139-40	**L.Cr.R 32** (g) Any information that the Probation Officer believes, consistent with Fed.R.Crim.P. 32(b)(5), should not be disclosed to the defendant (such as ... information obtained upon a promise of confidentiality, or other information the disclosure of which might result in harm, physical or otherwise, to the defendant or other persons) shall be submitted on a separate page from the body of the report and marked "confidential." The sentencing Judge in lieu of making the confidential page available, exclusive of the sentencing recommendation, shall summarize in writing the factual information contained therein if it is to be relied on in determining the sentence. The summary may be provided to the parties in camera. (k) Disclosure to Other Agencies: presentence report to be marked "Confidential, property of U.S. Courts." "6.... requests for disclosure shall be handled on an individual basis by the Court, and shall be granted only upon a showing of compelling need for disclosure in order to meet the ends of justice." **(m) The Role of the United States Attorney;** The United States Attorney or an Assistant United States Attorney may advise the Judge, on the record or confidentially in writing, of any cooperation rendered by the defendant to the Government. If such information is given in written form, the memorandum shall be submitted by the U.S. Attorney and it shall be revealed to defense counsel unless the United States Attorney or his or her assistant shows good cause for non-disclosure. **L.Cr.R 57(b)(7)(a) Cooperation Agreements and Related Filings;** When a defendant's plea agreement has been filed and the Court has ordered that the associated cooperation agreement shall be sealed, the executed cooperation agreement and transcript of the canvass of a defendant regarding a cooperation agreement shall be maintained by the judicial officer who will sentence the defendant.	Information that should not be disclosed to the defendant for consideration of safety of witness, among other things, is to be submitted on separate page from body of presentence report. Transcript cooperation and sealed cooperation maintained by the court.

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DC	**DC**	L.Cr.R. 49	pg. 152	(6)(i) **SEALED OR CONFIDENTIAL DOCUMENTS.** Absent statutory authority, no case or document may be sealed without an order from the Court. A document filed with the intention of it being sealed in an otherwise public case must be filed by electronic means in a manner authroized by the Clerk and shall be accompanied by a motion to seal. The document will be treated as sealed, pending the outcome of the ruling on the motion. Failure to file a motion to seal will result in the document being placed on the public record.	Sealing upon order of the court.
11	**FLS**	Admin Order 2009-2		**Administrative Order 2009-2 REMOTE ELECTRONIC ACCESS TO PLEA AGREEMENTS;** ...All plea agreements filed on or after February 20, 2009 will be public documents, with full remote access available to all members of the public and the bar, unless the Court has entered an Order in advance directing the sealing or otherwise restricting a plea agreement;	All plea agreements will be public accessible documents
11	**GAN**	L.Cr.R 32.1	pg. 17	**L.Cr.R 32.1 PRESENTENCE REPORT** B. Confidentiality. Any copy of a presentence report which this court makes available, or has made available, to the United States Parole Commission or to the Bureau of Prisons constitutes a confidential court document and shall be presumed to remain under the continuing control of the court during the time it is in the temporary custody of these agencies. A copy of the presentence report shall be loaned to the Parole Commission and Bureau of Prisons only for the purpose of enabling those agencies to carry out their official functions, including parole release and supervision. The presentence report shall be returned to the court after such use or upon request. Disclosure of the report is authorized only so far as necessary to comply with 18 U.S.C. § 4208(b)(2).	Presentence report confidential and under court control as to disclosure
9	**HI**	L.Cr.R. 32.1	pg. 15	**CrimLR32.1. Sentencing Procedure** (g) Not less than fourteen (14) days prior to the sentencing date, the completed presentence report shall be submitted to the court and to all parties under seal.	Presentence report under seal
8	**IAN**	see above	See above	10. If sensitive information must be included in a document, certain personal and identifying information should be redacted from the document, whether it is filed electronically or non-electronically. (6)Information concerning a person's cooperation with the government; [...]It is the responsibility of counsel and the parties to assure that appropriate redactions from documents have been made before they are filed; the Clerk of Court will not review filings to determine whether such redactions have been made.	Sealing by motion; redactions allowed for information concerning cooperation
8	**IAS**	L.R. 10(h) and Appx. B	pg. 25	10. If sensitive information must be included in a document, certain personal and identifying information should be redacted from the document, whether it is filed electronically or non-electronically. (6)Information concerning a person's cooperation with the government; [...]It is the responsibility of counsel and the parties to assure that appropriate redactions from documents have been made before they are filed; the Clerk of Court will not review filings to determine whether such redactions have been made.	Sealing by motion; redactions allowed for information concerning cooperation
9	**ID**	L.Cr.R 32.1 and L.Civ.5.3	L.Civ.5.3	**L.Cr.R 32.1 Disclosure of Investigative Reports by U.S. Probation Office** a) Presentence Report, Sentencing Recommendation and Confidentiality. 1) Presentence reports are not available for public inspection. They shall not be reproduced or copies distributed to other agencies or other individuals unless the Court or the Chief United States Probation Officer grants permission.**(a) General Provisions.** (1) Motion to File Under Seal. Counsel seeking to file a document under seal shall file a motion to seal, along with supporting memorandum and proposed order, and file the document with the Clerk of Court. Said motion must contain "MOTION TO SEAL" in bold letters in the caption of the pleading. **(2) Public Information.** Unless otherwise ordered, the motion to seal will be noted in the public record of the Court. However, the filing party or the Clerk of Court shall be responsible for restricting public access to the sealed documents, as ordered by the Court.	Presentence reports not available for public inspection; other documents sealed upon motion
7	**ILC**	32.1(C)	pg. 108 (in pdf)	(C) The presentence investigation report, the statement of reasons in the judgment of conviction, and the probation officer's sentencing recommendation will be sealed unless otherwise directed by the presiding judge. . . **(2) Sealed Documents.** The Court does not approve of the filing of documents under seal as a matter. A party who has a legal basis for filing a document under seal without prior court order must electronically file a motion for leave to file under seal. The motion must include an explanation of how the document meets the legal standards for filing sealed documents. The document in question may not be attached to the motion as an attachment but rather must be electronically filed contemporaneously using the separate docket event "Sealed Document." In the rare event that the motion itself must be filed under seal, the motion must be electronically filed using the docket event "Sealed Motion."	Court discourages sealed documents; only approved by motion with explanation; presentence reports are sealed

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7	ILN	L.Cr.R. 32.3 and 26.2		**LR26.2. Sealed Documents (b) Sealing Order.** The court may for good cause shown enter an order directing that one or more documents be filed under seal. No attorney or party may file a document under seal without order of court specifying the particular document or portion of a document that may be filed under seal. **(f) Docket Entries.** The court may on written motion and for good cause shown enter an order directing that the docket entry for a sealed document show only that a sealed document was filed without any notation indicating its nature. Unless the Court directs otherwise, a sealed document shall be filed pursuant to procedures referenced by Local Rule 5.8. **LCrR32.3. Confidentiality of Records Relating to Presentence Investigation Reports and Probation Supervision** Records maintained by the probation department of this Court relating to the preparation of presentence investigation reports and the supervision of persons on probation or supervised release are confidential. Information contained in the records that is relied on by the probation department to prepare presentence investigation or supervision reports may be released only by order of the court.	Order for good cause required for sealing; docket entries sanitized; presentence reports confidential
7	INN	L.R. 5-3(c)(2)	pg. 9-11	**L.R. 5-3(c)(2) Ex Parte and Sealed Filings in a Criminal Case;** The following documents may be filed under seal without motion or further order of the court provided counsel has a good faith belief that sealing is required to ensure the safety, privacy or cooperation of a person or entity, or to otherwise protect a substantial public interest: [...] **(**vii)Motions for sentence variance or reduction based on substantial assistance pursuant to Fed. R. Crim. P. 35 or U.S.S.G. § 5K1.1, including supporting documents; [...]	Rule 35 motions for sentence variance or reduction in sentence under 5K1.1 automatically sealed
7	INS	L.Cr.R. 49.1-2 (c)	pg. 100-101	**L.Cr.R.49.1-2 - Filing Under Seal** (c) No Separate Motion Necessary. The following documents may be filed under seal without motion or further order of the court, provided counsel has a good faith belief that sealing is required to ensure the safety, privacy or cooperation of a person or entity, or to otherwise protect a substantial public interest: [...] (6) plea agreements that reference a defendant's cooperation and related documents, whether filed by the government or the defendant;	Plea agreements and other documents referencing cooperation can be filed under seal without a motion
10	KS	L.Cr.R. 32.1	pg. 151	**RULE CR32.1 PRESENTENCE REPORTS** (d) Reports Made Available to U.S. Parole Commission or Bureau of Prisons. Any copy of a presentence report that the court makes available or has made available to the United States Parole Commission or to the Bureau of Prisons, constitutes a confidential court document and shall be presumed to remain under the continuing control of the court during the time it is in the temporary custody of those agencies. **CR49.6. (a) Procedure for Requesting Leave to File Under Seal. I**n criminal cases, a party filing a motion for leave to file documents under seal must file that motion electronically, under seal, in the Electronic Filing System. The motion for leave to file under seal must attach as sealed exhibits the document(s) the party requests to be filed under seal. Finally, if required, the party must simultaneously provide the motion and document(s) it requests to be filed under seal to other parties in the case.	Presentence reports confidential; sealing only made upon motion
6	KYE	General Order 16-06 (General Order 08-09 was withdrawn)		**GENERAL ORDER 16-06 IN RE: Plea Agreement Supplement in Criminal Cases;** criminal case resolved by plea requires a sealed supplement to accompany the plea agreement. 1)The supplement to a plea agreement shall NOT be filed in the record, unless otherwise ordered by the Court 2) The government will maintain the original cooperation agreement. In the event of a dispute, the parties may present the cooperation agreement to the Court.	Supplement attached to every plea agreement; cooperation agreements to be maintained by the Government.
6	KYW	General Order 2010-06		**GENERAL ORDER 2010-06 IN RE: Supplemental Plea Agreements;** [...] Because a plea agreement may contain information regarding cooperation and because such documents are available on the internet by way of PACER, the Court has decided to restructure its practice to make each case appear identical. [...] (1) All plea agreements will be accompanied by a sealed document entitled "plea supplement." (2) That the plea supplement will contain either a cooperation agreement or a statement that no such agreement exists. (3) That the Clerk is DIRECTED to SEAL the plea supplement	Supplement attached to every plea agreement.

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5	LAM	L.Cr.R.32(b)	pg. 59	**LOCAL CRIMINAL RULE 32 - SENTENCE AND JUDGMENT** **(b) Sentencing Memoranda.** A party may submit a sentencing memorandum addressing any factor taken into account for sentencing purposes. The memorandum may contain, but is not limited to, sentencing factors enumerated in 18 U.S.C. § 3553(a); factors for upward or downward departure including those considered pursuant to U.S.S.G. § 5K1.1; argument on unresolved objections to the presentence report; and any information concerning the background, character, and conduct of the defendant, in accordance with 18 U.S.C. § 3661. Sentencing memoranda shall be filed UNDER SEAL . . .**(c) USSG § 5K1.1 Motions.** Government motions, pursuant to USSG § 5K1.1 (Substantial Assistance to Authorities) and accompanying memorandum, should be filed UNDER SEAL by counsel through the Court's electronic filing system.	All sentencing memoranda and 5K1.1 Motions automatically filed under seal
5	LAW	LCr.R.32.1 (H), 32.2	pg. 52	**LCrR32.1 Sentencing (h);** The presentence report and addendum, along with the written statement of reasons of the district court for imposition of sentence as required by 18 U.S.C. §3553(c), shall be filed in the record under seal by the Court immediately after sentencing. **32.2 Presentencing Memoranda**; The presentence report and addendum, along with the written statement of reasons of the district court for imposition of sentence as required by 18 U.S.C. §3553(c), shall be filed in the record under seal by the Court immediately after sentencing.	Presentence report and sentencing memoranda filed under seal
1	MA	Rule 83.6.11	p. 118	(5) Exceptional Circumstances. Any other matters that, due to exceptional circumstances presented in the case, should not be disclosed in the interests of justice. Any such redaction or protective order shall be in writing or made on the record and shall state the reasons for the order. The court, in fashioning such an order, shall give due regard to the need to protect the public from further attorney misconduct and to maintain public confidence in the integrity of the court.	Plea and cooperation agreements may be sealed by court order for 'exceptional circumstances'
4	MD	L.Cr.R.213(1)(a)	pg. 38	**RULE 213. SENTENCING 1. Confidentiality of Presentence, Supervised Release, and Probation Records a) Generally.** Unless the Court orders that a presentence report, supervised release report, violation report, probation record, or portion thereof be placed in the public record, such report or record is a confidential internal court document to which the public has no right of access. [...]	Per practice, sealed supplement in every plea agreement and plea hearing transcript; presentence report considered internal court document
1	ME	Local Rule L.R. 157.6(a)	pg. 122 and pg. 142	LR 157.6(b) A party seeking to obtain an order sealing any pleading or document not listed in subsection (a) of this Rule, or seeking to continue the sealing of any pleading or document already sealed shall file a motion pursuant to this subparagraph (b). The motion shall state the basis for sealing, the period of time during which the document(s) are to be sealed, and shall set forth specific findings as to the need for sealing and the duration thereof. The motion itself shall be filed under seal, and remain sealed pending order of the Court pursuant to subsection (e) of this Rule. The documents or pleadings for which sealing is sought will be accepted provisionally under seal. Unless the motion is filed ex parte, the motion shall include a statement whether there is agreement of the parties to the sealing.	Sealing is by motion and court order only, period for sealing decided on case by case basis
6	MIW	L.Cr.R. 49.8(a)	pg. 20	**Requests to seal** - The procedures set forth in this rule apply to cases that have not been sealed in their entirety. Documents may be submitted under seal only if authorized by the Court for good cause shown. A person seeking leave to file a document under seal must file a motion requesting such relief, unless the Court has entered a previous order authorizing the submission of the document under seal or submission under seal is authorized by statute. The motion seeking leave to file under seal should generally be a public filing, unless the submitting party believes in good faith that public access to the motion will compromise the confidential matter.	Sealing by motion only
8	MN	L.R. 83.10(g)(2)		**LR 83.10 CRIMINAL SENTENCING (g) Response to Position Regarding Sentencing; Motion for Downward Departure;** 2) If the government intends to move for a downward departure under § 5K1.1 of the Sentencing Guidelines or under 18 U.S.C. § 3553(e), it must do so at least 7 days before sentencing. The government's motion must be filed under seal and served on the defendant. The government must provide two courtesy copies to the judge and one courtesy copy to the probation officer.	Motions for reduction in sentence must be filed under seal
8	MOE	Misc. Provision 13.05 and		**Pleadings and Documents Filed Under Seal** **(B) Pleadings and Documents in Criminal Cases.** (1) Unless otherwise ordered by the Court, the following documents and materials will be filed and maintained by the Clerk under seal: all pleadings and documents relating to grand jury proceedings . . . all presentence investigation reports and such other materials regarding sentencing which the Court orders filed under seal; and any other material or item ordered sealed by the Court.	Presentence reports sealed; other documents sealed upon court order

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5	MSN	L.Cr.R. 49.01	pg. 5	**Rule 49.1. SEALING OF COURT RECORDS;** The process for sealing court records shall be governed by Rule 79 of T*he Uniform Local Civil Rules of the Northern and Southern Districts of Mississippi* EXCEPT for the following specific documents: [...] **(B) Plea Agreements;** (2) All plea agreements shall be accompanied by a sealed document titled "Plea Supplement." The Plea Supplement will also contain the government's sentencing recommendation. The Plea Supplement will be electronically filed under seal. All cases will be docketed identically with reference to a sealed Plea Supplement, regardless of whether or not a cooperation agreement exists [...] **(C) Motions for Sentence Reductions based on Cooperation with the Government;** (1) Government motions filed pursuant to Fed. R. Crim. P. 35 or Section 5K1.1 of the United States Sentencing Guidelines or 18 U.S.C. § 3553(e) shall be filed under seal without prior leave of court.	Supplement attached to all plea agreements; all cases docketed identically.
5	MSS	L.Cr.R. 49.1	See above	Rule 49.1. SEALING OF COURT RECORDS; The process for sealing court records shall be governed by Rule 79 of The Uniform Local Civil Rules of the Northern and Southern Districts of Mississippi EXCEPT for the following specific documents: [...] (B) Plea Agreements; (2) All plea agreements shall be accompanied by a sealed document titled "Plea Supplement." The Plea Supplement will also contain the government's sentencing recommendation. The Plea Supplement will be electronically filed under seal. All cases will be docketed identically with reference to a sealed Plea Supplement, regardless of whether or not a cooperation agreement exists [...] (C) Motions for Sentence Reductions based on Cooperation with the Government; (1) Government motions filed pursuant to Fed. R. Crim. P. 35 or Section 5K1.1 of the United States Sentencing Guidelines or 18 U.S.C. § 3553(e) shall be filed under seal without prior leave of court.	Supplement attached to all plea agreements; all cases docketed identically.
9	MT	L.Cr.R.11.1 and 32.1	pg. 94 and 85	**CR 32.1 Presentence Reports.** (a) Electronic Filing. (1) The probation office shall provide to the clerk for filing under seal in the electronic record the final presentence report as transmitted to the parties and the court before sentencing. **L.Cr.R. 11.1 Sealed Plea Agreements.** No plea agreement may be filed under seal unless a party moves for leave to seal under L.R. CR 49.1.	Presentence reports filed under seal; rule prohibits plea agreements from being filed under seal unless by motion
4	NCE	Amended Standing Order 09-SO-2 dated 2/12/10		In response to "information regarding the misuse of publicly available information regarding misuse of publicly available information regarding assistance to law enforcement by criminal defendants..." and that information has been posted on websites such as "whosarat.com". "As to all plea agreements in criminal cases filed after August 28, 2009, the Clerk of this Court is directed to file said plea agreements in such a manner that there is no remote electronic public access to plea agreements." (with the exception of court personnel, USPO, and attorneys of record.) The public including media may have access to filed plea agreements at the clerk's office, subject to existing rules. Motions filed regarding the substantial assistance of a defendant, whether pursuant to USSG 5K1.1., 18 USC 3553(e), or FEd. R. Crim.P. 35(b) [...], shall be filed under seal by the clerk. "The Court has considered alternatives to the blanket sealing of substantial assistance motions, such as entertaining motions to seal on a case-by-case basis or merely removing the motions from the electronic window provided by PACER, but has found these inadequate to preserve the "higher value" (see In re Washington post Co., 807 F.2d 383,390 (4th Cir. 1986)) of preventing interference with the due administration of justice that results from reprisals against witnesses. But (2) the sealed documents will ultimately be available for public inspection after the expiration of the two-year period.	No remote access to plea agreements; motions filed regarding the substantial assistance of a defendant, whether pursuant to USSG 5K1.1., 18 USC 3553(e), or FEd. R. Crim.P. 35(b) filed under seal. Sealed documents available for public inspection after two-year period.
4	NCM	L.Cr.R 32.3	pg. 5	**LCrR32.3 CONFIDENTIALITY OF PRESENTENCE INVESTIGATION REPORTS** (a) Presentence investigation reports prepared by the probation office and any response or objection thereto shall be filed under seal in the Office of the Clerk of Court and shall be visible only to court personnel, attorneys of record in the particular case to which the report relates, and defendants to whom the particular report relates. Such records shall not be made available to the public.	Presentence report filed under seal
4	NCW	L.Cr.R.55.1(H)	pg. 73	**L.Cr.R 55.1(H) Sentencing Materials;** All portions of pleadings, motions and objections which incorporate or refer to a defendant's pre-sentence report shall, if filed, be filed under seal. No motion to seal shall be required for such materials.	Presentence report and 'portions of pleadings' related to sentencing may be filed under seal without a motion
8	ND	Standing Order Sept. 30, 2011		**Standing Order In the Matter Of: Sealed Documents; t**he following documents fall within the criteria set forth above and grants leave of Court to file the following documents under seal: (1) plea agreement supplements; (2) motions pursuant to Rule 35 of the Federal Rules of Criminal Procedure, memorandums in support thereof, and responsive filings; (3) motions pursuant to Section 5K1.1 of the United States Sentencing Guidelines, memorandums in support thereof, and responsive filings. . . Such documents shall be filed under seal and shall remain sealed unless otherwise ordered by the Court.	Plea agreement supplements, Rule 35 motions, 5K1.1, filed automatically under seal without a motion

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8	**NE**	L.Cr.R 32.2 and 12.5	pg. 23	**32.2 Pretrial Services, Presentence, and Probation/Supervised Release Records. (a) Confidentiality.** Information contained in pretrial services, presentence, and probation/supervised release records is confidential and may not be disclosed except as authorized by statute, regulation, or court order. **(b) Filing Under Seal. (1) Records Sealed.** Except as stated in Nebraska Criminal Rule 32.1.1, and unless a judge orders otherwise in a specific case, the clerk files under seal all pretrial services, presentence, and probation/supervised release records... 1**2.5 Sealed Documents and Objects. (i) Motion to Seal.** A party seeking to file a sealed document or object must electronically file a motion to seal. . .**(c) Docket Sheet Entries.** When a sealed document is filed, an entry appears on the electronic docket sheet only for court users and the filing party. The parties and the public do not have remote access to the sealed document from the docket sheet.	Presentence reports sealed; entries for sealed documents hidden from public
1	**NH**	L.R. 83.12 (regarding sealing)		83.12 Sealed Documents (c) A motion to seal must be filed conventionally together with the item to be sealed and both will be accepted provisionally under seal, subject to the court's subsequent ruling on the motion. The motion must explain the basis for sealing, specify the proposed date on which the requested seal order shall expire, and designate whether the material is to be sealed at Level I or Level II. If a party is requesting that only certain portions of a document be sealed, the party must provide a full copy of the document clearly displaying the portions sought to be sealed. Departure motions based on substantial assistance need not contain a proposed seal duration and, unless extended upon motion for good cause shown, shall remain sealed for five (5) years or until the completion of any term of imprisonment, whichever occurs later. Any motion to seal, upon specific request, may also be sealed if it contains a discussion of the confidential material. If the court denies the motion to seal, any materials tendered under provisional seal will be returned to the movant.	Sealing is by motion only; for 5 year periods or until completion of imprisonment
3	**NJ**	L.Civ.R. 5.3 (applicable to criminal cases)	pg. 7	**L.Civ.R. 5.3 (3)** Any materials deemed confidential by a party or parties and submitted with regard to a motion to seal or otherwise restrict public access shall be filed electronically under the designation "confidential materials" and shall remain sealed until such time as the motion is decided, subject to Local Civil Rule 72.1(c)(1)(c). When a document filed under seal contains both confidential and non-confidential information, an unredacted version shall be filed under seal, and a version with only the confidential portions redacted shall be filed publicly.	Sealing by motion only, option for redacted and unredacted copies filed
10	**NM**	L.Cr.R. 32.B	pg. 3	**RULE 32 Sentencing and Judgment.** 32.B Confidential Nature of Report. The presentence report is a confidential record of the United States District Court. It must not be disclosed to anyone other than the Court, the defendant, the defendants attorney, and the attorney for the government unless required by law or ordered by the Court.	Plea addendum in every case, addendum kept in prosecutors' files
9	**NV**	L.Cr.R. 32.2	pg. 90	**CR 32-2. DISCLOSURE OF PRESENTENCE INVESTIGATION REPORTS, SUPERVISION RECORDS OF THE UNITED STATES PROBATION OFFICE, AND TESTIMONY OF THE PROBATION OFFICER** (a) Confidentiality. The presentence investigation report, supporting documents, and supervision records are confidential court documents and are not available for public inspection. **LR IA 10-5. SEALED DOCUMENTS** (a) Unless otherwise permitted by statute, rule, or prior court order, papers filed with the court under seal must be accompanied by a motion for leave to file those documents under seal.	Presentence reports and supporting documents confidential; other documents filed under seal must be accompanied by motion
2	**NYE**	L.Cr.R. 23.1	pg. 92-93	**L.Cr. R. 23.1. Free Press-Fair Trial Directives** (a) It is the duty of the lawyer or law firm, and of non-lawyer personnel employed by a lawyer's office or subject to a lawyer's supervision, private investigators acting under the supervision of a criminal defense lawyer, and government agents and police officers, not to release or authorize the release of non-public information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which they are associated, if there is a substantial likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice. [...] (d) Statements concerning the following subject matters presumptively involve a substantial likelihood that their public dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice within the meaning of this rule: [...](4) The identity, testimony or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law; (5) The possibility of a plea of guilty to the offense charged or a lesser offense;	Sealing is by motion only; provisions as to dissemination of information

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2	NYN	L.R.Cr.P.11.1 (c), 23.1	pg. 86; pg. 91-93	**L.Cr.R 11.1(c) Pleas;** For any plea agreement that is to be sealed, the United States Attorney shall provide the Court with a proposed sealing order **L.Cr.R 23.1 Free Press-Fair Trial Directives; I**t is the duty of the lawyer or law firm, and of non-lawyer personnel employed by a lawyer's office or subject to a lawyer's supervision, private investigators acting under the supervision of a criminal defense lawyer, and government agents and police officers, not to release or authorize the release of non-public information.	Sealing is by motion only; provisions as to dissemination of information
2	NYS	L.Cr.R. 23.1	pg. 92-93	**L.Cr.R 11.1(c) Pleas; F**or any plea agreement that is to be sealed, the United States Attorney shall provide the Court with a proposed sealing order **L.Cr.R 23.1 Free Press-Fair Trial Directives;** It is the duty of the lawyer or law firm, and of non-lawyer personnel employed by a lawyer's office or subject to a lawyer's supervision, private investigators acting under the supervision of a criminal defense lawyer, and government agents and police officers, not to release or authorize the release of non-public information.	Sealing is by motion only; provisions as to dissemination of information
2	NYW	L.Cr.R.32	pg. 7; pg. 10	**Rule 32.** Upon appearance of either retained or assigned counsel and the attorney for the government on a violation of probation or supervised release, the probation office shall be permitted to provide counsel with a copy of the presentence report and judgment with statement of reasons from the underlying offense. Further, where the defendant has been previously convicted of a federal offense, upon appearance of either retained or assigned counsel and the attorney for the government on a new charge, the probation office shall be permitted to provide counsel with a copy of the presentence report and judgment with statement of reasons from any previous federal conviction. **Rule 55**. Except where restrictions are imposed by statute or rule, there is a presumption that Court documents are accessible to the public and that a substantial showing is necessary to restrict access.	Presentence report confidential and under court control as to disclosure.
6	OHN	L.Cr.R. 32.2(e) and 49.5	49.4(link)	**(e) Presentence Report as Part of the Record**. (1) The Presentence Report shall be placed by the Clerk in the record under seal **Rule 49.4 Filing Documents Under Seal.** No document will be accepted for filing under seal unless a statute, court rule, or prior court order authorizes the filing of sealed documents. If no statute, rule, or prior order authorizes filing under seal, the document will not be filed under seal.	Presentence reports filed under seal; other documents only by motion and court order
6	OHS	L.Cr.R. 32.1(k) and 5.2.1	pg. 45; 13	**L.R. 32.1 Presentence Reports;** (k) Both the initial and final presentence reports are confidential Court documents. All copies and all information contained in the reports shall be maintained in confidence by anyone who obtains them and not disclosed to another for any purpose other than the prosecution or defense of the case or unless the Judge to whom this case is assigned authorizes another disclosure. **5.2.1 Sealed Documents.** (a) Filing Under Seal**.** Unless permitted by statute, parties cannot file documents under seal without leave of Court. Upon obtaining leave of Court, litigants other than pro se litigants must file the documents electronically using the ECF system as provided in S.D. Ohio Civ. R. 5.1. Pro se litigants who have obtained leave must follow the procedures set forth in subsection (b). The Court may strike any document filed under seal if the filing party failed to obtain leave of Court.	Sealed documents upon leave of court; presentence reports confidential
10	OKE	L.Cr.R 32.1 and 49.3	pg. 8 and 11	**L.Cr.R 32.1 Presentence Report** C. Confidentiality of Presentence Report. The pretrial services, presentence and probation reports maintained by the probation office of this Court are hereby declared to be confidential except as otherwise authorized. Correspondence to the United States Probation Office or to the Court, relative to a charged defendant, shall also be deemed confidential and shall not be released publicly except upon order of the Court. **L.Cr.R 49.3 Redaction of Personal Identifiers** In addition, parties may refrain from including, or may partially redact where inclusion is necessary, the following confidential information: [...] information regarding an individual's cooperation with the government;	Presentence reports confidential; redactions of information regarding cooperation allowed
10	OKN	L.Cr.R. 32.3, 41.1, 49.5	pg. 12	**49.5 Sealed Documents.** a. Policy. It is the policy of this Court that sealed documents are disfavored. The Court strongly urges attorneys to present all arguments and all documents in unsealed pleadings. In an effort to do this, attorneys should use good judgment in generically referring to matters without revealing confidential information. **41.1.1 Redaction of Personal Data Identifiers.** Parties should exercise caution when filing a document that contains any of the following information and should consider filing such document under seal, or may refrain from including, or may partially redact where inclusion is necessary: personal identifying numbers such as . . .information regarding an individual's cooperation **32.3 Confidential Nature of Presentence Report.** The presentence report is confidential and may only be disclosed to the Court and parties for use in this case and to the U.S. Sentencing Commission and the U.S. Bureau of Prisons for discharge of their official duties.	Presentence report confidential; sealed documents disfavored; redactions recommended to protect cooperation information; redacted documents marked

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10	OKW	L.Cr.R 11.3; L.Cr.R. 32.1	pg. 45; 51	**LCrR11.3 Plea Agreements.** All plea agreements shall be accompanied by a sealed document titled "Plea Supplement," the contents of which shall be limited to describing any agreement for cooperation. The Plea Supplement will be electronically filed under seal and shall be filed in all cases regardless of whether a cooperation agreement exists. **LCrR32.1 Confidentiality of Pre-Sentence Reports.** (b) Any pre-sentence report filed with the court is a restricted document, that is, access to the document is restricted [...]	Presentence reports are confidential, sealed documents and all plea agreements are accompanied by a separate, sealed plea supplement
9	OR	L.Cr.R 3003		**LR 3003 - Confidentiality of Presentence Report** The presentence report must remain a confidential court document, disclosure of which is controlled by the Court. Any copies must be marked "Not For Further Disclosure Without Prior Authorization From the Court."	Presentence report confidential and under court control as to disclosure
3	PAE	Notice of Court dated 7/9/2007	Rule 32.1	"The judges of the United States District Court determining that there is an immediate need to address problems endengered by an Internet website which uses publicly available information to identify and publicize individuals suspected of cooperating with law enforcement agents appearing on the docket as accessed through the court's CM/ECF system ... approve the following protocol for adoption: 1. All documents related to pleas and sentencing and orders relating to those documents, will be designated on the docket as Plea Documents, Sentencing Documents and Judicial Documents respectively, no matter their content." **Rule 32.1 Loan of Presentence Investigation Report to US Parole Commission and US Bureau of Prisons** "Presentence Report to remain under continuing control of the court..." "Presentence report outside the "agency record" dentition set forth in U.S. v. Carson. 631 F.2d 1088 (D.C. Cir. 1980)."	All documents related to pleas and sentencing and orders relating to those documents, will be designated on the docket as Plea Documents, Sentencing Documents and Judicial Documents respectively; Presentence Report to remain under continuing control of the court. Copies are only loaned to the Parole Commission or to the BOP.
3	PAW	L.Cr.R.49(D)	pg. 77	**L.Cr.R 49(D). Filing Under Seal**. The following documents shall be accepted by the Clerk for filing under seal without the necessity of a separate sealing order: (1) Motions setting forth the substantial assistance of a defendant in the investigation or prosecution of another person pursuant to U.S.S.G. § 5K1.1 or Fed. R. Crim. P. 35; (2) Motions for writs to produce incarcerated witnesses for testimony.	Motions under Rule 35, 5K1.1, and to produce incarcerated defendants automatically sealed
1	PR	L.Cr.R. 111	pg. 107	**L.Cr.R. 111 Pleas (b) Contents of Plea Agreements and Plea Agreement Supplements:** "The parties shall ensure that plea agreements are sanitized as to any reference as to whether a criminal defendant has agreed to cooperate with the United States." A Plea Agreement Supplement must be filed with every plea agreement, and the Supplement must contain any cooperation agreement(s) and must indicate if there is none. (d) Plea agreements must also be sanitized of any reference to how defendant qualifies for safety valve. (e) Duration of Sealing; Plea Agreement Supplements shall remain sealed until otherwise ordered by the Court.	plea and cooperation agreements to be "sanitized," and separate non public plea agreement supplement has any reference of cooperation.
1	RI	L.R. Gen 303(c)(2)(F); L.R. Gen 102 (b) and (d)	pg. 63; pg. 5-6	**LR 303 Documents to be conventionally filed (**10) Any pleading or document in a criminal case containing the signature of a defendant, such as a waiver of indictment or plea agreement; **LR 102(d)** Filing of Sealed Documents in Criminal Cases. Documents filed with the Court may not be sealed unless ordered by the Court. If a party or non-party filing a document has a good faith basis for believing that a document should be sealed, the document shall be accompanied by a motion to seal, which explains why the document should be sealed.	Sealing by court order only
4	SC	Misc. Order 3:04mc5009; L.Cr.R. 49.01	pg. 7 (L.Cr.R. 49.01)	**Misc. Order 3:04mc5009**; ...certain information be redacted prior to filing to avoid disclosure of sensitive or protected information... [as well as] various documents which should be excluded from public access. [...] 2. Pretrial bail, presentence investigation reports, or supervised release violation reports; [...] **L.Cr.R. 49.01 Filing Documents Under Seal**. The following procedures are mandatory and apply to any request to file documents under seal.	Presentence reports and sealed documents excluded from public access
8	SD	Standing Order dated 3/4/08; L.R.11.1	pg. 4 (L.Cr.R. 11.1 Plea Agreements)	**Standing Order Plea Agreements;** To balance the safety of criminal defendants, law enforcement officers, and court personnel with the public's right to access court documents, the Court implements a procedure to uniformly treat Plea Agreements and motions and orders that reduce a defendant's sentence because that defendant has cooperated with police [...] Plea Agreements filed with the Court must no longer identify whether or not a defendant has agreed to cooperate with the United States. Plea Agreement Supplement[s] must contain the cooperation agreement ...[and].. will be filed under seal. **L.Cr.R. 11.1 Plea Agreements;** [...]the plea agreement supplement will be sealed in all cases.	Supplements attached to every plea agreement

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6	TNE	L.Cr.R. 83.9 (h)-(k)	pg. 100	**L.Cr.R. 83.9 Sentencing Proceedings. (k) Plea Agreements and Plea Agreement Supplements;** The following procedures govern the filing of plea agreements: 1. Plea agreements will not be sealed on the grounds that the defendant is cooperating with the Government. 2. Information pertaining to cooperation shall not be set forth in the Plea Agreement. 3. A separate document entitled "Plea Agreement Supplement" must be filed with every Plea Agreement. 4. Information pertaining to cooperation will be set forth in the Plea Agreement Supplement. Otherwise, a statement that the defendant is not cooperating will be set forth in the Plea Agreement Supplement. 5. The Plea Agreement and Plea Agreement Supplement must be filed either prior to the change of plea hearing or at the time of the change of plea hearing, depending upon the preference of the presiding judge. 6. The plea agreement supplement will be filed under seal without the necessity of a motion or Court order.	Supplements attached to every plea agreement
6	TNW	L.R. Appendix A	pg. 83 (in pdf)	**13.4.3 Protection of Other Sensitive Information;** Attorneys and parties shall exercise caution and shall consider redaction or consider filing a sealed document if any of the following information is referenced: [...] (f) Information regarding an individual's cooperation with the government;	Recommends considering sealing information regarding cooperation
5	TXE	L.Cr.R 49		**L.Cr.R. 49 Service and Filing;** [...} (c) Authorization to Routinely Seal Particular Types of Criminal Case Documents . Despite the general rule cited in section (b) above, the court finds there is an overriding interest in routinely sealing certain types of criminal case documents, because public dissemination of the documents would substantially risk endangering the lives or safety of law enforcement officers, United States Marshals, agents, defendants, witnesses, cooperating informants, judges, court employees, defense counsel, or prosecutors, or their respective family embers, and could jeopardize continuing criminal investigations. The documents that trigger this overriding interest are:[...] 5. plea agreements, which shall be governed by paragraph (d) below; 6. addenda to plea agreements described in paragraph (e) below; 7. motions for downward departure for substantial assistance, and responsive pleadings and orders granting or denying the same; 8. motions pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines, memoranda in support thereof, responsive pleadings and orders granting or denying the same; 9. motions for reduction of sentence under Fed. R. Crim. P. 35(b), memoranda in support thereof, responsive pleadings and orders granting or denying the same; 10. amended judgments pursuant to a grant of a Fed. R. Crim. P. 35(b) motion; and 11. orders restoring federal benefits filed in conjunction with item 10 above. Entire criminal case sealed in some instances.	Court routinely seals all plea agreements, addenda to plea agreements, motions for downward departure for substantial assistance, motions pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines, motions for reduction of sentence under Fed. R. Crim. P. 35(b), and related pleadings and orders and memoranda).
5	TXN	Amended Special Order 19-1		The clerk of court will ensure that there is no public access, either in paper or electronic form, to the following documents: [...] pretrial bail or presentence investigation reports; plea agreement supplements; motions filed for downward departure under United States Sentencing Commission Guidelines Manual 5K1.1; and motions filed for a reduction of sentence under Fed. R. Crim. P. 35(b).	Presentence reports eliminated from access
5	TXS	Admin. Proced. For Elec. Filing (6)(1)(c)(2012)		**6. Sealed Documents; (B) Criminal or Miscellaneous Cases:** (1). Filing users must electronically file the following documents under seal: a. Documents related to pre-sentence reports b. Requests to Debrief c. Motions for downward departure, including motions under Fed R. Crim. P. 35(b) d. Requests for continuances or other relief for cooperating Defendants [...]	Automatic seal of presentence reports, motions for downward departure, Rule 35, or other 'relief for cooperating defendants'
5	TXW	L.Cr.R. 32		**RULE CR-32. SENTENCE AND JUDGMENT (e) Post-Sentencing Disclosures.**(1) Presentence Report. After sentencing, the presentence report and its contents must remain confidential,(2) Confidential Sentencing Recommendation. Except as ordered by the sentencing judge, the probation officer's confidential sentencing recommendation must not be disclosed.	Presentence reports must remain confidential; sentencing recommendation must not be disclosed
10	UT	L.Cr.R. 11-1; L.Cr.R. 32-1		**L.Cr.R. 11-1 PLEA AGREEMENTS;** All plea agreements must be in writing and signed by counsel and the defendant. The plea agreement must be accompanied by a written stipulation of facts relevant to a plea of guilty which, if appropriate, includes the amount of restitution and a list of victims. If the agreement involves the dismissal of other charges or stipulates that a specific sentence is appropriate, the court will review and consider the presentence report before accepting or rejecting the plea agreement. All plea agreements shall be accompanied by a sealed document entitled "Plea Supplement." The Plea Supplement will be electronically filed under seal.	Supplements attached to every plea agreement

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4	VAE	L.Cr.R.49(J)	pg. 65	(J) The Court having found that all motions for downward departure filed by the government under 18 U.S.C. § 3553(e), United States Sentencing Guidelines § 5.K.1.1, or Fed. R. Crim. P. 35 satisfy, by their nature, the requirements for sealing, such motions and responses thereto may be filed under seal without filing a motion to seal by placing the words "UNDER SEAL" on the face sheet of the motion and by informing the Clerk of the need to file the document under seal.	Motions for reduction in sentence, 5K1.1, and Rule 35 sealed without need for motion.
4	VAW	L.R.9(c)	pg. 15-20	**L.R.9 Sealed Documents**; generally procedures that govern documents under seal in criminal and civil cases **(c) Expectations**; (1) No motion or order is required to file the following under seal: [...] c. Presentence investigation reports, pretrial services reports, psychiatric or psychological evaluations in criminal cases, including documents incorporating the content of the foregoing documents; ...	Presentence reports filed under seal without motion;
2	VT	L.Cr.R.5.2, 32(c)	pg. . 50	**Rule 5.2 (a) Order Required.** Cases or court documents cannot be sealed without a court order. Otherwise, all official files in the court's possession are public documents. **Rule 32. Sentencing Procedure. (c) Presentence Investigation Report**. Defense counsel is responsible for ensuring that the defendant has reviewed and understands the presentence report. (1) Counsel is prohibited from providing (by any means) a draft, copy or final Presentence Report ("PSR") to the defendant unless the following categories of information have been redacted from the PSR: (A) statements regarding the defendant's cooperation, including references to USSG §5K1.1. motions and USSG §5C1.2. proffers; (B) statements regarding any other person's cooperation including but not limited to post-arrest statements, proffers, grand jury testimony, and trial testimony. Counsel is not prohibited from reviewing the unredacted PSR with the defendant. (2) Counsel receiving the report may not disclose the contents to others.	Sealed upon with court orders only; defense counsel prohibited from sharing PSRs or statements regarding cooperation
9	WAW	L.Cr.R 32(i); L.Cr. R. 55	pg. 56; 88 (in pdf)	**L.Cr.R 32(i) Sentencing;** (1) Sentencing Hearing. (A) Section 5K1.1 Motions. If the government intends to file a § 5K1.1 motion for substantial assistance, the motion must be served on all counsel and filed under seal at least fourteen days prior to sentencing...**(5) Confidentiality.** Each copy of a probation department presentence report which this court has or does make available to the United States Parole Commission, the Bureau of Prisons, the United States Sentencing Commission or any other agency for any reason whatever constitutes a confidential court document and shall be presumed to remain under the continuing control of the court during the time that such presentence report is in the temporary custody of any of those agencies. Such copy of the presentence report shall be provided to such agency only for the purpose of enabling the agency to carry out its official functions.	5K1.1. motions filed under seal; presentence reports confidential
7	WIE	L.Cr.R. 32(a) and Gen L R. 79(d);	pg. 50; 9	**Criminal L. R. 32. Presentence Investigation; Presentence Reports.** (a) Confidentiality of Presentence Reports. (1) Confidential records of this Court maintained by the United States Probation Office, including presentence investigation reports and probation supervision records, may not be disclosed except upon written petition to the Court establishing with particularity the need for specified information contained in such records. [...] **(d) Confidential Matters; Sealed Records.** (1) The Court will consider any document or material filed with the Court to be public unless, at the time of filing, it is accompanied by a separate motion requesting that the document or material, or portions thereof, be sealed by the Court, or unless the document or material is otherwise protected from disclosure.	Presentence reports sealed; other documents sealed upon motion, provides for different levels of restriction upon motion
7	WIW	Admin. Order 311	pg. 2	**Admin Order 311: GENERAL RULES FOR FILING DOCUMENTS UNDER SEAL; [...**]criminal cases only the following documents may be filed under seal without motion or further order of the court and without an accompanying redacted version provided counsel has a good faith belief that sealing is required to ensure the safety, privacy or cooperation of a person or entity, or to otherwise protect a substantial public interest: [...] 8. Motions for sentence variance or reduction based on substantial assistance pursuant to Fed. R. Crim. P. 35 or Guideline § 5KI.I, including supporting documents; 9. Presentence investigation reports and any addenda or objection	Motions under Rule 35 and 5K1.1 X, presentence reports, and related documents filed under seal without motion
4	WVN	L. Cr. P. 32.01(f) (g)	pg. 86	**LR Gen P 6.01. Sealed Documents in Public Cases.** (a) Motion for Leave to File Under Seal: (1) Motion: To file a document under seal, a party must first electronically file a Motion for Leave to File Under Seal. If the Motion for Leave to File Under Seal itself contains sensitive information, the party shall: (i) Electronically file it under seal in CM/ECF and because this is a sealed event that is inaccessible to recipients of the NEF, parties shall effect service of process traditionally, or (ii) File the motion with the Clerk's office in paper. The Clerk's office will then file the motion under seal. The parties remain responsible for effecting service of process traditionally. **L.Cr.P. 3201 Disclosure of Presentence Reports;** The Clerk shall file the presentence report on CM/ECF under seal to assure the confidentiality of the report...	Sealing by motion, motion itself may be filed outside electronic service; presentence reports filed under seal

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4	**WVS**	L.Cr.R. 32.2(a)	pg. 58	**LR Cr P 32.2. Disclosure of Presentence Reports, Statement of Reasons and Probation Records** (a) Disclosure of Presentence Reports. Disclosure of presentence reports is governed by 18 U.S.C. ' 3552(d) and FR Cr P 32. Except as specifically provided by statute, rule, regulation, or guideline promulgated by the Administrative Office of the United States Courts, or LR Cr P 32.3, no confidential records of the court maintained by the probation office, including presentence reports and probation or supervised release records, shall be producible except as set forth below or by written petition to the court, particularizing the need for specific information. . . (b) Statement of Reasons. The Clerk is directed to SEAL the Statement of Reasons in all criminal cases before this court and shall forward a SEALED copy to counsel of record and to the probation office in this District.	Presentence reports filed under seal; Clerk directed to seal all Statements of Reasons

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U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

June 27, 2016

MEMORANDUM

TO: Prof. Sara Sun Beale
Cooperator Subcommittee
Advisory Committee for Criminal Rules

FROM: Michelle Morales
Acting Director

SUBJECT: Bureau of Prisons' Responses to Subcommittee's Questions

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

In an email dated June 15, 2016, you asked the Department to respond to the following questions regarding Bureau of Prisons' ("BOP", or the "Bureau") facilities, and their ability to protect cooperators. The questions included were grouped in two categories: the first, in relation to information about assignments to prisons, variations among prisons, etc.; and the second, in relation to the distinction between state and private facilities. Below are our answers:

ASSIGNMENTS TO PRISONS

1. What is the relationship between district of conviction and place of confinement? How likely is it that a federal offender will initially be placed in/near the district of conviction? How likely is an offender to be moved to an institution in another district during the period of his incarceration?

The Bureau designates inmates based on release residence address, not the district of conviction. Every attempt is made to place an inmate in a facility located within 500 miles of his release residence. However, assignment of an inmate to an institution is based on the following factors and may preclude an inmate's placement close to his release residence:

- Level of security and staff supervision the inmate requires
- Inmate's Programming Needs (Residential Drug Abuse Program, Sex Offender Management Program, Sex Offender Treatment Program)
- Judicial Recommendations - Every attempt is made to comply with judicial recommendations, however a conflict with BOP policy and/or sound correctional management may prevent compliance

- Inmate's release residence
- Level of crowding
- Required separation from other sentenced inmates (i.e., provided testimony, previous altercations)
- Disruptive Group or Security Threat Group Assignments
- Medical/Mental Health Care Level Concerns

As an inmate progresses in his/her sentence, the factors noted above may result in movement another facility.

2. Do gangs have a major presence in all federal prisons? If not, are they geographically limited? Or found only in higher security prisons?

Unfortunately, gangs have a presence in most facilities, and most gangs are not limited by geography. The Bureau's gang management strategy is to identify gang-affiliated inmates, track them, monitor their conduct, take interdictive action, and apply sanctions when they are found to be involved in illicit or unlawful gang activity. To accomplish this task, inmates that are gang affiliated and meet the criteria's are assigned a Security Threat Group (STG) or Disruptive Group (DG) identifier. Inmates are then placed in an institution based on their security level (Minimum, Low, Medium, High, and Administrative).

3. Where there is a significant gang presence in a prison, are all cooperating prisoners (even white collar offenders) equally at risk?

There is an equal risk to all that are in the presence of gangs in prison, to include staff. The Bureau provides staff with training to recognize and defuse potential problems to minimize the risk to all.

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STATE, PRIVATE, AND FEDERAL FACILITIES

4. What percentage of federal inmates are in state institutions, either during the pretrial phase or after sentencing? Do you have any information about the relative incidence of threats or harm in those institutions, as compared to federal facilities?

There are only 145 inmates out of 195,072 (.0007%) committed solely to the custody of the Bureau of Prisons who are in state facilities. We do not have data on incidence of threats or harm in those institutions.

5. What percentage of federal inmates are in privately run jails or prisons? Do you have any information about the relative incidence of threats or harm in those institutions, as compared to other federal facilities?

Currently, there are 22, 561 inmates in private prisons, or about 11.57% of all federal inmates. Assault rates in private prisons are very low as they are mostly low security prisons. In calendar years 2014 and 2015 there were 2 serious assaults on inmates in private facilities.

6. Has BOP considered having a network of cooperator prisons? Would this be feasible (even though it would require significant changes in current assignment practices)?
Rather than separate prisons for cooperators, most BOP facilities have special housing units that house inmates who are in need of protected custody, and they can serve their sentence within those units, while protected from the general population. Because the goal is to get inmates into the general population, the Bureau also operates Reintegration Housing Units for inmates identified as protective custody cases who consistently refuse to enter the general population. These units offer these inmates the opportunity to safely program in a general population setting.

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U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

May 31, 2016

MEMORANDUM

TO: The Honorable Lewis A. Kaplan
Chair, Rules Subcommittee on Cooperators

FROM: Michelle Morales
Acting Director

SUBJECT: Efforts to Prevent Court Documents from Revealing the Identity of Cooperators: DOJ Survey and Official Position

I. Background

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

In June 2015, the Federal Judicial Center issued its "Survey of Harm to Cooperators: A Final Report," a study it prepared for the Committee on Court Administration and Case Management (CACM). The report concluded that there is "a linkage between threats and harm to cooperators, on the one hand, and the use of court documents to identify those cooperators on the other" and that "the injuries and even acts of murder being suffered by cooperators present a compelling need for greater controls on access to criminal case information that can be used for this purpose." CACM determined that immediate action to address the problem was required, and adopted a series of recommendations that it proposes all districts should adopt by local rule or standing order. It also requested that the Rules Committee address whether a nationwide solution is required, resulting in the creation of this subcommittee. Specifically, this subcommittee has been charged with examining whether there are amendments to the Federal Rules of Criminal Procedure that could eliminate or minimize risks to defendants or witnesses cooperating in federal criminal cases.

The subcommittee first met by teleconference on February 25, 2016 and discussed generally whether amending the Federal Rules of Criminal Procedure was needed, appropriate, and whether doing so would have a measurable impact. At the end of that meeting, the Department of Justice (DOJ) was asked to survey some of the United States Attorney offices (USAO) most impacted by this issue to determine what measures they were currently taking to protect the identity of cooperators, and how those measures were working. The Department conducted such a survey and drafted a preliminary report, but was later informed the results, if submitted to the subcommittee, would be made public. In light of the sensitivity of the information, in particular, the notion that if some of the specific measures being taken in the different districts would be rendered useless if publicized, we provided the district specific

findings directly to the Federal Judiciary Center to incorporate into their ongoing study of the issue, and summarize the findings more generally below.

The Advisory Committee for the Criminal Rules met in Washington, DC on April 18th and discussed CACM recommendations, as well as the work of the subcommittee. The consensus was that the issue was an important and complicated one that merited further study. At the conclusion of the discussion, the Department was asked to develop and announce its position in regards to the CACM recommendations by Memorial Day, 2016.

II. USAO Survey

The Department, through its Executive Office of United States Attorneys (EOUSA) and with the support of the Attorney General's Advisory Committee (AGAC) Subcommittee on Criminal Practice, reached out to a number of USAOs to provide a description of the measures taken and their assessment of how those measures have generally worked. The USAOs were asked several questions for the purposes of this report, specifically:

1. **Is there a local rule or standing order in your district with respect to the protection of cooperation information in a plea agreement or at a plea hearing?**

2. **Is there a usual practice, informally adhered to by most judges in your district, with respect to the protection of cooperation information in a plea agreement or at a plea hearing?**

3. **Is your office satisfied with the practice or practices used in your district?**

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We received responses from fourteen (14) districts, and summarize their responses broadly below, identifying only those which have Local Rules or Standing Orders that are public.

RESPONSES FROM UNITED STATES ATTORNEY OFFICES

1. Is there a local rule or standing order in your district with respect to the protection of cooperation information in a plea agreement or at a plea hearing?

Of the 14 offices surveyed, only two replied in the affirmative, affirming they do have local rules or standing orders. These districts were NDTX, and EDPA.

2. Is there a usual practice, informally adhered to by most judges in your district, with respect to the protection of cooperation information in a plea agreement or at a plea hearing?

Some USAOs indeed cited a "usual practice' in their district, but others districts simply employ a variety of different measures, depending on the court or judge, or depending on the specific facts of the case. We describe the variety of measures, noting the districts that employ them, below:

Sealing court documents

The most common practice, unsurprisingly, is the sealing of the various documents that potentially indicate cooperation. The specific documents sealed, and the manner in which they are sealed, varies. Yet in most of the districts responding, the sealing of documents is done on a case by case basis, with courts relying on the parties to request sealing documents as needed. That indeed is the rule in EDPA:, judges will seal the record in the clerk's office. In other cases, they file the 5K motion separately from the sentencing motion, and the court will seal that.

In other districts, the court either asks the parties whether the plea agreement, transcript of the hearing, and plea documentation should be sealed, or simply does so at the request of the defense. Significant facts regarding a defendant's cooperation or reductions of sentence for cooperating are filed by the government in a separate sealed motion that is usually filed at the time of sentencing. The transcripts – or portions of them addressing cooperation – are then sealed upon court or defense motion.

A variety of sealing practices are used, the most common being sealing affidavits or letters detailing the nature and extent of a defendant's cooperation. However, different districts, and different judges take different approaches to sealing. In some, they seal the cooperation section of plea agreements, with the balance of the agreement filed publicly. Sometimes, they seal the entire plea agreement with cooperation provisions. Other times, they mark a plea agreement with cooperation provisions as a court exhibit for the plea proceeding, providing the agreement to the government to maintain until sentencing, and file the agreement publicly after sentencing. On occasion, they file the entire 5K1.1/3553(e) motion, including supporting affidavit or letter under seal.

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Separate sealed documents (attachments, letters)

Only one of the districts surveyed follows the CACM recommendation of including a sealed filing in every case, so as to avoid the mere fact of a sealed document to suggest cooperation. Indeed, NDTX utilizes a sealed plea agreement supplement in every case, regardless of cooperation. All plea agreement supplements are sealed as per a Special Order.

In one district, the terms of a cooperation agreement are not contained in the publicly filed plea agreement but rather, in a "side letter" that is signed by the defendant, defense counsel, and the AUSA. The judge taking the plea reviews and signs the side letter, acknowledging the court's awareness of the terms. The side letter is provided to the United States Probation Office for its use in preparing the presentence report, but it is never filed publicly, nor is its existence referenced in any publicly filed document nor is it openly referred to during any public proceeding. In one district, the cooperation agreement is drafted as an attachment and maintained in the USAO case file. In another, plea agreements for cooperators have a cooperation addendum which is discussed at the plea colloquy at sidebar and which is manually file-stamped by the Deputy Clerk. The cooperation addendum is either publicly filed or filed under seal. When it is not publicly filed, both parties maintain a copy.

Wording in Plea Agreements

Many USAOs make concerted efforts to ensure that plea agreements are free of references to cooperation. In one district, there is broad language in all plea agreements that suggests a defendant can cooperate if he/she chooses to do so. Since the cooperation language is in every plea agreement and not binding on any defendant, it is not evident that a defendant is cooperating based on the plea agreement alone.

Bench Conferences

A couple of USAOs cited the use of side bars or bench conferences to inform the court of cooperation information. In one district, Assistant United States Attorneys (AUSAs) file a sealed 5K motion prior to sentencing and address the motion in a sealed bench conference during the sentencing of the cooperating defendant. In another, the defense may ask that cooperation language be omitted from plea agreements, and then that aspect of the plea agreement is reviewed side bar. Likewise, at sentencing, the cooperation might be discussed side bar.

Timing

Several USAOs mentioned the use of timing to minimize the risk of identifying a cooperator. In one district, AUSAs file the motions just before the sentencing to avoid any cooperation information appearing in the Pre-Sentence Report (PSR) or having it available on PACER for too long prior to sentencing. The Federal Public Defenders (FPDs) also generally delay filing their safety valve debriefs in order to avoid any mention in the PSR. In one district, the typical practice is to delay the production of cooperator discovery until just before trial. In the absence of a contrary order from the court, that usually means until about 60 days before trial. In some, sentencing is delayed until the cooperator's cooperation is completed. Even then, since there are other motions filed under seal at the time of sentencing, it is not therefore evident that the defendant is cooperating.

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Additional protective measures

Although the above measures are mostly limited to those employed during the plea and sentencing stages, some USAOs employ additional protective measures during other stages of the investigation and prosecution. Some USAOs obtain protective orders for discovery materials which disclose cooperators. In some districts, defense counsel are prohibited from sharing the discovery with the defendant.

In one district, the standard order for pretrial discovery and inspection also states that temporary custody can be obtained in any case upon written request to the USMS. This eliminates the need to file a sealed motion – which would be consistent with 'snitching' – for temporary custody orders when proffering detained defendants.

One district that has a a practice as sealing also has a rule in relation to unsealing. There is a limited unsealing for purposes of producing discovery, where the cooperator testifies at trial. Depending on the circumstances, the cooperator's entire case is unsealed at the time of sentencing. In some circumstances, where there is an ongoing risk to the safety of the

cooperator, the cooperator's case remains under seal post-sentencing, even though the cooperator testified at trial about his/her cooperation plea agreement and guilty plea pursuant to that agreement.

No measures generally taken

Some USAOs noted that although they do employ measures when necessary, no measures are taken in the typical case. One district noted that in spite of their many cooperators, there are many cases where there is nothing sealed and where all aspects of cooperation are included in the public filings and record. Another noted that cooperation information is typically included in public plea agreements and addressed at public plea hearings. Very rarely, and only when there is a specific and credible threat, do they ask that plea agreements be sealed.

3. Is your office satisfied with the practice or practices used in your district?

The overall sense of the USAOs surveyed was that measures employed had positive effects, and the more uniformly applied, the better they worked. Below, we describe what measures were described as having positive effects, and what concerns were raised.

The two office that practice where there are explicit rules or practices – NDTX and EDPA – reported satisfaction with their practices. Most of the others also reported that the measures they employed, even if on an *ad hoc* basis, were mostly satisfactory. It was noted that measures such as sealing documents as described above, were most effective when coupled with Witness Security Program and collaborative efforts with the USMS.

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Nonetheless, it was noted that there are indeed flaws in these practices. There is a recognition that when the only sealed documents are those including cooperator information, others can monitor the sealed filings to get a sense of who is cooperating. Indeed, one district where the original practice was to seal cooperation plea agreements has now largely moved to describe the cooperation in an unfiled attachment. Even the measure of obtaining protective orders for discovery materials which disclose cooperators has a flaw, because the entire procedure can be undermined when a defendant decides to represent himself and the government is required to give the cooperator information to that defendant.

The districts with fewer measures, or more where they are seldom used, were the least satisfied with the *status quo*. They noted the lack of uniformity as a problem, stating predictability and uniformity from case to case which can easily make cooperators feel unsafe or exposed. And of course, there have been threats in certain districts against cooperating defendants, and although it is not clear that cooperation was learned from public plea agreements, there is a recognition that it is possible to learn of a defendant's cooperation by searching court files online.

Additional Concerns Raised and Ongoing Efforts

One USAO expressed concern that they could not control what the USPO does with the information gathered while compiling the PSR, which typically includes the cooperator's names and statements and can result in defendants sharing this information with each other. It is common knowledge that defendants arriving and/or returning to the jail or the BOP are asked by other inmates to provide a copy of their PSR, which may contain unsealed cooperation information.

Another concern cited was that some judges, for judicial economy, often insist that multiple defendants in a case be sentenced together, even if some of the defendants have cooperated against their fellow co-defendants, so that a defendant's cooperation has been discussed openly in front of co-defendants whose sentences were enhanced based on the information provided by the cooperator.

Survey Conclusions

As per the above, the districts with fewer measures, or more where they are seldom used, were the least satisfied with the *status quo,* whereas districts that implement measures are fairly satisfied, even if narrowly targeted to address only those cases that are likely to result in threats or harm. That said, there is a recognition that the *ad hoc* measures have their flaws, and indeed, the more explicit and uniform practices got the highest marks. However, we should note that the above represents only a fraction of USAOs across the country, and should be considered simply a snapshot of practices around the country rather than a definitive assessment of the value (or lack thereof) of the measures discussed. The FJC study, which is studying a broader sample and will attempt to correlate district specific measures with their impact, should further illustrate the efficacy of the measures.

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III. Department Position

As per the request from the Advisory Committee, the AGAC met and discussed the implementation of measures to prevent court documents from revealing the identity of cooperators. Much like the discussion at the subcommittee and the Advisory Committees, there was a recognition of the seriousness of the problem, of its complexity, and an acknowledgement of the potential First Amendment implications. There was also a recognition that what may work in one district may not work in another. Given that fact, the AGAC will distribute the proposed guidance to the U.S. Attorneys and request that they consider it and make a decision as to whether it meets the needs of each district, in conjunction with their Chief Judge and other stakeholders. That directive will be circulated immediately following the dissemination of the CACM recommendations.

As to potential amendments to the Criminal Rules that are at the basis of this subcommittee, the Department is not currently advocating for any such amendment. We believe that it would be useful to first see how the CACM recommendations are received by the district

courts throughout the country before taking any additional and broader measures. The Department is willing to continue the dialogue regarding such amendments as additional information becomes available.

We look forward to continuing to work with the subcommittee on this important issue.

cc: Professor Sara Sun Beale, Committee Reporter
Professor Nancy King, Committee Reporter

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U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

July 12, 2016

MEMORANDUM

TO: The Honorable Lewis A. Kaplan
Chair
Rules Subcommittee on Cooperators

FROM: Michelle Morales
Acting Director, Office of Policy and Legislation

SUBJECT: Efforts to Prevent Court Documents from Revealing the Identity of Cooperators: Supplemental Findings

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

On June 7, 2016, we submitted to the subcommittee a report summarizing the responses the Department received in response to a survey conducted of approximately a dozen United States Attorney offices (USAOs) to determine what measures they were currently taking to protect the identity of cooperators, and how those measures were working. In that memo, we also summarized the Department's position on the broader issue of whether there should be a uniform response throughout the country to better protect the identity of cooperators from appearing in court documents. As we noted there, the Department would advise the USAOs to consider the guidance to be issued by the Court Administration and Case Management Committee (CACM) and make a decision as to whether it meets the needs of each district, in conjunction with their Chief Judge and other stakeholders. Indeed, the guidance went out on July 1st, 2016, and the Executive Office of the United States Attorneys (EOUSA) promptly followed with the above message to all USAOs on July 8th.

Nonetheless, the Department has continued to research the issue to further explore the universe of measures implemented throughout the country, and how they are working. We conducted open source research of Local Rules and Standing Orders, and expanded our outreach to USAOs to both confirm our findings and get additional feedback on the measures. We paid particular interest to districts where they had measures similar to those recommended by CACM. Below, we summarize the results of this stage of those efforts.[1]

[1] As we noted in our previous memo, some of the information related to the specific measures being taken in the different districts is sensitive, as it would further help reveal the identity of cooperators, so we will be describing measures and their efficacy broadly.

1. Sealed Supplements in Every Case

In its interim guidance, CACM recommends that: "[i]n every case, all plea agreements shall have a public portion and a sealed supplement, and the sealed supplement shall either be a document containing any discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement. There shall be no public access to the sealed supplement unless ordered by the court." They also recommend that "[i]n every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant's cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court."

A number of districts have already implemented the practice of sealing supplements in plea agreements and/or sentencing memoranda. These districts include (but are not limited to):

- District of Alaska, D. Alaska Crim. R. 11.2(e) and 32.1(e)
- District of Delaware, per local practice
- Eastern District of Kentucky, E.D. Ky. Gen. Order 16-06
- Western District of Kentucky, W.D. Ky. Gen. Order 2010-06
- District of Maryland, per local practice
- Northern and Southern Districts of Mississippi, N.D. & S.D. Miss. Crim. R. 49.1(B)
- Western District of Oklahoma, W.D. Okla. Crim. R. 11.3
- District of Puerto Rico, D.P.R. Crim. R. 111(b) and (e)
- District of South Dakota, Stand. Order 03-04-2008
- Eastern District of Texas, E.D. Tex. Crim. R. 49
- Eastern District of Tennessee, E.D. Tenn. Crim. R. 89.3(h)-(k)
- District of Utah, D. Utah Crim. R. 11-1.
- District of Wyoming, per local practice

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We have reached out to the vast majority of the above districts, and they report that the measures are working well. They have faced no legal challenges or other significant obstacles. Many of the districts did report that the practice was a result of collaborative process between the district stakeholders, which is likely a significant factor in why it has been well received.

It bears noting that most of the districts that include the supplement in every case include boilerplate language in every public document, such as "the U.S. will file a plea agreement supplement in this case, as it does in every case…;" That aims to reduce the concern that the supplement itself is proof of cooperation, especially when noticed by those from other districts where supplements are not standard.

2. Automatic sealing of all motions related to reductions in sentence

In its interim guidance, CACM also recommends that "[a]ll motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court."

We have identified a number of districts that have Local Rules or Standing Orders which provide automatic sealing of not only Rule 35 motions, but also of motions under 5K1.1 and sometimes, other documents that telegraphs cooperation. These districts include (but are not limited to):

- District of Arizona, General Order 11-09 eff. 7/1/2011
- Northern District of Indiana, L.R. 5-3(c)(2)
- Southern District of Indiana, L.Cr.R. 49.1-2 (c)
- Northern District of Iowa, per practice
- Middle District of Louisiana, L.Cr.R.32(b)
- District of Minnesota, L.R. 83.10(g)(2)
- Northern and Southern Districts of Mississippi, N.D. & S.D. Miss. Crim. R. 49.1(B)
- District of Montana, D. Mont. Crim. R. 49.1
- Eastern District North Carolina, E.D. N.C. Amend. Stand. Order 09-SO-2
- District of North Dakota; D. N.D. Stand. Order 09-30-2011
- Western District of Pennsylvania, W.D. Pa. Crim. R. 49(D)
- Eastern District of Texas; Tex. Crim. R. 49
- Northern District of Texas, N.D. Tex. Am. Spec. Order 19-1
- Southern District of Texas, S.D. Tex. Admin. Proced. For Elec. Filing (6)(1)(c)
- Eastern District of Virginia, L.Cr.R.49(J)
- Western District of Washington, L.Cr.R 32(i); L.Cr. R. 55
- Eastern District of Wisconsin, E.D. Wis. Gen. R. 79(d)(5)
- Western District of Wisconsin, Admin. Order 311

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We reached out to the majority of the above districts, and they also reported general satisfaction with the practice of sealing certain documents automatically. In some districts, the practice required the clerk's office to implement special procedures under the Case Management/ Electronic Case Files (CM/ECF) system, and the processes work better in some districts than in others. For example, in some, the docket continues to reflect a sealed document, possibly flagging cooperation; in others, they have managed to find a workaround that obstacle.

3. Protection of presentence reports

Another recommendation in the interim CACM guidance is that "[c]opies of presentence reports and any other sealed documents, if requested by an inmate, shall be forwarded by the Chief Probation Officer or the Clerk of the Court to the warden of the appropriate institution for review by the inmate in an area designated by the warden and may neither be retained by the inmate, nor reviewed in the presence of another inmate, consistent with the institutional policies

of the Bureau of Prisons. Federal court officers or employees (including probation officers and federal public defender staff), community defender staff, retained counsel, appointed CJA panel attorneys, and any other person in an attorney-client relationship with the inmate may, consistent with any applicable local rules or standing orders, review with him or her any sealed portion of the file in his or her case, but may not leave a copy of a document sealed pursuant to this guidance with an inmate."

As noted by the recommendation, the Bureau of Prisons has a policy that prevents an inmate from having free access to his presentence report or other sealed documents or allowing review in the presence of other inmates. Our research of local rules and standing orders reveals that indeed, a majority of districts do have Local Rules and Standing Orders that refer to the confidentiality and general management of the use of presentence reports, with some explicitly stating how those documents can be accessed and by whom, many requiring court orders. It is our understanding based on our discussions with the U.S. Probation Office that in districts where there are no such explicit rules, it is because the presentence report is never actually filed, so there is no need to explicitly seal it. In any case, the evidence suggests that the recognition that presentence reports should be confidential and access to them very restricted is universal.

Nonetheless, our outreach to USAOs revealed that inmates occasionally still gain access to presentence reports and other documents that suggest cooperation (or not). We were unable to discern whether the existence of the rules had any practical impact on their access.

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4. Sealing duration

The CACM guidance recommends that "[a]ll documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis." Our open source research suggests that although most districts do seal indefinitely, several either order a specific duration on a case-by-case basis limitation[2], or have blanket duration, such as two years[3], or five years[4].

5. Other Practices

Our expanded outreach confirmed that the most common practice currently in use is the sealing of the various documents that potentially indicate cooperation. The specific documents sealed, and the manner in which they are sealed, varies around the country, and is intrinsically tied to the local practices and procedures, both formal and informal. Yet all recognize that when the only sealed documents are those including cooperator information, others can monitor the sealed filings to get a sense of who is cooperating. However, there is a measurable increase in the number of districts that have adopted measures similar to those recommended by CACM. Moreover, a number of districts we surveyed expressed interest in adopting the CACM measures.

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[2] District of Maine, District of New Jersey
[3] Eastern District of North Carolina
[4] District of New Hampshire

As noted above, the Executive Office of United States Attorneys notified all USAOs of the CACM guidance, requested that they consider it, and asked that they make a decision as to whether it meets the needs of each district in conjunction with their Chief Judge and other stakeholders. We recognize that although the outreach has revealed that the CACM measures have worked well where implemented, in every district where they have been implemented, the cooperator practice was a result of close collaboration with and the 'buy-in' of district stakeholders, and were adapted to existing local rules and procedures.

We look forward to continuing to work with the subcommittee on this important issue.

cc: Professor Sara Sun Beale, Committee Reporter
Professor Nancy King, Committee Reporter

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MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professors Sara Sun Beale and Nancy King, Reporters**

RE: **United States v. Lustig, Rule 11(a)(2)**

DATE: **August 21, 2016**

Judge Susan Graber of the Ninth Circuit Court of Appeals has called to the Committee's attention the split decision in United States v. Lustig, 2016 WL 4056065 (9th Cir. 2016), which revealed a disagreement about the meaning and effect of Rule 11(a)(2). The issue in Lustig is the test for evaluating harmlessness in the context of a conditional guilty plea under Rule 11(a)(2), which provides:

Cited in USA v. John Doe, No. 15-50259 archived on September 9, 2017

> **(2)** ***Conditional Plea.*** With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

In Lustig, the defendant plead guilty to using a cell phone to facilitate a prostitution offense under 18 U.S.C. § 1591, reserving the right to appeal from the district court's denial of his motion to suppress evidence obtained from several cell phones. On appeal, after concluding that the district court erred in denying the motion to suppress evidence obtained from the defendant's car phones, the court turned to the question whether the error was harmless. The majority concluded that the error was not harmless because it could have affected the defendant's decision to plead guilty. The test in conditional plea cases, said the court, is whether there is "a reasonable possibility that the error *contributed to the plea*." *Id.* at *11 (emphasis in original, citations omitted). Accordingly, the court reversed the conviction, remanding the case to permit the defendant to withdraw his guilty plea. The court stated that its analysis was in accord with the decisions of sister circuits, citing decisions from the Sixth Circuit, D.C. Circuit, and Second Circuit. It acknowledged, however, that the First Circuit had applied a different harmlessness standard that would be "even harder (or impossible) for the government to satisfy." *Id.* at *12 (*citing* United States v. Molina-Gomez, 781 F.3d 12, 25 (1st Cir. 2015)).

Judge Watford concurred, writing separately to highlight his view that the final sentence of Rule 11(a)(2)–"A defendant who prevails on appeal may then withdraw his plea."–leaves no

room for harmless error analysis. As long as a defendant has prevailed on appeal, Judge Watford argued, the Rule requires reversal. Under this view, when the defendant reserves the right to appeal a ruling under Rule 11(a)(2), the only question for the appellate court is whether the ruling in question was in error, and harmless error comes into play only in determining whether the district court's ruling could be affirmed.[1] In support of this interpretation of Rule 11(a)(2), Judge Watford cited decisions from the First Circuit and Fourth Circuits. Id. at *15.

The Lustig opinion is provided at Tab B.

The question is whether a subcommittee should be appointed to consider an amendment to the Rule 11(a)(2).

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[1]As Judge Watford explained:

> There is a place for harmless error review in the context of conditional pleas, but it differs from the kind of harmless error review the court engages in here. Appellate courts always have the authority to determine that, even though the district court's reasoning was flawed in some respect, the district court's bottom-line ruling is nonetheless correct and should be affirmed. Or, in like fashion, that the district court's ruling on a subsidiary issue was erroneous, but that the court's bottom-line decision to deny a suppression motion is still correct, albeit for reasons that differ from those given by the district court. *See, e.g.*, *United States v. Davis*, 530 F.3d 1069, 1083–85 (9th Cir. 2008). In those circumstances we say the district court's errors are "harmless" in the sense that they do not affect the ultimate disposition of the appeal—the district court's bottom-line ruling still gets affirmed.

TAB 7B

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From: donald_molloy[redacted]
Sent: Wednesday, August 3, 2016 12:24 PM
To: Sara Sun Beale [redacted]
Cc: King, Nancy [redacted]
Subject: RE: US vs Lustig 2016 WL 4056065

Judge Graber referred it as follows:

"If you have not already thought of this, you may want to suggest that the Criminal Rules group take a look at the newly published United States v. Lustig, No. 14-50549, 2016 WL 4056065 (9th Cir. July 29, 2016). There may be room to clarify Rule 11(a)(2). Best wishes."

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2016 WL 4056065
United States Court of Appeals,
Ninth Circuit.

United States of America, Plaintiff–Appellee,
v.
Michael Lustig, AKA George, Defendant–Appellant.

No. 14-50549
|
Argued and Submitted January
8, 2016 Pasadena, California
|
Filed July 29, 2016

Synopsis

Background: After his motions to suppress evidence obtained in warrantless searches of his cell phone and e-mail account and an internet website were denied by the United States District Court for the Southern District of California, Roger T. Benitez, J., 3 F.Supp.3d 808, defendant entered conditional guilty plea to three counts of using a cell phone to facilitate a prostitution offense. Defendant appealed.

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Holdings: The Court of Appeals, Friedland, Circuit Judge, held that:

[1] good faith exception to exclusionary rule applied to evidence seized during warrantless search of defendant's cell phones;

[2] four-day delay between searches of defendant's cell phones incident to his arrest and more comprehensive search at police station did not render station searches unconstitutional; and

[3] error in failing to suppress evidence obtained from unreasonable search of cell phones found in defendant's vehicle was not harmless.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Southern District of California Roger T. Benitez, District Judge, Presiding, D.C. No. 3:13-cr-03921-BEN-1

Attorneys and Law Firms

Timothy A. Scott (argued) and Nicolas O. Jimenez, Coleman, Balogh & Scott LLP, San Diego, California, for Defendant–Appellant.

Helen H. Hong (argued), Assistant United States Attorney; Peter Ko, Chief, Appellate Section, Criminal Division; Laura E. Duffy, United States Attorney; United States Attorney's Office, San Diego, California; for Plaintiff–Appellee.

Before: Paul J. Watford and Michelle T. Friedland, Circuit Judges and J. Frederick Motz,** Senior District Judge.

Concurrence by Judge Watford

OPINION

FRIEDLAND, Circuit Judge:

***1** The United States Supreme Court held in *Riley v. California*, ——U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), that the Fourth Amendment requires law enforcement officers to obtain a warrant before they may search an arrestee's cell phone. Approximately two years before that decision, an officer arresting Michael Lustig conducted warrantless searches, incident to the arrest, of cell phones found in Lustig's pockets. We must determine whether pre-*Riley* precedent provided a reasonable basis to believe such searches were constitutional. Because we hold that binding appellate precedent at the time of the searches did provide a reasonable basis to believe the searches were constitutional, the good-faith exception to the exclusionary rule applies to the evidence obtained from those searches. In addition, we must determine the effect of a concededly erroneous denial of a motion to suppress evidence obtained from separate searches of other cell phones found in Lustig's car. To do so, we first adopt our sister circuits' test for evaluating harmlessness

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in the context of a conditional guilty plea. Because the Government has not met its burden of establishing harmlessness under that test, Lustig must be given an opportunity to vacate his guilty plea if he so wishes. We thus affirm in part, reverse in part, and remand. [1]

I

***2** In June 2012, a task force consisting of local and federal law enforcement agencies conducted a sting operation to obtain evidence of prostitution offenses. To effectuate the operation, an undercover officer posed as a prostitute and placed listings on a classified advertisements website. Defendant-Appellant Michael Lustig responded to the advertisements and agreed to meet the undercover officer at a hotel in Encinitas, California. Lustig was arrested at the hotel for soliciting prostitution in violation of California law. Upon the arrest, Deputy Sheriff Chase Chiappino seized and searched cell phones found on Lustig's person and in his car.

Two cell phones were seized from Lustig's pockets incident to his arrest (the "Pocket Phones"). One was an Apple iPhone, which Chiappino, upon its seizure, unlocked by swiping across the screen. Chiappino observed that the phone opened to the website where the fake advertisement was posted, and he located the phone's number on its settings page. The other Pocket Phone was a Kyocera flip phone. Chiappino searched the Kyocera phone by viewing its call history and text messages and identifying its phone number. The search revealed text messages suggesting further involvement with prostitution.

Officers seized additional cell phones from Lustig's car, which was in the parking lot of the hotel (the "Car Phones"). At the scene, Chiappino searched those phones and found additional text messages regarding prostitution.

Four days later, Chiappino returned to searching the phones. He downloaded content from the phones and searched the phones' contacts in law enforcement databases. The parties dispute whether Chiappino searched the Car Phones or the Pocket Phones first, and whether evidence discovered in one set of phones motivated searches of the other.

In one of the Car Phones, Chiappino found text message exchanges suggesting prostitution activity with a contact named "Dominick." He searched that contact's phone number in law enforcement databases but found no match. He also found a contact named "Dominick" in one of the Pocket Phones (the iPhone), searched that phone number, and discovered a match to a twelve-year-old minor female, whom the officers thereafter referred to as "MF1."

In his investigation of the Kyocera Pocket Phone, Chiappino found a series of messages discussing libraries and bookstores with a contact named "Andrew." He searched for that contact's phone number in law enforcement databases and matched it to a fourteen-year-old minor female, "MF2."

Officers then located and interviewed MF1 and MF2 separately, and both confirmed that they had engaged in commercial sex activity with Lustig. According to a declaration filed by Chiappino but disputed by Lustig, MF2 also directed officers to a motel, where the officers eventually obtained video surveillance of Lustig entering and leaving a room with a female whom officers identified as MF1.

No warrants were obtained prior to any of these cell phone searches. Sixteen months later, however, the officers did obtain warrants to search two of the already searched Car Phones.

Lustig was indicted in the United States District Court for the Southern District of California on two counts of child sex trafficking in violation of 18 U.S.C. §§ 1591(a) and (b), based on his conduct with MF1 and MF2. During pretrial proceedings, Lustig moved to suppress the evidence found through the searches of the phones. He argued that the seizure of the Car Phones, and the searches of both the Car Phones and Pocket Phones, violated the Fourth Amendment. [2] The district court, after declining to hold a hearing, denied the motion approximately three months before the Supreme Court issued its decision in *Riley v.*

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California, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

***3** Regarding the Pocket Phones, the district court held that the searches were unconstitutional. It reasoned that "searching an arrestee's phone [without a warrant], beyond what is in plain view, is an unreasonable search under the Fourth Amendment ... where the crime charged is a misdemeanor," as Lustig's charge was at the time of arrest.[3] Nevertheless, the district court went on to conclude that the evidence found in the searches was admissible pursuant to the good-faith exception to the exclusionary rule. The court explained that at the time of the searches, the California Supreme Court in *People v. Diaz*, 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 (2011), had held that warrantless searches of cell phones seized from an arrestee's person incident to arrest did not violate the Fourth Amendment. The district court also noted that there were "no binding decisions to the contrary from the federal courts."

As to the Car Phones, the district court held that they were constitutionally seized, but that the warrantless searches of the phones' content were unconstitutional. The district court nevertheless declined to suppress evidence obtained from the Car Phones. Because the Government eventually attained—16 months later—a search warrant for the Car Phones, the district court reasoned that the evidence would inevitably have been discovered.

Lustig filed two motions to reconsider these suppression rulings, each of which the district court denied. Lustig subsequently entered a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). Under the plea agreement, Lustig pled guilty to three counts of violating 18 U.S.C. § 1952(a)(3) by using a cell phone to facilitate a prostitution offense under 18 U.S.C. § 1591, involving only MF2, rather than the original indictment's two counts for child sex trafficking involving both MF1 and MF2. The conditional guilty plea preserved Lustig's right to appeal the Fourth Amendment issues related to his motions to suppress.

After the plea was entered, the Government filed as part of its sentencing submissions the aforementioned declaration from Chiappino, which asserted that evidence concerning MF2 "was wholly untainted by" evidence from the Car Phones, and that officers "would have inevitably discovered" MF1 even if not for the Car Phone searches.

Lustig now appeals the denial of his suppression motions.

II

[1] **[2]** We review a district court's denial of a motion to suppress evidence de novo. *United States v. Fowlkes*, 804 F.3d 954, 960 (9th Cir. 2015). We review a district court's factual findings for clear error and its application of the good-faith exception de novo. *United States v. Camou*, 773 F.3d 932, 937 (9th Cir. 2014).

III

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Lustig advances two primary contentions on appeal. First, he argues that pre-*Riley* authority provided no reasonable basis for Chiappino to search without a warrant the contents of the Pocket Phones, and that the district court therefore erred in holding that the fruit of those searches was admissible under the good-faith exception to the exclusionary rule. Second, Lustig argues that the district court erred in declining to suppress the Car Phone evidence. On appeal, the Government concedes that the district court erred as to the Car Phone evidence, but argues that the error was harmless because it did not affect Lustig's counts of conviction. We address each issue in turn.

A

[3] In *Riley v. California*, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), the Supreme Court unanimously held that warrantless searches of cell phones seized incident to arrest violate the Fourth Amendment. *Id.* at 2495. There is thus no question that the searches of Lustig's Pocket Phones were unconstitutional. The question on appeal is instead whether the good-faith exception to the exclusionary rule nevertheless makes

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admissible the evidence found in the Pocket Phone searches. We hold that it does.

***4 [4] [5]** The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. To deter Fourth Amendment violations, courts apply the exclusionary rule to suppress evidence that has been unconstitutionally obtained. *Davis v. United States*, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). In circumstances in which "suppression fails to yield 'appreciable deterrence,' " however, the Supreme Court has held that "exclusion is 'clearly ... unwarranted.' " *Id.* at 237, 131 S.Ct. 2419 (alteration in original) (quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)). "[W]hen the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful ... the 'deterrence rationale loses much of its force,' " and therefore the exclusionary rule does not apply. *Id.* at 238, 131 S.Ct. 2419 (quoting *United States v. Leon*, 468 U.S. 897, 909, 919, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). In *Davis*, the Supreme Court held that such a "reasonable good-faith belief" exists when searches are conducted "in objectively reasonable reliance on binding appellate precedent." *Id.* at 238, 249–50, 131 S.Ct. 2419.

Davis involved a vehicle search during which the arrestee, Davis, was out of reaching distance of the car. Davis moved to suppress a revolver found inside the vehicle. *Id.* at 223–36, 131 S.Ct. 2419. The Eleventh Circuit had long approved of such searches, understanding the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), "to establish a bright-line rule authorizing substantially contemporaneous" automobile searches incident to arrest. *Davis*, 564 U.S. at 235, 131 S.Ct. 2419 (citing *United States v. Gonzalez*, 71 F.3d 819, 822, 824–27 (11th Cir. 1996)). The district court denied Davis's motion, consistent with the Eleventh Circuit's law at the time. While Davis's appeal was pending, however, the Supreme Court held in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), that vehicle searches pursuant to arrest are generally forbidden when the arrestee is out of reaching distance of the vehicle. *Davis*, 564 U.S. at 234, 131 S.Ct. 2419. The Supreme Court in *Davis* held that, although *Gant* made the search of Davis's car unconstitutional, the good-faith exception applied because the search had been "in strict compliance with" "binding appellate precedent." *Id.* at 240–41, 131 S.Ct. 2419.

[6] Here, the Government argues that, like the officers in *Davis*, Chiappino reasonably relied on then-binding appellate precedent authorizing his search of Lustig's Pocket Phones. The Government specifically points to *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), in which the Supreme Court held, seemingly as a categorical matter, that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.* at 235, 94 S.Ct. 467. The Supreme Court emphasized that "[t]he authority to search the person incident to a lawful custodial arrest ... does not depend on ... the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect," because once there is probable cause to arrest, "a search incident to the arrest requires no additional justification." *Id.* Applying this broad principle, the Supreme Court held that an officer had not violated the Fourth Amendment by searching a crumpled package of cigarettes in the arrestee's pocket without a warrant, or by seizing the heroin capsules hidden therein. *Id.* at 236, 94 S.Ct. 467.

We agree with the Government that, before *Riley*, it was objectively reasonable to have interpreted *Robinson* to announce a bright-line rule authorizing any search incident to arrest of any item found in an arrestee's pocket.

1

As a threshold matter, we recognize the obvious fact that *Robinson* did not involve searches of cell phones, and indeed could not have, given the state of technology at the time. Lustig argues that *Robinson*'s lack of factual equivalence to his case is alone sufficient to preclude application of the good-faith exception under *Davis*. But, as the Third Circuit has accurately observed, "[n]o two cases will be factually identical." *United States v. Katzin*, 769 F.3d 163, 176 (3d Cir. 2014) (en banc), *cert. denied*, —— U.S. ——, 135 S.Ct. 1448, 191

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L.Ed.2d 403 (2015). The Third Circuit has explained that the *Davis* inquiry "is not answered simply by mechanically comparing the facts of cases and tallying their similarities and differences. Rather, [it] involves a holistic examination of whether a reasonable officer would believe in good faith that binding appellate precedent authorized certain conduct." *Id.* The relevant determination is thus whether "the *rationale* underpinning the [binding appellate precedent] ... clearly authorized the [officers'] conduct." *Id.* at 173–74 (emphasis added); *see also United States v. Burston*, 806 F.3d 1123, 1129 (8th Cir. 2015) (considering whether the purported binding precedent "provide[s] a rationale to justify [the officer's] search"); *United States v. Stephens*, 764 F.3d 327, 337–38 (4th Cir. 2014) ("[I]t is the legal principle of [the precedent], rather than the precise factual circumstances, that matters."), *cert. denied*, —— U.S. ——, 136 S.Ct. 43, 193 L.Ed.2d 27 (2015); *United States v. Aguiar*, 737 F.3d 251, 260–62 (2d Cir. 2013) (rejecting the contention that binding appellate precedent must be "specific to the facts at hand").

***5** Our own case law is consistent with this approach to applying the good-faith exception. In *United States v. Thomas*, 726 F.3d 1086, 1094–95 (9th Cir. 2013), we held that the good-faith exception applied when officers relied on Supreme Court precedent that was silent on the key fact motivating the suppression motion. There, the defendant challenged as unconstitutional a drug-detection dog's touching of his vehicle during a dog-sniff inspection of the vehicle—an inspection that resulted in the discovery and seizure of marijuana. *Id.* at 1092. The defendant relied on two Supreme Court cases decided after the seizure in question for the proposition that the dog's physically touching his vehicle was an unconstitutional trespass prohibited by the Fourth Amendment.[4] *Id.* at 1092–93. We held that, whether or not the dog's physical contact with the car violated the Fourth Amendment under these later cases, Supreme Court precedent at the time of the incident categorically authorizing dog-sniff inspections at vehicle stops made the evidence admissible under the good-faith exception to the exclusionary rule. *Id.* at 1094–95 (citing *Illinois v. Caballes*, 543 U.S. 405, 410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) ("A dog sniff conducted during a ... lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment") (alteration in original), and *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) ("[A]n exterior sniff of an automobile" is permissible because it "does not require entry into the car.")). Although *Caballes* and *Edmond* did not address physical contact with a vehicle, we nevertheless held that the good-faith exception applied because neither case "so much as hinted that officers were to avoid contact" between the dog and the vehicle's exterior. *Thomas*, 726 F.3d at 1095. Because the binding case law at the time of the inspection "specifically *authorize[d]* a particular police practice"—exterior dog-sniffs at vehicle stops—"the absence of a previously expressed limit" on the categorical rule, rather than a prior endorsement of a particular subset of factual circumstances, was dispositive of the good-faith analysis. *Id.* (quoting *Davis*, 564 U.S. at 241, 131 S.Ct. 2419).

Following this approach, we reject Lustig's contention that the good-faith exception cannot apply here because, at the time of his arrest, there had not been any decision by this Circuit or the Supreme Court directly authorizing warrantless cell phone searches incident to arrest. If precedent had to constitute a factual match with the circumstances of the search in question for the good-faith exception to apply, it would make the good-faith exception a nullity because the exception would only apply when the search was necessarily constitutional under existing precedent.

Considering, then, the legal principles established by *Robinson* and not merely its specific facts, we conclude that *Robinson* was binding appellate authority that made it reasonable to search Lustig's Pocket Phones. Even the Supreme Court in *Riley*, which "decline[d] to extend *Robinson*" from physical objects to cell phone data, acknowledged that *Robinson* had established a "categorical rule," and that "a mechanical application of *Robinson* might well support" cell phone searches. 134 S.Ct. at 2484–85.[5]

Lustig argues, however, that the law governing warrantless searches of cell phones was unsettled at the time of the search, thus precluding objectively reasonable reliance on *Robinson*. In support, Lustig cites a handful

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of federal district court decisions and an Ohio Supreme Court decision pre-dating the searches here, which had held that cell phone searches incident to arrest were unconstitutional. *See, e.g.*, *United States v. Park*, No. CR 05–375SI, 2007 WL 1521573, at *6–9 (N.D. Cal. May 23, 2007); *State v. Smith*, 124 Ohio St.3d 163, 920 N.E.2d 949, 954 (2009).

***6** The *Davis* inquiry, however, is focused on binding appellate authority, which Lustig's cases are not. *See United States v. Pineda–Moreno*, 688 F.3d 1087, 1090–91 (9th Cir. 2012) (looking to Supreme Court and Ninth Circuit precedent in applying *Davis*); *see also United States v. Taylor*, 776 F.3d 513, 517 n.1 (7th Cir. 2015) (per curiam) (noting that courts applying *Davis* look to "circuit-level binding appellate precedent," but that "[c]ircuits without local precedent ... rel[y] on ... Supreme Court" precedent); *United States v. Barraza–Maldonado*, 732 F.3d 865, 867–68 (8th Cir. 2013) (for the *Davis* good-faith exception to apply, "officers performing a particular investigatory action ... must strictly comply with binding appellate precedent governing the jurisdiction in which they are acting"); *United States v. Aguiar*, 737 F.3d 251, 261 (2d Cir. 2013) ("binding precedent" under *Davis* "refers to the precedent of this Circuit and the Supreme Court"). Even if state appellate court decisions could serve as "binding appellate precedent"—a question we do not decide, *see infra* n.10—an Ohio state court appellate decision had no "binding" effect on the officers' searches of Lustig's phones in California. Lustig's contrary argument would suggest that police could not rely on Supreme Court precedent that seems to authorize the search in question if any district court or state court anywhere in the country disagreed about the breadth of that precedent. We decline to impose on law enforcement an obligation to constantly search for non-binding authority across all jurisdictions and to curtail their otherwise authorized activities as soon as any court casts existing precedent into doubt. [6]

Lustig contends that application of the good-faith exception here is precluded by our decision in *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014), which he argues has already held that the good-faith exception does not apply to pre-*Riley* warrantless cell phone searches. Lustig misconstrues *Camou*, which dealt only with the timing of searches following an arrest. In *Camou*, United States Border Patrol agents had stopped the defendant's truck at an inspection checkpoint and discovered an undocumented immigrant hiding in the truck. *Id.* at 935. The defendant was placed under arrest and agents seized his truck as well as a cell phone found in the cab of the truck. *Id.* One hour and twenty minutes after the defendant's arrest, an agent searched the cell phone and found photographic images of child pornography. *Id.* at 936. The defendant was indicted on child pornography charges and moved to suppress the images found on his cell phone. *Id.* The district court denied the motion and we reversed. *Id.* at 936–37. We held, *inter alia*, that the search of the phone was not incident to arrest because it was conducted at a time too remote from the arrest, and that the good-faith exception did not apply because the "governing law at the time of the search made clear that a search incident to arrest had to be contemporaneous with the arrest." *Id.* at 944–45 (citing *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996)).

Although *Camou*, in its broadest outlines, is a post-*Riley* case holding that the good-faith exception did not apply to a pre-*Riley* cell phone search, it did not address the central issue here—whether, when a cell phone is found during an otherwise unquestionably valid search incident to arrest, it may be searched during the arrest without a warrant. [7] Because *Camou* said nothing about the question we face here—and indeed never mentioned *Robinson* at all, let alone its relationship to *Riley*—it does not foreclose application of the good-faith exception to the searches of Lustig's Pocket Phones.

***7** Lustig's reliance on our recent decision in *United States v. Lara*, 815 F.3d 605 (9th Cir. 2016)—another post-*Riley* case that declined to apply the good-faith exception to a pre-*Riley* search of a cell phone—is similarly unavailing. *Lara* concerned a warrantless search of a probationer's cell phone pursuant to a probation agreement that included a "Fourth Amendment waiver." *Id.* at 607. The Fourth Amendment waiver provided that the probationer would submit his "person and property, including any residence, premises, container or vehicle ... to search and seizure at any time" by any officer, "with or without a warrant, probable cause, or reasonable suspicion." *Id.* The probationer was ultimately

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charged with being a felon in possession of a firearm and ammunition based on evidence discovered from a search of his cell phone. *Id.* at 608. The probationer moved to suppress that evidence. *Id.* On appeal, we held that the waiver language did not clearly authorize the search in that case, and that the search was not otherwise a reasonable probation search. *Id.* at 610, 612.

In addition, although we rejected the government's reliance on the *Davis* good-faith exception,[8] we specifically distinguished cases involving searches of cell phones incident to arrest: "It hardly needs saying that a search incident to arrest is not the same thing as a warrantless, suspicionless, probation search. Nor is a case dealing with an incidental search on all fours with a probation search." *Id.* at 614. Given this language in *Lara* making clear that the questions it addressed were distinct from the questions posed by searches incident to arrest, *Lara* does not help Lustig resist application of the good-faith exception here.

Finally, Lustig suggests that *Riley* tacitly rejected applying the good-faith exception to cell phone searches. He points to the fact that the Supreme Court in *Riley* unanimously rejected the argument that *Robinson* extended to cell phone searches as evidence that it was never reasonable to think that *Robinson* authorized such searches. But the Supreme Court suggested exactly the opposite when it observed, as noted above, that "mechanical application of *Robinson* might well support the warrantless searches at issue here." *Riley*, 134 S.Ct. at 2484.[9]

Because *Robinson*, by its terms, "specifically authorize[d]" the search incident to arrest of an object found on the arrestee's person, the good-faith exception makes admissible the evidence obtained during the searches of the Pocket Phones incident to Lustig's arrest.[10] *Davis*, 564 U.S. at 241, 131 S.Ct. 2419 (emphasis omitted). As the First Circuit observed in discussing another line of precedent, even though this bright-line rule "turned out not to be as categorical as [it] seemed, ... that is not a reason to penalize the police for applying [it] faithfully before [that] clarification[ ] occurred." *United States v. Sparks*, 711 F.3d 58, 67 (1st Cir. 2013).

2

***8** Lustig contends that even if the good-faith exception saves the searches of the Pocket Phones conducted at the hotel, the delay between those initial searches and the more comprehensive stationhouse searches undertaken four days later rendered the stationhouse searches unconstitutional. We disagree.

[7] In *United States v. Burnette*, 698 F.2d 1038 (9th Cir. 1983), we held that once an item "has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate uninterrupted possession of the police, may be conducted without a warrant." *Id.* at 1049. In specifically holding that a brief search of a purse incident to arrest and a more detailed warrantless search of the same purse later at the stationhouse were both constitutional, we emphasized the "necessarily reduced expectation of privacy one holds in his person after being placed under arrest" and the "necessarily reduced" expectation of privacy in an item already validly searched incident to arrest. *Id.* "Requiring police to procure a warrant for subsequent searches of an item already lawfully searched would in no way provide additional protection for an individual's legitimate privacy interests." *Id.* This reasoning applies to the searches here, whether delayed by four hours or four days. Because the Pocket Phones were lawfully seized from Lustig's person and immediately searched incident to arrest, *Burnette* fully authorizes the later searches. At the very least, it was reasonable for Chiappino to believe that four days was a permissible delay.

Lustig argues to the contrary, contending that the four-day delay is "far more egregious" than the one hour and twenty minute delay at issue in *Camou*. *See Camou*, 773 F.3d at 944–45. *Camou*, however, did not consider how a preliminary search at the time of arrest might affect a later search of the same item. In *Camou*, there was no search of the cell phone incident to arrest, so the delayed warrantless search *was* the initial search. *Camou* thus has no bearing here.

In sum, *Robinson* made it objectively reasonable to believe that the searches of the Pocket Phones were constitutional.

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We further conclude that *Burnette* authorized the subsequent stationhouse searches of the Pocket Phones, or at least provided a basis for a good-faith belief that those searches were lawful. We therefore affirm the denial of Lustig's suppression motion as to the Pocket Phones.

B

[8] Lustig also challenges the denial of the motion to suppress evidence obtained through the Car Phone searches. In its Answering Brief, the Government concedes, citing *United States v. Sullivan*, 753 F.3d 845, 855–56 (9th Cir. 2014), [11] that it did not present sufficient evidence to show that the 16-month delay between the seizure of the Car Phones and the officers' obtaining a warrant to search them was reasonable under the Fourth Amendment, and that the district court therefore erred in denying Lustig's motion. The Government argues, however, that the error was harmless. It contends that because Lustig pled guilty only to charges involving MF2, whom the Government asserts was identified exclusively through information obtained from the Pocket Phones, any evidence derived from the Car Phones was "immaterial to Lustig's conviction." We are not persuaded that this is the relevant harmlessness inquiry. Rather, as our sister circuits have held, the relevant question in the conditional plea context is whether the erroneous suppression ruling could have affected Lustig's decision to plead guilty. Because it could have, we reverse the suppression ruling on the Car Phones.

1

***9** As an initial matter, we agree with the Government's contention that harmless error review applies here. The Federal Rules of Criminal Procedure specifically provide, under the heading "[h]armless [e]rror," that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). And the Supreme Court has held that, generally, constitutional errors in criminal proceedings must be disregarded if the government can prove that they are harmless "beyond a reasonable doubt." *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Consistent with these general principles, our prior decisions have applied harmless error review in the Rule 11(a)(2) conditional plea context. [12] In *United States v. Richard Davis*, 530 F.3d 1069, 1083 (9th Cir. 2008), for instance, we held that a frisk of the defendant violated his Fourth Amendment rights and that the district court erred by failing to suppress the hashish oil discovered as a result of that frisk. Nevertheless, we held that the error did not mandate reversal because, even without the hashish oil, the officers had "sufficient [evidence] to establish probable cause to search [the defendant's] truck"—a search that ultimately led to discovery of the marijuana plants that formed the basis of the defendant's conviction. *Id.* at 1076, 1083–84. Therefore, "[a]ny error by the district court in failing to suppress the hashish oil was harmless." *Id.* at 1084; *see also, e.g.*, *United States v. DiCesare*, 765 F.2d 890, 896–99 (9th Cir.), *amended*, 777 F.2d 543 (9th Cir. 1985) (reviewing district court errors for harmless error on appeal from a conditional plea).

[9] Lustig's contention that harmless error review does not apply in the Rule 11(a)(2) context, and that *any* error, however slight or tangential, requires reversal with the opportunity to withdraw the plea, is incorrect in light of this precedent. Lustig rests his argument entirely on a statement in a footnote in our decision in *United States v. Mejia*, 69 F.3d 309 (9th Cir. 1995), that "[i]f *any* ruling that forms a basis for the conditional plea is found to be erroneous, we are required to permit the defendant to withdraw his plea." *Id.* at 316 n.8. In context, it is clear that this sentence was not stating a general proposition but responded instead to the particular facts of that case.

Mejia concerned two motions to suppress, relating to a confession and consent to search a home, respectively. Both the confession and the consent to search arose out of an allegedly unconstitutional interrogation. The error we held the district court to have made related to a continuance denial that prevented the defendant from presenting testimony needed to resolve material fact disputes about the interrogation. We explained in the same footnote that:

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> given the fact that the [two] motions [to suppress] were heard together, that they related to the same interrogation and involved overlapping issues, that the failure to give a *Miranda* warning can be a consideration when determining questions of consent, and that the court's error as to both motions was identical, we would conclude that, under all the circumstances, a showing of prejudice as to either would be sufficient to require a finding of error and a new hearing as to both.

***10** *Id.* This factual context shows that the statement Lustig relies upon cannot be interpreted to broadly foreclose harmless error review in all instances. Instead, it refers to the interrelated nature of the two motions and the conditional plea at issue in that case. Indeed, the need to show that an error was prejudicial in order for that error to trigger the right to vacate a plea was clarified in the same footnote by the phrase "a *showing of prejudice* as to either [motion] would be sufficient to require a finding of error and a new hearing as to both." *Id.* (emphasis added).

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This understanding of Rule 11(a)(2) is consistent with the approaches of other circuits, which likewise have applied harmless error type principles in the conditional plea context. *See, e.g.*, *United States v. Benard*, 680 F.3d 1206, 1212–15 (10th Cir. 2012); *see also United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014); *United States v. Leake*, 95 F.3d 409, 420 n.21 (6th Cir. 1996).[13] We thus agree with the Government that harmless error review applies to the district court's failure to suppress the fruit of the Car Phone searches.

2

[10] Having established that harmless error review applies in Rule 11(a)(2) appeals, we must now determine the standards that govern that review. The Government urges us to adopt a standard that defines an error as harmless when we can conclude, beyond a reasonable doubt, that the evidence erroneously admitted was "immaterial to [the defendant's] conviction." Our cases have not directly addressed this issue, but Rule 11(a)(2) itself and authority from our sister circuits cause us to believe that the correct standard is instead whether the government has proved beyond a reasonable doubt that the erroneously denied suppression motion did not contribute to the defendant's decision to plead guilty.

[11] The critical event for a defendant in a conditional plea context is the *decision* to plead guilty after considering what a trial would entail in light of the failed pretrial motions. Rule 11(a)(2) allows a defendant, having lost certain pretrial motions, to plead guilty while reserving the right to appeal those pretrial rulings. *See* Fed. R. Crim. P. 11, advisory committee's note to 1983 amendment (stating that the purpose of subsection (a)(2) is to avoid forcing "a defendant who has lost one or more pretrial motions" to "go through an entire trial simply to preserve the pretrial issues for later appellate review"). As the Tenth Circuit has held, unlike in cases decided by a jury, in which constitutional error will be harmless if the court concludes "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *United States v. Benard*, 680 F.3d 1206, 1213 (10th Cir. 2012) (quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. 824), for convictions based on conditional guilty pleas, the test must be "reformulated to determine whether there is a reasonable possibility that the error *contributed to the plea*," *id.* (emphasis added) (quoting *People v. Grant*, 45 N.Y.2d 366, 408 N.Y.S.2d 429, 380 N.E.2d 257, 264 (N.Y. 1978)); *see also United States v. Molina-Gomez*, 781 F.3d 13, 25 (1st Cir. 2015) (considering whether suppression of the contested evidence "would have affected [the defendant's] decision to plead guilty"). It is thus whether the evidence at issue in an erroneously denied suppression motion could have affected the defendant's decision to plead guilty, not whether the evidence was material to a charge to which the defendant pled, that determines whether the suppression error was harmless in a conditional plea context.

***11** **[12]** **[13]** The relevant inquiry in this case is thus whether there is a "reasonable possibility"[14] that the erroneously admitted Car Phone evidence contributed to Lustig's decision to plead guilty. *Benard*, 680 F.3d at 1213. This "reasonable possibility" standard is necessarily

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hard for the government to meet. This is because, as the Tenth Circuit has explained, "in the context of a plea, the record will be unlikely to contain enough information for an appellate court" to conclude beyond a reasonable doubt that the evidence did or did not contribute to the defendant's plea decision. *Id.* A "defendant's decision to plead guilty may be based on any factor inside or outside the record," *id.* (quoting *Grant*, 408 N.Y.S.2d 429, 380 N.E.2d at 264), and "only the defendant is in a position to evaluate the impact of a particular erroneous refusal to suppress evidence," *id.* (citation omitted) (quoting *Jones v. Wisconsin*, 562 F.2d 440, 445 (7th Cir. 1977)). "Accordingly, 'an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision [to plead guilty], unless at the time of the plea he states or reveals his reason for pleading guilty.' " *Id.* (alteration in original) (quoting *Grant*, 408 N.Y.S.2d 429, 380 N.E.2d at 265).

Applying these principles, the Tenth Circuit in *Benard* rejected the government's argument that the suppression error there was harmless because the key firearm evidence supporting the firearm conviction that determined the defendant's ultimate sentence was not affected by the error. *Id.* Instead, the Tenth Circuit held that it was unable to "conclude beyond a reasonable doubt that the district court's error did not contribute to [the defendant's] decision to plead guilty. The record does not indicate why [the defendant] decided to plead guilty, what other defenses or evidence he might have produced on his behalf, or how the altered bargaining positions of the parties might have affected his decision if his post-arrest statements had been properly suppressed." *Id.* at 1214.

Further, the Tenth Circuit rejected the government's contention in *Benard* that, on remand, the case should be limited to the defendant's firearm conviction because the suppression error implicated only the defendant's drug conviction. *Id.* The Tenth Circuit explained that a reviewing court should consider the error's effect on the "bargaining positions of the parties" in light of "the aggregate strength of all the incriminating evidence accumulated by the government," including evidence on other counts. *Id.* (alteration omitted) (quoting *People v. Miller*, 33 Cal.3d 545, 189 Cal.Rptr. 519, 658 P.2d 1320, 1325–26 (1983) (in bank)). "[F]inding the suppression error to affect only some counts of a multi-count indictment would interfere with the defendant's 'prerogative to *personally* decide whether to stand trial or to waive his rights by pleading guilty' to the various counts of the indictment." *Id.* (quoting *People v. Hill*, 12 Cal.3d 731, 117 Cal.Rptr. 393, 528 P.2d 1, 29 (1974), *overruled on other grounds by People v. Devaughn*, 18 Cal.3d 889, 135 Cal.Rptr. 786, 558 P.2d 872 (1977) (in bank)). Because the Tenth Circuit could not conclude beyond a reasonable doubt that the defendant "would still have agreed to waive his right to a jury trial as to either or both of the counts of conviction absent the district court's error," it remanded "both counts of conviction under Rule 11(a)(2)." *Id.* at 1214–15.

Other circuits are in accord with these principles. The Sixth Circuit in *United States v. Leake*, 95 F.3d 409 (6th Cir. 1996), for example, articulated a standard substantially similar to the Tenth Circuit's for determining when a defendant would be entitled to withdraw his plea, requiring consideration of "the probability that the excluded evidence would have had a *material effect on the defendant's decision to plead guilty.*" *Id.* at 420 n.21 (emphasis added). The D.C. Circuit has adopted a similar test. *See United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014) (quoting *Leake* to conclude that the defendant was entitled to withdraw his plea); *see also United States v. Burns*, 684 F.2d 1066, 1076 (2d Cir. 1982) (addressing conditional pleas prior to Rule 11(a)(2) and holding that failure to suppress evidence was harmless error because suppression "would not have altered appellant's decision to plead guilty").

***12** Recently, the First Circuit arguably applied a harmlessness standard even harder (or impossible) for the government to satisfy when it remanded a case to allow the defendant to withdraw his guilty plea despite noting that "it is highly unlikely that the suppression of [the statements in question] regarding drug trafficking activity ... would have affected [the defendant's] decision to plead guilty." *United States v. Molina–Gomez*, 781 F.3d 13, 25 (1st Cir. 2015). The First Circuit explained that determining whether the defendant would have pled guilty absent the error was "not our decision to make.... '[A] court has no right to decide for a defendant that his decision [to plead guilty] would have been the same had the evidence the court considers harmless

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not been present.' " *Id.* (second alteration in original) (quoting *United States v. Weber*, 668 F.2d 552, 562 (1st Cir. 1981)). The defendant "is entitled to determine for himself whether he still wishes to plead guilty given the suppression of the drug-trafficking-related statements." *Id.*

Insofar as *Molina–Gomez* may be read to mandate remand on *any* error without considering harmlessness,[15] our precedents applying harmless error review, described above, foreclose adopting such a blanket rule. *See, e.g.*, *Richard Davis*, 530 F.3d at 1083; *see also Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc) (holding that a three-judge panel is bound by prior circuit precedent unless "clearly irreconcilable ... intervening higher authority" "effectively overrule[s]" the precedent). We instead adopt the rule articulated by a plurality of the circuit courts, under which we must consider whether an erroneous denial of a motion to suppress contributed to the defendant's decision to plead guilty, and under which it is only the "rare [ ]" case in which we may definitively make the harmlessness determination necessary to preclude remand. *Benard*, 680 F.3d at 1213; *see also United States v. Mikolon*, 719 F.3d 1184, 1188–89 (10th Cir. 2013) (recognizing *Benard*' s standard for allowing the defendant to vacate the plea but concluding beyond a reasonable doubt that any error did not contribute to the defendant's decision to plead guilty because "[t]he government unequivocally represented to [the defendant] and the court that it would not seek to admit [the defendant's] statements at trial" and thereby took the contested statements "off the table").

Contrary to the Government's arguments, our precedent is not inconsistent with a Rule 11(a)(2) inquiry that looks to the decision to plead guilty rather than the relationship of the wrongfully admitted evidence to the conviction. Although we noted in *United States v. Sines*, 761 F.2d 1434, 1442 (9th Cir. 1985), that the evidence wrongfully admitted was "immaterial to [the defendant's] conviction," that case did not mention, much less consider, the essential distinction between evidence of underlying guilt and evidence that could contribute to a plea decision in the Rule 11(a)(2) context. Moreover, even if it had, it is unlikely that that distinction would have made a difference to the outcome of that particular case. *Sines* was an example of the "rare" case in which it was clear that the wrongfully admitted evidence made no difference either to the decision to plead guilty or to the conviction. The evidence at issue in *Sines* was the defendant's passport, which the prosecution could have used to corroborate a witness's testimony that the defendant was in Thailand at the relevant time. *Id.* We determined, however, that the passport was entirely unnecessary for that purpose because other ample and admissible evidence served the same function. *Id.* Furthermore, the prosecution did not even mention the passport as part of the evidence against the defendant during the defendant's nolo contendere plea colloquy, despite mentioning all of the other evidence that proved his presence in Thailand. *Id.* The passport was thus unambiguously not a factor in the case.[16]

***13** In sum, in light of the purpose and effect of Rule 11(a)(2) and our existing case law, we agree with the approach taken by at least the plurality of our sister circuits for analyzing whether an error is harmless under Rule 11(a)(2). If it is beyond a reasonable doubt that the error did not contribute to the decision to plead guilty, it will be considered harmless. Otherwise, the error will require a remand to provide an opportunity for the defendant to vacate the guilty plea.

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3

Applying this framework to the present case, we conclude that the Government has not met its burden of establishing harmless error. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1035 (9th Cir. 2001) (en banc) ("The burden of proving a constitutional error harmless beyond a reasonable doubt rests upon the government."). The Government asks and answers the wrong question when it argues that admission of the Car Phone evidence was harmless because it was "immaterial to Lustig's conviction." The relevant inquiry is whether the erroneous admission of the Car Phone evidence was immaterial to Lustig's decision to enter a guilty plea. Given the dearth of factual clarity in the record as to Lustig's plea considerations, and indeed as to what evidence, exactly, was derived from the Car Phones, we cannot conclude

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beyond a reasonable doubt that the Car Phone evidence did not contribute to Lustig's decision to plead guilty.

The Government centers its argument on its assertion that all of the evidence pertaining to MF2—which formed the basis for the only charges to which Lustig ultimately pled guilty—was obtained solely from the Kyocera pocket phone rather than from the Car Phones. But this argument "ignores the fact that the guilty plea was entered as part of an agreement involving all of the counts of the [indictment]," *Benard*, 680 F.3d at 1214 (alteration in original) (quoting *People v. Miller*, 33 Cal.3d 545, 189 Cal.Rptr. 519, 658 P.2d 1320, 1326 (1983) (in bank)) —an indictment that initially included not just counts related to MF2, but also counts related to MF1, about whom some evidence was found in the Car Phones. The express terms of Lustig's conditional plea make explicit that "[i]n exchange for Defendant's guilty plea ... the United States agrees to dismiss the Indictment without prejudice at the time of sentencing." Thus, Lustig's "decision to plead guilty to [the MF2-related counts in the superseding information] was not made in a vacuum independent of the evidence on [the MF1-related counts]." *Benard*, 680 F.3d at 1214. Considering the "bargaining positions of the parties" in light of the "aggregate strength of all the incriminating evidence accumulated by the [government]," *id.* (alteration in original) (quoting *Miller*, 189 Cal.Rptr. 519, 658 P.2d at 1325–26), the Car Phone evidence could have had some effect on Lustig's *decision to plead guilty* even if that evidence may not have supported the MF2-related counts of *conviction*.

An additional and independent reason to reject the Government's harmlessness argument is that it is unclear what evidence may have constituted the fruit of the Car Phone searches. The Government relies entirely on a single declaration by Deputy Chiappino for its assertion that none of the Car Phone evidence was used to locate the evidence needed to support the MF2-related charges. But this declaration was submitted at *sentencing*, long after the suppression motions were litigated, and Lustig never had an opportunity to challenge Chiappino's statements through cross-examination. Indeed, at oral argument before this court, the Government conceded that Chiappino's statements were not "tested below." Lustig, for his part, raises factual questions as to the order of the searches of the various phones and had asked the district court to hold a hearing to identify the fruit of the searches. Because the district court denied Lustig's motion to suppress the Car Phones, it never had occasion to hold such a hearing or to make a determination as to the exact fruit of the searches.

***14** For these reasons, we simply cannot know "how the altered bargaining positions of the parties might have affected [Lustig's] decision [to plead guilty] if [the Car Phone evidence and any fruit thereof] had been properly suppressed." *Benard*, 680 F.3d at 1214. We certainly cannot conclude, as the Government urges, that the Car Phone evidence was analogous to the redundant, essentially useless passport that the prosecution disclaimed as evidence in *Sines*. *See Sines*, 761 F.2d at 1442. [17] In light of the Government's failure to satisfy its burden of proving beyond a reasonable doubt that the district court's suppression error was harmless, we remand to allow Lustig the opportunity to withdraw his guilty plea. [18]

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IV.

The district court's denial of the motion to suppress evidence from the Pocket Phones is **AFFIRMED**. We **REVERSE** the district court's denial of the motion to suppress evidence from the Car Phones and **REMAND** for further proceedings consistent with this opinion.

WATFORD, Circuit Judge, concurring:

I join the court's opinion but write separately to highlight one aspect of the court's reasoning that I cannot fully embrace. The court holds that, even though we are reversing in part the district court's denial of Lustig's motion to suppress, he's not automatically entitled to withdraw his guilty plea. Instead, the court concludes that we must engage in "harmless error review" to determine whether the district court's partially erroneous denial of the motion "contributed to [Lustig's] decision to plead guilty." Maj. op. at ——, ——.

I do not think Federal Rule of Criminal Procedure 11(a)(2)—or basic principles of contract law, which govern plea

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agreements—permit any such inquiry. In my view, if our court does anything other than affirm in full the district court's denial of Lustig's suppression motion, he is entitled to withdraw his guilty plea without more. The harmless error analysis the court engages in has no place in this context.

That conclusion is dictated by the plain language of Rule 11(a)(2), a short, two-sentence provision added in 1983. The first sentence authorizes a new type of guilty plea—the "conditional" plea—that had not previously been sanctioned by rule or statute: "With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." Adding this provision was necessary because a number of courts had held, prior to the Rule's amendment in 1983, that conditional pleas were not permissible. A defendant either had to plead guilty unconditionally and waive appellate review of adverse pretrial rulings, or, if the defendant sought to preserve such review, he had to plead not guilty and proceed through trial, an often wasteful exercise with a foregone conclusion. *See* Fed. R. Crim. P. 11(a) advisory committee's note to 1983 amendments. Rule 11(a)(2) avoids that undesirable state of affairs by allowing a defendant, with the government's and the court's consent, to plead guilty on the condition that a specified adverse ruling is ultimately affirmed on appeal. *United States v. Carrasco*, 786 F.2d 1452, 1454 (9th Cir. 1986), *overruled on other grounds by United States v. Castillo*, 496 F.3d 947 (9th Cir. 2007). The second sentence of the Rule states what happens if the condition does not hold: "A defendant who prevails on appeal may then withdraw the plea."

***15** In a case in which the defendant reserves the right to challenge a single adverse ruling and that ruling ultimately gets reversed in full on appeal, the application of Rule 11(a)(2)'s second sentence is simple. The defendant has obviously "prevail[ed] on appeal" and as a result must be afforded an opportunity to withdraw his plea. *United States v. Botello–Rosales*, 728 F.3d 865, 868 (9th Cir. 2013) (per curiam). I think the application of the Rule is just as simple when, as in this case, the defendant prevails in part on appeal. As we said in *Carrasco*, a Rule 11(a)(2) plea is "conditioned on the appellate court's affirmance of the adverse pretrial ruling." 786 F.2d at 1454. If the appellate court does anything other than affirm the specified ruling (or rulings) in full, then the condition is not satisfied. That means, under basic contract law principles, that the defendant is entitled to withdraw from his end of the bargain. *See United States v. Bundy*, 392 F.3d 641, 649 (4th Cir. 2004). There is no place for an appellate court to decide that the partial victory the defendant won on appeal is too insignificant to warrant the defendant's backing out of the deal. *See United States v. Molina-Gomez*, 781 F.3d 13, 25 (1st Cir. 2015).

Here, Lustig agreed to plead guilty on the condition that the ruling denying his motion to suppress would be affirmed on appeal. It didn't get affirmed; it got reversed in part with respect to the car phones. Thus, the one condition Lustig placed on his agreement to plead guilty wasn't satisfied, and only he gets to decide whether the partial victory he won on appeal is too inconsequential to justify backing out of the deal.

The parties, of course, could have struck a different deal. Nothing in the language of Rule 11(a)(2) precludes a defendant and the government from agreeing that the defendant's guilty plea will stand unless he wins reversal in full of a particular adverse ruling. Or, in cases in which the defendant challenges several distinct adverse rulings, that his guilty plea will stand unless he wins reversal of all of them. That's why the drafters of Rule 11(a)(2) inserted the requirement that a conditional plea may be entered only with the government's consent—to ensure that the defendant could not insist upon reserving the right to appeal some inconsequential pre-trial ruling, the reversal of which would not have any appreciable impact on the outcome of the case. *See* Fed. R. Crim. P. 11(a) advisory committee's note to 1983 amendments ("As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence."). But the key point here is that if the parties do not qualify the condition that a particular adverse ruling must be affirmed on appeal in order for the plea to stand, then a defendant who wins even partial reversal will be entitled under the terms of the agreement to withdraw his plea. *See United States v. Mejia*, 69 F.3d 309, 316–17 n.8 (9th Cir. 1995).

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There is a place for harmless error review in the context of conditional pleas, but it differs from the kind of harmless error review the court engages in here. Appellate courts always have the authority to determine that, even though the district court's reasoning was flawed in some respect, the district court's bottom-line ruling is nonetheless correct and should be affirmed. Or, in like fashion, that the district court's ruling on a subsidiary issue was erroneous, but that the court's bottom-line decision to deny a suppression motion is still correct, albeit for reasons that differ from those given by the district court. *See, e.g.*, *United States v. Davis*, 530 F.3d 1069, 1083–85 (9th Cir. 2008). In those circumstances we say the district court's errors are "harmless" in the sense that they do not affect the ultimate disposition of the appeal—the district court's bottom-line ruling still gets affirmed.

***16** That kind of harmless error review is perfectly proper in the context of Rule 11(a)(2) pleas. *See United States v. Rivera-Nevarez*, 418 F.3d 1104, 1111–12 (10th Cir. 2005). It allows the court to determine, as the court did in *Davis*, that the defendant ultimately won *no* victory on appeal—not even a partial one—and thus that he cannot be said, in the language of Rule 11(a)(2), to have "prevail[ed] on appeal." In such cases, the court uses harmless error review to affirm in full the ruling that the defendant reserved the right to challenge on appeal. *See, e.g.*, *Davis*, 530 F.3d at 1083–85. The defendants in cases like *Davis* are not entitled to withdraw their conditional guilty pleas because the condition attached to their pleas is satisfied. This case has to come out differently because the condition attached to Lustig's plea was not satisfied. We did not affirm in full the district court's ruling on Lustig's motion to suppress.

In short, I agree with the court that Lustig's convictions must be vacated, and on remand he must be afforded an opportunity to withdraw his guilty plea. In my view, though, that result follows from an application of the plain language of Rule 11(a)(2) and basic contract law principles, not from an application of harmless error review.

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All Citations

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Footnotes

** The Honorable J. Frederick Motz, Senior District Judge for the U.S. District Court for the District of Maryland, sitting by designation.

1 In a concurrently filed memorandum disposition, we address and reject several secondary arguments Lustig raises in his briefing.

2 Lustig conceded that the Pocket Phones were properly seized incident to arrest.

3 Lustig was initially arrested for soliciting prostitution in violation of California Penal Code § 647(b). The state charge against Lustig was eventually dismissed.

4 Specifically, the defendant relied on *United States v. Jones*, —— U.S. ——, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (holding that attaching a GPS device to a car constituted a Fourth Amendment search), and *Florida v. Jardines*, —— U.S. ——, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (holding that a dog-sniff conducted in the curtilage of the defendant's home was a Fourth Amendment search).

5 The Fifth Circuit—before *Riley* and before the Pocket Phone searches at issue here—similarly understood *Robinson* to authorize searches of cell phones incident to arrest. *See United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007) (holding that, under *Robinson*, a valid custodial arrest permits a warrantless search of an individual's cell phone, including its call records and text messages). In *United States v. Flores–Lopez*, 670 F.3d 803, 810 (7th Cir. 2012), also decided before the Pocket Phone searches here, the Seventh Circuit likewise held that looking in a cell phone for the cell phone's number did not exceed what *Robinson* allows. Lustig is correct that the Seventh Circuit went on to discuss the unique features of cell phones, but it explicitly left "for another day" the constitutionality of a "more extensive search of a cell phone without a warrant." *Id.* The First Circuit eventually held that a search incident to arrest does not authorize the warrantless search of data on a cell phone seized from an arrestee's person, but it did so after the searches at issue

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here. *See United States v. Wurie*, 728 F.3d 1, 13 (1st Cir. 2013), *aff'd sub nom. Riley v. California*, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

6 A sufficient body of district court or state appellate court decisions could perhaps create enough uncertainty about the scope of prior appellate precedent to make it unreasonable to rely on that precedent. *See Davis*, 564 U.S. at 250–51, 131 S.Ct. 2419 (Sotomayor, J., concurring in the judgment) (arguing that when the "law in the area" is "unsettled," law enforcement officials should "err on the side of constitutional behavior") (quoting *United States v. Johnson*, 457 U.S. 537, 561, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)). We need not determine here whether that is so or precisely what would be required to create enough uncertainty because it is clear that, in light of *Robinson*'s seemingly broad and categorical holding, the handful of decisions that Lustig cites were not enough to make reliance on *Robinson* unreasonable.

7 Lustig also challenges the resumption of that initial search four days later, which we address below.

8 Because in *Lara* the government had not sought application of the good-faith exception in the district court, we held that the argument had not been preserved on appeal. *Id.* at 613. We nevertheless proceeded to explain that we would have rejected the argument on the merits even if not waived. *Id.*

9 Lustig also argues that because *Riley* affirmed the First Circuit's decision in *Wurie*, which rejected the government's good-faith exception arguments, *Riley* must have done so as well. But *Wurie* concluded that the government had *waived* the good-faith exception, not that the exception was inapplicable on the merits. *See Wurie*, 728 F.3d at 13–14 (holding that because the government "did not invoke the exception before the district court," it "entirely failed to carry [its] burden").

10 The Government argues that the California Supreme Court's decision in *People v. Diaz*, 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 (2011), supports the conclusion that Chiappino could reasonably believe that *Robinson* authorized the Pocket Phone searches. *Diaz* held that, under *Robinson*, searches of cell phones discovered directly from an arrestee's person comported with the Fourth Amendment. *Id.*, 119 Cal.Rptr.3d 105, 244 P.3d at 505–06. Lustig responds that *Diaz* is irrelevant because it is not binding *federal* appellate authority, and the searches of his phones were conducted by officers cross-designated as federal agents. Because we hold that *Robinson* provides the applicable binding appellate authority creating a reasonable basis for the Pocket Phone searches here, and because we may affirm on any ground supported by the record, *United States v. Albers*, 136 F.3d 670, 672 (9th Cir. 1998), we need not decide whether state court decisions such as *Diaz* have any relevance to the good-faith analysis here.

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11 This version of the *Sullivan* opinion cited by the Government was subsequently withdrawn and superseded by a revised opinion. *See United States v. Sullivan*, 797 F.3d 623 (9th Cir. 2015). The relevant portion remained substantively unchanged.

12 Federal Rule of Criminal Procedure 11(a)(2) provides:

> With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

13 *Peyton* and *Leake* framed the issue as whether the defendant had "prevail[ed] on appeal" for purposes of Rule 11(a)(2), rather than whether the district court error was "harmless." *See Peyton*, 745 F.3d at 557; *Leake*, 95 F.3d at 419–20 & n.21. However framed, the ultimate question is the same: when is a defendant entitled to withdraw his plea due to the district court's error? If an error is deemed harmless, then the defendant will not have "prevail[ed] on appeal," and vice versa.

14 In the Tenth Circuit's formulation, which we adopt here, concluding that there is a "reasonable possibility" that the error contributed to the plea decision is the opposite of concluding "beyond a reasonable doubt that the ... error did *not* contribute" to the plea decision. *Benard*, 680 F.3d at 1214 (emphasis added). In other words, an error will be harmless for Rule 11(a)(2) purposes if an appellate court can conclude beyond a reasonable doubt that the error did not contribute to the defendant's decision to plead guilty, but will not be harmless if there is a reasonable possibility that the error did contribute to the decision to plead guilty.

15 It is unclear to what extent, if any, the First Circuit intended to adopt a different standard than that articulated in *Benard*, given that it relied in *Molina–Gomez* on the same authority as *Benard* to establish an appellate court's limited role in determining harmless error under Rule 11(a)(2). *See Molina–Gomez*, 781 F.3d at 25 (quoting *Weber*, 668 F.2d at 562, and noting that *Weber* "adopt[ed] the rationale of the Seventh Circuit and numerous state courts," namely *Jones v. Wisconsin*, 562 F.2d 440 (7th Cir. 1977), *People v. Grant*, 45 N.Y.2d 366, 408 N.Y.S.2d 429, 380 N.E.2d 257 (1978), and *People v. Hill*, 12 Cal.3d 731, 117 Cal.Rptr. 393, 528 P.2d 1 (1974), all of which *Benard* also relied upon).

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16 The Government also relies on *United States v. Richard Davis*, 530 F.3d 1069 (9th Cir. 2008), to argue for a harmlessness standard that looks solely at the relationship between the evidence in question and the charges of conviction. But nowhere in *Richard Davis* did we discuss the import of the suppression error on either the defendant's ultimate conviction or his decision to plead guilty.

17 Although the district court indicated that Lustig's motion to reconsider the Car Phone suppression ruling was "moot" due to the Government's self-suppression of the Car Phone evidence, the Government never actually stated that it would refrain from using the Car Phone evidence to prosecute its case. Instead, it stated that "*to some extent* we don't intend to use the evidence from the cell phones seized in the car." This is a far cry from disavowing the Car Phone evidence altogether.

18 On remand, before Lustig is required to make a decision on whether to vacate his plea, Lustig should be given an opportunity to renew his motion to exclude any fruit of the Car Phone searches. *See United States v. Allard*, 600 F.2d 1301, 1305–06 (9th Cir. 1979) ("Because the question of taint was not fully explored below, we must remand for resolution of the remaining factual questions.").

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Survey of Harm to Cooperators: Final Report

Margaret S. Williams, Donna J. Stienstra, Marvin L. Astrada

February 12, 2016

In Print: Available for Distribution

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At the request of the Court Administration and Case Management Committee, the Criminal Law Committee, and the Committee on Defender Service, the FJC surveyed federal district judges, U.S. Attorney's Offices, federal defenders, Criminal Justice Act (CJA) district panel representative's offices, and chief probation and pretrial services offices about harm or threat of harm to government cooperators. Respondents reported a minimum of 571 instances of harm to defendants/offenders and witnesses in the past three years. Cases often involved harm to both defendants/offenders and witnesses. Respondents most often reported threats of physical harm to defendants/offenders or witnesses and to friends or family of defendants/offenders or witnesses. Defendants were most likely to be harmed or threatened when in some type of custody, while witnesses were either in pretrial detention or not in custody at the time of harm or threat. Respondents frequently reported court documents or court proceedings as the source for identifying cooperators. Concerns about harm or threat affected the willingness of both defendants/offenders and witnesses to cooperate with the government in the past three years. Overall, respondents generally agreed that harm to cooperators was a significant problem and that more needed to be done to protect cooperators from harm.

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Survey of Harm to Cooperators: Final Report

Prepared for the Court Administration and Case Management Committee, the Committee on Defender Services, and the Criminal Law Committee of the Judicial Conference of the United States

Margaret S. Williams, Donna Stienstra, and Marvin Astrada

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Executive Summary

In March 2015, pursuant to an August 2014 request made to the Federal Judicial Center, we surveyed federal district judges, U.S. Attorney's Offices, federal defenders, Criminal Justice Act (CJA) district panel representative's offices, and chief probation and pretrial services offices about harm or threat of harm to government cooperators. We summarize the results of the survey below.

- Respondents were asked to report harm to defendants/offenders and witnesses in the past three years for up to five cases. We limited the number of cases to five to prevent overtaxing respondents.
- Of 1,371 recipients, 976 completed the survey—a response rate of 71%.
- Respondents reported a minimum of 571 instances of harm to defendants/offenders and witnesses. Cases often involved harm to both defendants/offenders and witnesses.
- Among all types of harm or threat, respondents most often reported threats of physical harm to defendants/offenders or witnesses and to friends or family of defendants/offenders or witnesses.
- Defendants were most likely to be harmed or threatened when in some type of custody, while witnesses were either in pretrial detention or not in custody at the time of harm or threat.
- Respondents frequently reported court documents or court proceedings as the source for identifying cooperators.
- Respondents reported that concerns of harm or threat affected the willingness of both defendants/offenders and witnesses to cooperate with the government in the past three years.
- Respondents generally agreed that harm to cooperators was a significant problem and that more needed to be done, by the judiciary and/or the Bureau of Prisons, to protect cooperators from harm.

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Introduction

In August 2014, Judge Julie Robinson, then chair of the Court Administration and Case Management Committee (CACM), asked the Federal Judicial Center (FJC) to conduct a study to determine the number of offenders harmed or threatened with harm because they cooperated, or were suspected of cooperating, with the government. The population of concern included inmates who were post-conviction and in the custody of the Bureau of Prisons (BOP) and identified as cooperators through the use of court documents.[1] The request, made on behalf of CACM, the Criminal Law Committee, and the Committee on Defender Services, asked that we survey federal defenders, Criminal Justice Act (CJA) panel attorneys, federal prosecutors, and probation officers and ask them to report the number of offenders harmed or threatened with harm. We added district judges, witnesses, pretrial services offices, and pretrial detention to the study design as a result of early discussions with staff from the Administrative Office of the U.S. Courts (AO staff).

After receiving feedback from the three requesting committees, the Executive Office for U.S. Attorneys (EOUSA), and AO staff, the FJC designed a research study involving Web surveys of the groups listed above. The design of the survey instrument included asking the same basic questions of all groups, with additional questions targeted to specific populations based on which ones were most likely to have the information sought. The need to target questions to specific groups resulted in multiple versions of the survey instrument (see below). The FJC worked closely with the CACM Privacy Subcommittee (Subcommittee) to develop questionnaires that would acquire the needed information and be understood by recipients.

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The Subcommittee approved the questionnaires on February 24, 2015.[2] The five groups surveyed included all chief district judges, all district judges (active and senior status), U.S. Attorney's Offices, federal public defender and CJA district panel representative's offices, and chief probation and pretrial services offices. We obtained email lists for each group from various sources, including staff of the AO and EOUSA, as well as electronically available sources. Several groups made efforts to alert respondents to the survey before the initial mailing. In September 2014, Judge Julie Robinson, Judge Catherine Blake, and Judge Irene Keeley, as chairs of their respective committees, sent an initial letter to all district judges alerting them to the problem of harm to cooperators. Several other groups made efforts to alert respondents to the study at the end of February 2015, days before the survey went into the field. The EOUSA sent an email to all U.S. attorneys alerting them to the importance of their participation in the survey. The probation and pretrial services office of the AO included notification of the survey in a weekly email to all probation and pretrial services chiefs. Judge Terry Hodges, the chair of CACM, sent a letter to all circuit chief judges asking for their help in alerting judges in their circuits to the forthcoming survey invitation. Lastly, staff from the defender services office of the AO

1. Letter from Judge Julie A. Robinson, chair of the Committee on Court Administration and Case Management, to Judge Jeremy D. Fogel, director of the Federal Judicial Center, August 14, 2014.

2. We asked the initial set of questions, regarding cases involving harm and the details of that harm, of all respondents, with slight variations in wording. For most respondents, we referred to "defendants and/or witnesses" while for chief probation and pretrial services offices we referred to "defendants/offenders and/or witnesses." We use these terms interchangeably in this report.

mentioned the survey to participants at their federal defender meeting prior to survey distribution.

Survey Implementation and Administration

On March 3, 2015, we distributed the surveys electronically. A cover email, signed by the chairs of the three requesting committees, explained the purpose of the survey and included the link for completing the survey.[3] Two weeks later, we sent a reminder email to everyone who had not completed the survey. We sent a final reminder email on March 31, 2015, to everyone who had not yet completed the survey. The survey closed on April 8, 2015, although anyone asking to submit a late response was permitted to do so until we began drafting the report.[4]

A few issues pertaining to survey administration merit consideration before we present our analysis of the results. First, while chief district judges and district judges responded to the surveys for themselves, the other three groups of respondents reported for their offices. The efforts to coordinate office-wide responses made completion of the survey more difficult for these groups. Moreover, the results for all judges represent the experience of individual judges over the past three years, while the results for the other groups represent the experiences of an unknown, but substantially larger, number of people for that same period. If more harm is reported by the office respondents, this should not be considered an indication of anything more than inclusion of the responses of more people. These differences in respondent groups should be kept in mind as the results are discussed below.[5]

The overall response rates, shown below in Table 1, are quite strong. Chief probation and pretrial services offices responded at the highest rate, while district judges and U.S. Attorney's Offices responded at relatively lower rates, but still at levels sufficient for analysis.

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3. We provide a copy of this email and final versions of the survey in Appendix A. Because of an error in the survey software provided by the vendor, only half of the district judges received the email invitation on March 3. The remaining judges received the initial request for the survey on March 17, 2015. To ensure that these judges had ample time to complete the survey, we extended the field period of the survey. Like all respondents, the judges in this second wave received a follow-up email if they did not complete the survey; we sent the follow-up email on March 31, 2015. Thus, the first wave of judges received an invitation and two reminders, while the second wave received the follow up and one reminder. This error did not substantially affect the overall response rate of judges, as shown below.

4. A small number of respondents, either by preference or because of technical problems, requested to complete the survey on paper. For those submitting paper responses, FJC staff electronically entered their answers to all survey questions after the survey period ended.

5. While survey responses might be weighted in such circumstances, the results reported below are the unweighted survey responses. We did not weight survey responses for two reasons. First, we did not sample any of the respondent groups; we surveyed populations. Without a sampling frame, there is nothing by which to weight survey responses—except for probability of responding. We cannot weight by the probability of responding for a second reason: the respondent groups are not the same. Chief district judges and district judges responded as individuals. All other respondent groups were responding for an entire office, representing an unknown number of respondents. Because we do not know how many people each response represents, we cannot weight the responses as such. For these reasons, and given that we report only the frequencies with which responses occurred, it is not problematic to report unweighted survey results.

Table 1. Survey Response Rate

Respondents	Questionnaires Sent	Questionnaires Completed	Response Rate
Chief District Judges	94	77	82%
District Judges	929	611	66%
U.S. Attorney's Offices	93	62	66%
Federal Defenders and CJA District Panel Representative's Offices	178	128	72%
Chief Probation and Pretrial Services Offices	113	110	97%
Total	**1,407**	**988**	**70%**

A second issue of survey administration affected the responses of judges more than the other groups, though its impact was minimal. The list of district judges participating in the survey included active and senior status judges. Some senior status judges are in inactive status, while others are in active status, but no longer hear criminal cases as a matter of preference. Additionally, judges newly appointed to the bench may not have criminal cases on their docket, especially if they served in the U.S. Attorney's Office prior to their appointment. Thus, there are two groups of judges—those very new to the bench and those very senior—for whom a survey of harm to cooperators in criminal cases did not apply. To include the responses of these individuals would bias the number of instances of harm reported toward zero (they know of no instances of harm, but that is because they have no criminal cases). While, ideally, we would have excluded these judges from the survey population at the outset, such information was not systematically available on all judges, and we were not able to do so. After receiving the survey invitation, a number of judges contacted the FJC regarding their experience with criminal cases, either because they were new to the bench or they were in senior status (inactive or active but not taking criminal cases). We gave judges who contacted the FJC the option to complete the survey if they chose.[6] We closed the surveys of judges who opted against completing the survey for these reasons and removed them from the reported results. These exclusions bring the total response rate for district judges to 599 completed surveys out of a possible 899 district judges, or 67% of potential respondents. Table 2 shows the final response rates, after excluding those judges who notified us they were ineligible to answer the questionnaire.

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6. A small number of additional judges were unable to complete the survey during the allotted time for other reasons, including poor health and international travel. We also removed these judges from the survey results reported below. Undoubtedly, more newly appointed and senior status judges could have been excluded from the survey totals. If the judges did not contact the FJC, however, there is no way for us to know this information.

Table 2. Revised Survey Response Rate

Respondents	Questionnaires Sent	Questionnaires Completed	Response Rate
Chief District Judges	94	77	82%
District Judges	899	599	67%
U.S. Attorney's Offices	93	62	66%
Federal Defenders and CJA District Panel Representative's Offices	178	128	72%
Chief Probation and Pretrial Services Offices	113	110	97%
Total	**1,377**	**976**	**71%**

We addressed a third issue of survey administration, related to the first, after closing the survey on April 8, 2015. For some survey respondents (but only in groups coordinating an office response) duplicate answers appeared in the data. Typically duplicates occurred because a respondent began answering the survey and then thought a designee, such as the criminal division chief in a district office of the U.S. attorneys, would be better suited to answer the questions. In all instances of duplicate answers, respondents notified the FJC of the issue and asked for a second survey link to be emailed to the designee. We compared the two responses to ensure no loss of data occurred with the removal of duplicate (partial) answers. One response, whether for an individual or office, remains in the data.

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Despite these three issues, we find the survey results to be robust and reliable. Given the difficult nature of recalling the detailed events of the last three years, the limited timeframe for completing the survey, and the required efforts to coordinate a single office-wide response for the non-judge groups, a 71% response rate is high. Undoubtedly, the advance efforts to alert recipients to the survey, the follow-up reminders, and the salience of the topic contributed to so many people completing the survey. The high response rate increases our confidence in the results of the survey, reported below.

The geographic distribution of the survey responses further increases our confidence in the results. At least one judge from each of the 94 judicial districts responded to the survey, and 61% of the districts had responses from all groups. Defender and panel representative's offices responded from 83 different districts. The responses of probation and pretrial services offices represent the experiences of 92 different judicial districts. U.S. Attorney's Office responses were distributed across 62 judicial districts. Overall, we are confident the responses to the survey represent the national picture.

We should note one final issue affecting the reporting of the survey responses. Judges, defenders, prosecutors, probation officers, and pretrial services officers all see the same defendants/offenders and witnesses at different times. The instances of harm reported below undoubtedly include responses that detail the events in the same case from the perspectives of the judge, the attorneys, and the probation officers. Totaling the instances of harm across these groups risks over-counting the same event multiple times. Because we have no way of knowing if all groups are reporting the same events from different per-

spectives, we cannot remove any duplicate reporting of events. Instead, the results below report the range in instances of harm.

Analysis of Results

The first question on the survey asked respondents to report whether they knew of an instance in the past three years of harm or threat to defendants/offenders or witnesses (or their friends or family) because of the defendant/offender's or witness's cooperation with the government. If the respondent answered yes, we asked additional questions about the details of the harm or threat (described below). After the respondent answered the detailed questions on the first case, the initial screening question, followed by the detailed questions, repeated for up to five cases.

The results in Figure 1 show the percentage of respondents in each group reporting harm on each of up to five cases. The percentages reported for cases two through five were calculated for the subgroup that reported harm in the prior case. Ninety-seven percent of the 62 responding U.S. Attorney's Offices reported harm in a first case, while 49% of the 599 responding judges, 68% of defender offices, and 73% of probation offices reported a first case with harm.[7] Of the U.S. Attorney's Offices reporting harm in a first case, 95% reported harm in a second case as well. Overall, as a percentage of respondents, U.S. Attorney's Offices reported harm with greater frequency than any other group. In fact, more than 50% of U.S. Attorneys Offices responding to the survey reported harm in all five cases. Only 3% of U.S. Attorney's Offices reported no instances of harm or threat, whereas 27% of probation offices, 32% of defender offices, and 51% of the judges reported no instances of harm or threat.

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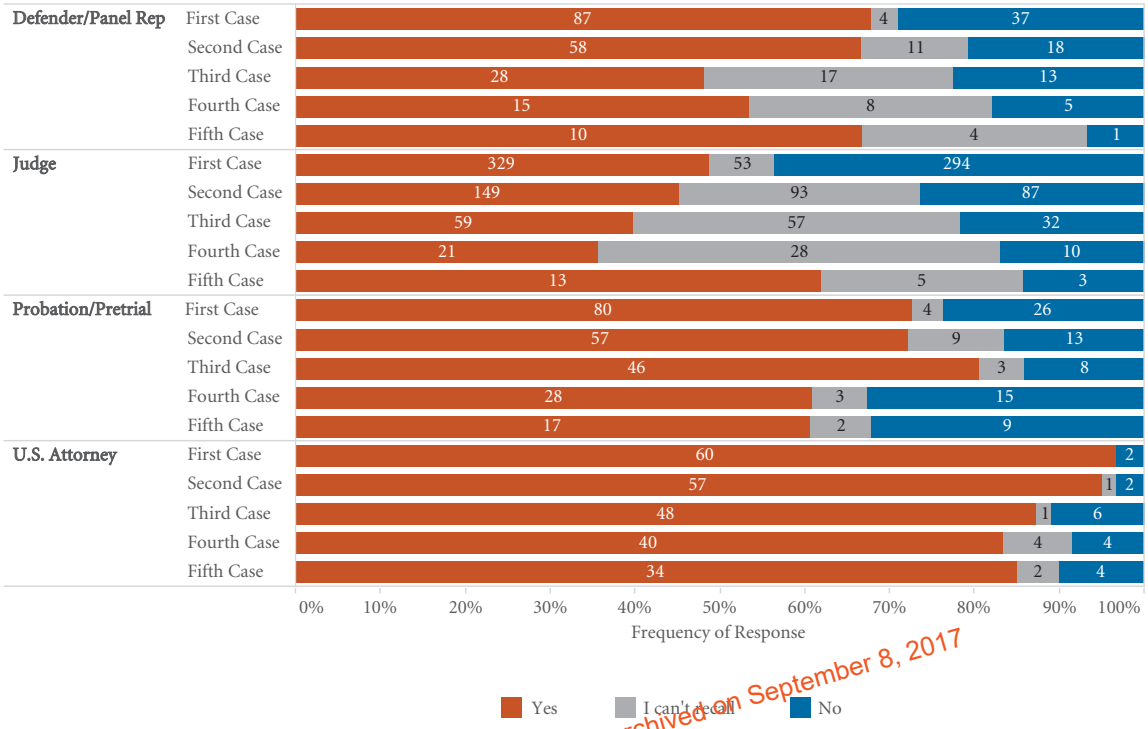
7. Twenty-nine of the judges reporting no instances of harm stated later in the survey that they knew of no instances of harm because they were very new to the bench or in senior status and no longer hearing criminal cases. If we removed these judges from the total, as we did with the judges who alerted us to their status prior to completing the survey, the percentage of judges reporting on a first case of harm would be just over 50%.

Figure 1. Frequency of Harm or Threat Reported, by Respondent Group[8]



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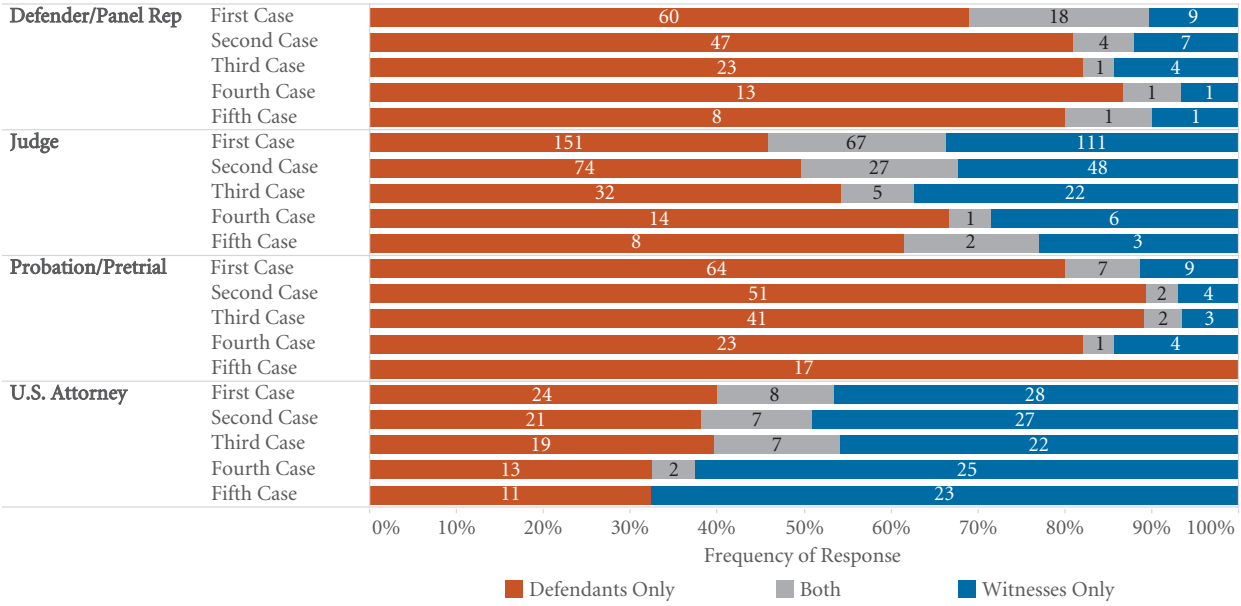
After reporting an instance of harm, respondents then described whether the harm or threat was directed at defendants/offenders or witnesses (or their family or friends). A respondent could choose both defendants/offenders and witnesses, if both were involved in the same case. Figure 2 shows the frequency with which defendants/offenders and witnesses were the subject of harm across all reported incidents. Respondents often reported harm to both defendants/offenders and witnesses in the same case.

8. Figures in this report, including Figure 1, show the frequency of an event by respondent groups, both as a percentage of the group and a number of reported events. The bars in Figure 1 show the frequency of harm as a percentage of the group, while the number on the bar is the actual number of instances of harm reported. For purposes of reporting, chief district judges and district judges are combined into a single group for all tables with one exception: Table 10, which reports district steps to protect cooperation information, includes the responses of chief district judges only, as they were the only group to receive that question.

Figure 2. Frequency of Harm or Threat to Defendants and Witnesses, by Respondent Group



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Taking these facts together, the results of the survey show that the 976 questionnaire respondents reported at least 571 instances of harm or threat to as many as 381 defendants/offenders and 292 witnesses in the past three years. These numbers, which are those reported by the judicial respondents, are the minimum number of instances of harm or threat. We assume that some number of instances reported by the other three groups of respondents are not duplicates of the instances reported by the judges and thus the actual incidence of harm and threat is higher.

Both the frequency of occurrence and the number of people harmed or threatened in the past three years are sufficient to provide details about the nature of threats and harm (reported below). While respondents did not always have complete information on the events that occurred, they provided a substantial amount of detailed information on the type of harm, the location of the individual at the time harm occurred, and the source for identifying cooperators. We report summaries of the details for defendants/offenders and witnesses separately below. The results are aggregated across all cases, though we would expect that the details of the first case are somewhat more cognitively available to the respondent (as it is the first case occurring to them) than the details of the fifth case. Of course, availability bias is more likely to be a problem for individual judicial respondents than other groups who provided an office response.

Harm or Threat to Defendants/Offenders

When respondents reported an instance of harm or threat to a defendant/offender, we asked them to detail the type of harm or threat that occurred. These details included the type of harm or threat, the location of the defendant/offender at the time of harm or threat, and the source used to identify the defendant/offender as a cooperator.

Types of harm or threat to defendants/offenders

Respondents could select as many categories as described the case in question.[9] If, for example, a defendant/offender was threatened with physical harm and then beaten, the respondent could check the boxes for both threats of physical harm and actual physical harm. Figure 3 reports all threats and harm to defendants/offenders reported by all respondent groups for all instances in the past three years. While the bar represents the frequency of the answer as a percentage of the group, the number on the bar is the actual number of responses in that category. Respondents most often reported threats of physical harm to the defendant/offender and to the friends and family of the defendant/offender. Over 80% of the incidents reported involved threats of physical harm, a minimum number of 339 instances. The minimum number of instances of actual harm (murder and other physical harm) is 133.

Those selecting the "Other" category detailed a variety of types of harm to the defendant.[10] While some of the incidents could be classified into the existing categories, two additional categories emerged from the "Other" responses: Internet/community/general threats and property damage. Internet/community/general threats included responses such as "told family members to put his name on rats.com," "flyers posted in his neighborhood," "[d]efendant's status as a cooperator was put on the internet," and "[n]ame posted on Top Snitches Facebook page." Property damage included shooting at the cars or houses of defendants, or harm to pets. We report the remaining details, which are too varied to categorize, in Appendix B.

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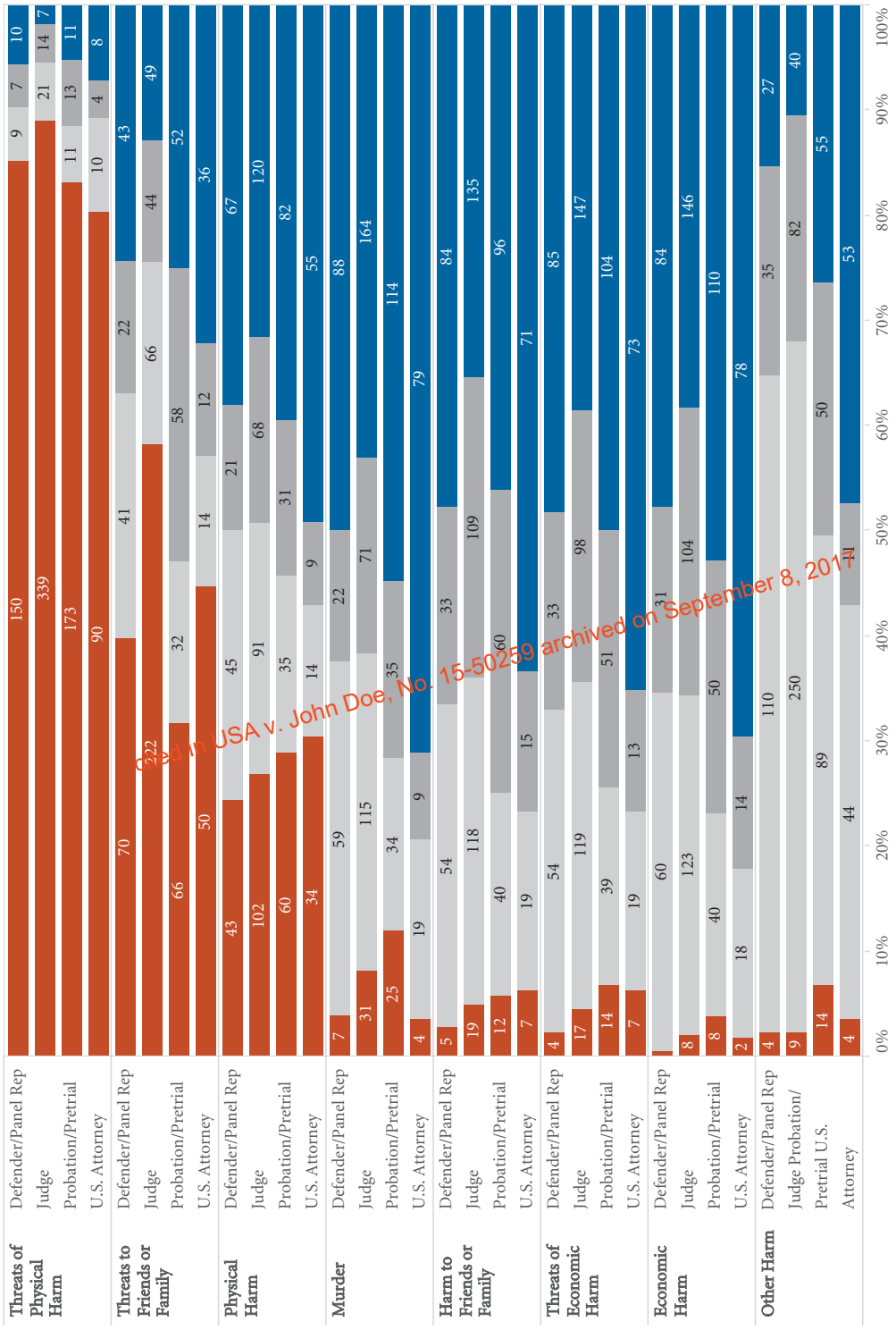
Table 3. Categories of "Other" Harm or Threat to Defendants Specified by Respondents

Category of "Other" Harm or Threat	Number of Responses
Internet/Community/General Threats	16
Existing Categories	9
Property Damage	9
Other	5

9. It is for this reason that the types of harm or threat reported are higher than the number of defendants harmed or threatened.

10. When the questionnaire gave respondents the option to choose "Other," respondents were asked to specify what they meant. For every question where respondents could select "Other," we found instances of respondents selecting other without specifying what they meant, or writing in a specification without having chosen "Other." To prevent loss of information, the Appendices report all specified comments, regardless of whether "Other" was selected as a category or not. For each of the "Other" options, we made an initial attempt to categorize these comments. We report this categorization in the tables in the text, while the items coded into each category can be found in the Appendices. All specifications and open-ended responses reported in the Appendices were lightly edited for clarity and redacted to prevent identifying either the case or the respondent.

Figure 3. Frequency of the Type of Harm or Threat Directed at Defendants, by Respondent Group



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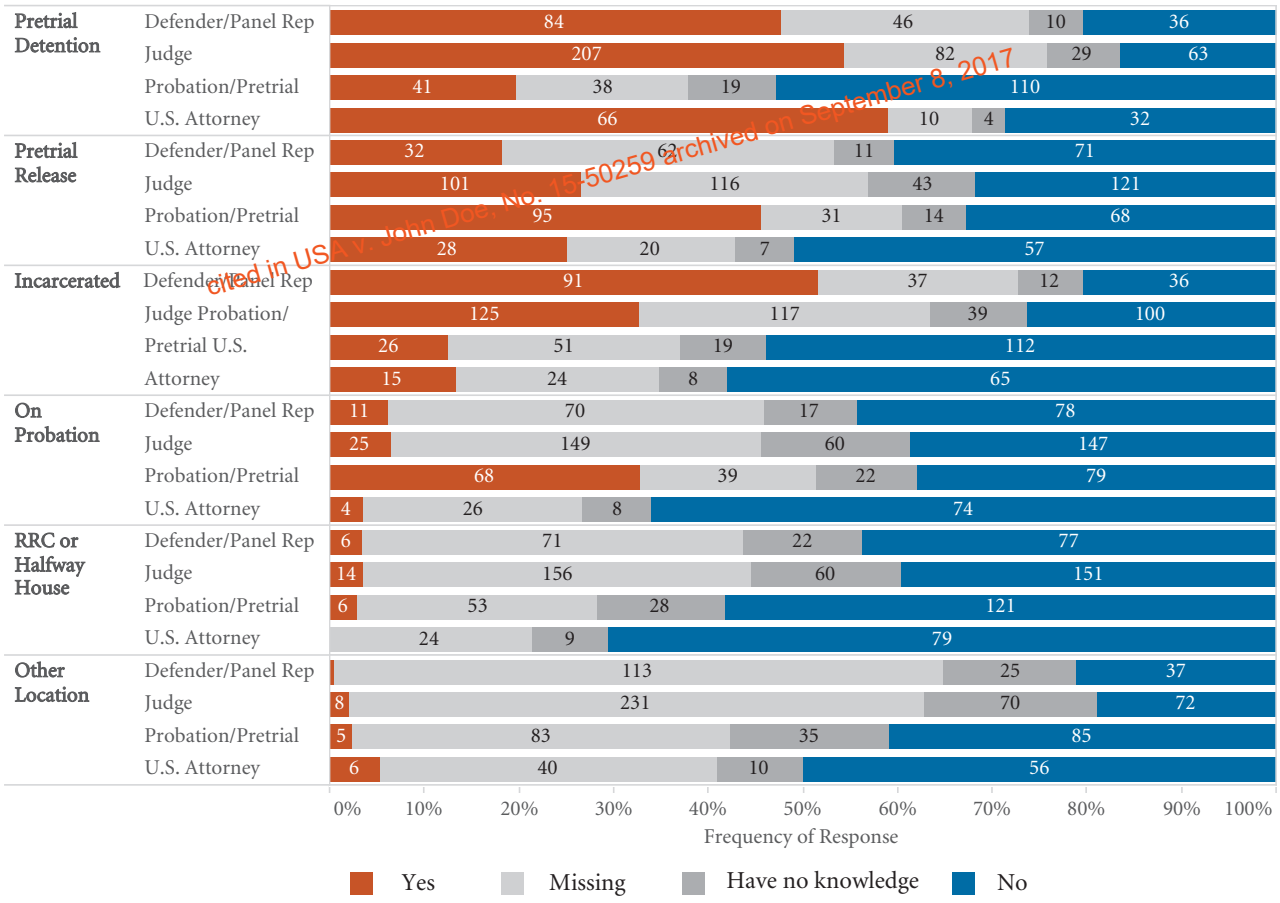
Location of the defendant/offender at the time of harm or threat

After reporting the details of harm or threat, respondents identified the location of the defendant/offender at the time the harm or threat occurred. Once again, because respondents reported multiple instances of harm or threat for each case, more than one location could be chosen. Figure 4 reports the number and percentage of respondents reporting each location across all respondents and all cases. Respondents most often reported that defendants/offenders were harmed or threatened while in pretrial detention—a minimum of 207 instances—followed by pretrial release and incarceration—a minimum of 125 instances. Chief probation and pretrial services offices reported the location of the defendant/offender as "on probation" more often than other groups, which is not surprising given their contact with defendants/offenders at that time. Overall, as a percentage, respondents reported a substantial amount of harm occurring while defendants were in custody of some kind.

Figure 4. Frequency of Reported Location of Defendant at the Time of Harm or Threat, by Respondent Group



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Respondents also specified "Other" locations for the defendant/offender at the time of harm or threat. The "Other" response provided most often was that the defendant/offender was not in any form of custody. The second most common response included defendants/offenders who were in some other form of custody that we did not specify. We report other specified options provided by respondents in Appendix C.

Table 4. Categories of "Other" Defendant Locations Specified by Respondents

Category of "Other" Locations	Number of Responses
Not in Custody of Any Kind	13
Other Forms of Custody	10
Other	7

Protective custody

One set of questions, only for those reporting harm to defendants/offenders, asked respondents if the defendant/offender requested or received protective custody or placement in a special housing unit (SHU). Figure 5 shows the number of respondents reporting that defendants/offenders requested protective custody and the number receiving it. Because respondents may know of defendants/offenders requesting but not receiving protective custody (or receiving it without knowing if they requested it), we asked both questions of all respondents reporting harm to defendants/offenders. Respondents knew of a minimum of 128 instances of defendants/offenders requesting protective custody and a minimum of 136 instances of defendants/offenders receiving protective custody.

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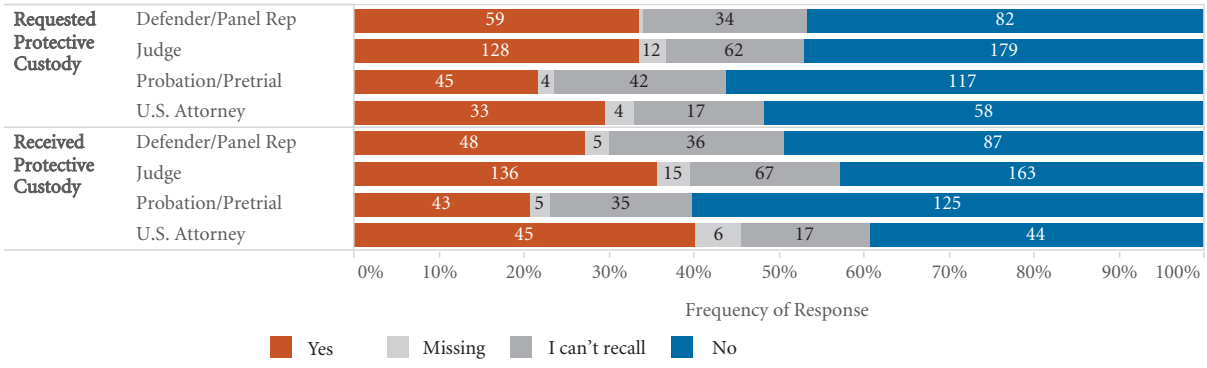
Figure 5. Frequency of Defendants Requesting and Receiving Protective Custody, by Respondent Group

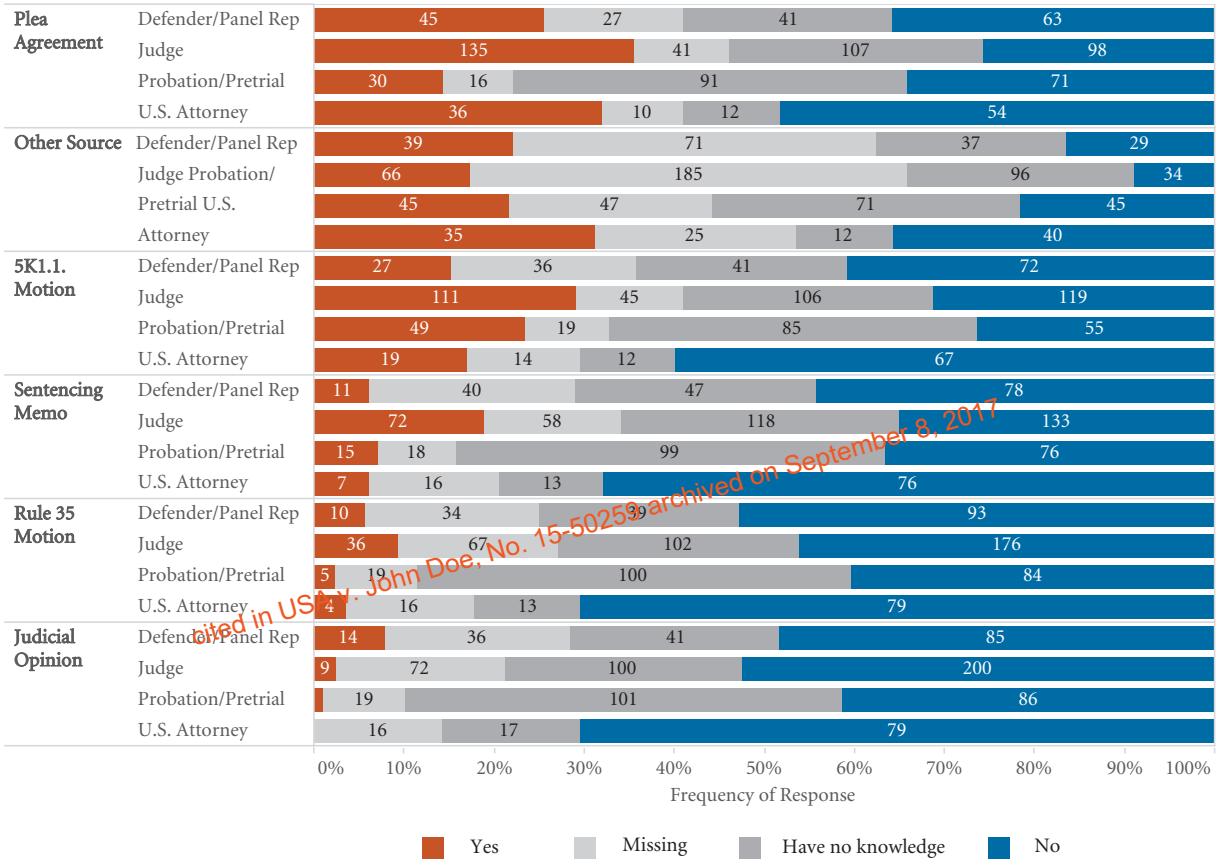


Sources for identifying defendants/offenders

We asked respondents to report any court documents used to identify the defendant/offender as a cooperator. Respondents could report multiple sources. Figure 6 shows

the percentage and number of respondents reporting the use of each type of document for identifying the defendant/offender as a cooperator. The plea agreement or plea supplement was the document most frequently used to identify a defendant/offender as a cooperator—a minimum of 135 instances—with a 5K1.1 motion used nearly as often—a minimum of 111 instances.

Figure 6. Frequency of the Use of Court Documents to Identify Defendant Cooperators, by Respondent Group



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Regarding the "Other" sources by which cooperators were identified, a single category emerged. Respondents frequently reported use of other court documents or proceedings, especially discovery, testimony, and inferences from docket activity (such as sealed entries or gaps in docket sequence numbers) to identify defendant/offender cooperators. Appendix D details the exact sources of information while Table 5 shows the categorization of those details.

Table 5. Categories of "Other" Sources Used to Identify Defendant Cooperators Specified by Respondents

Categories of "Other" Sources	Number of Responses
Other Court Documents/Proceedings	165
Talking to Agents/Debriefing/Government Disclosure	14
Codefendant/Known	14
Suspicion	12
Other	11
News Reports	5

Additional instances of harm or threat to defendants/offenders

To avoid overtaxing respondents with an excessively long questionnaire, we capped the number of cases on which respondents could provide detailed information at five. We did not, however, want the total amount of harm reported by the survey to be artificially capped by this number. To provide an indication of how much additional harm occurred in the past three years, we asked respondents reporting on a fifth case two additional questions, one regarding defendants and one regarding witnesses (discussed below). If the fifth case involved harm to a defendant/offender, we asked the following: "Not including the defendants regarding whom you've provided information in this survey, how many more defendants from your cases have you learned were harmed or threatened in the past three years?" For this question, we required respondents to enter a whole number, between 0 and 100.[11]

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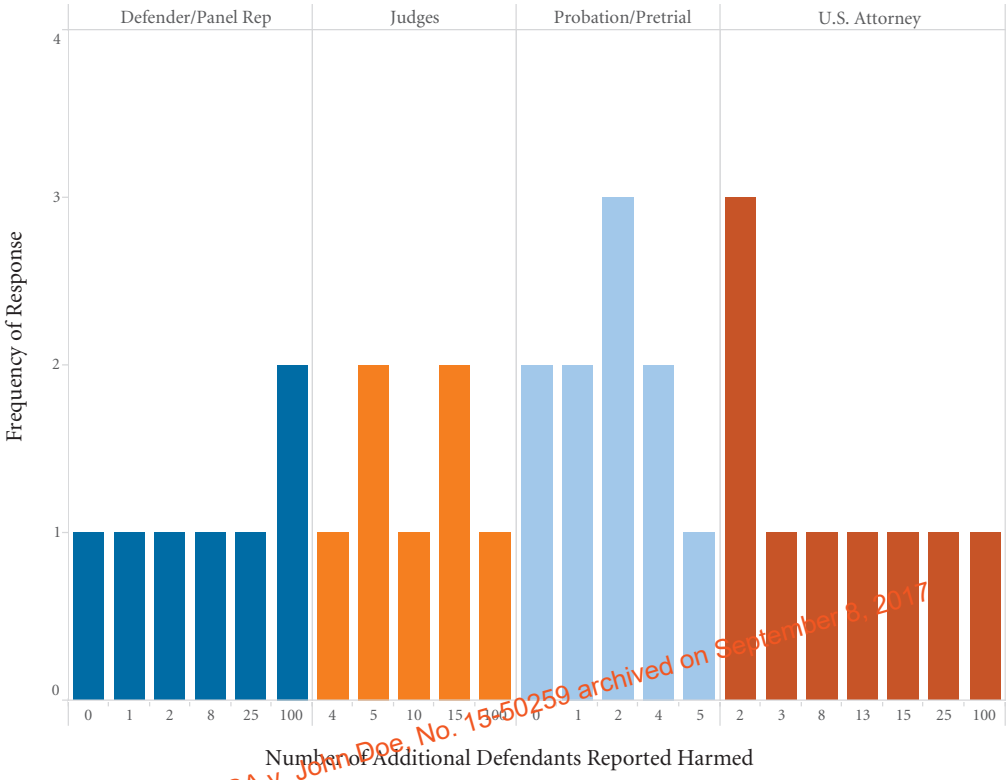
Figure 7 shows the number of defendants/offenders reported by all groups. If we sum the numbers provided by all respondents, and assume there were no duplicate answers across groups, we find a maximum of 579 more defendants/offenders harmed or threatened with harm in the past three years. The number of additional defendants/offenders harmed ranged from a low of 21 (reported by chief probation and pretrial services offices) to a high of 236 additional defendants/offenders (reported by defender and panel representative's offices). While few respondents reported information on a fifth case, those who did were often reporting for an office. The office responses were more likely to report 100 or more additional defendants/offenders harmed in the past three years.

11. Initial discussions within the FJC and with AO staff suggested that capping this number at 100 would yield more reliable data. A handful of respondents found this cap to be a source of frustration and chose to report their frustration, as well as a number over 100, in their open-ended responses (see below).

Figure 7. Frequency of Additional Instances of Harm or Threat to Defendants, by Respondent Group



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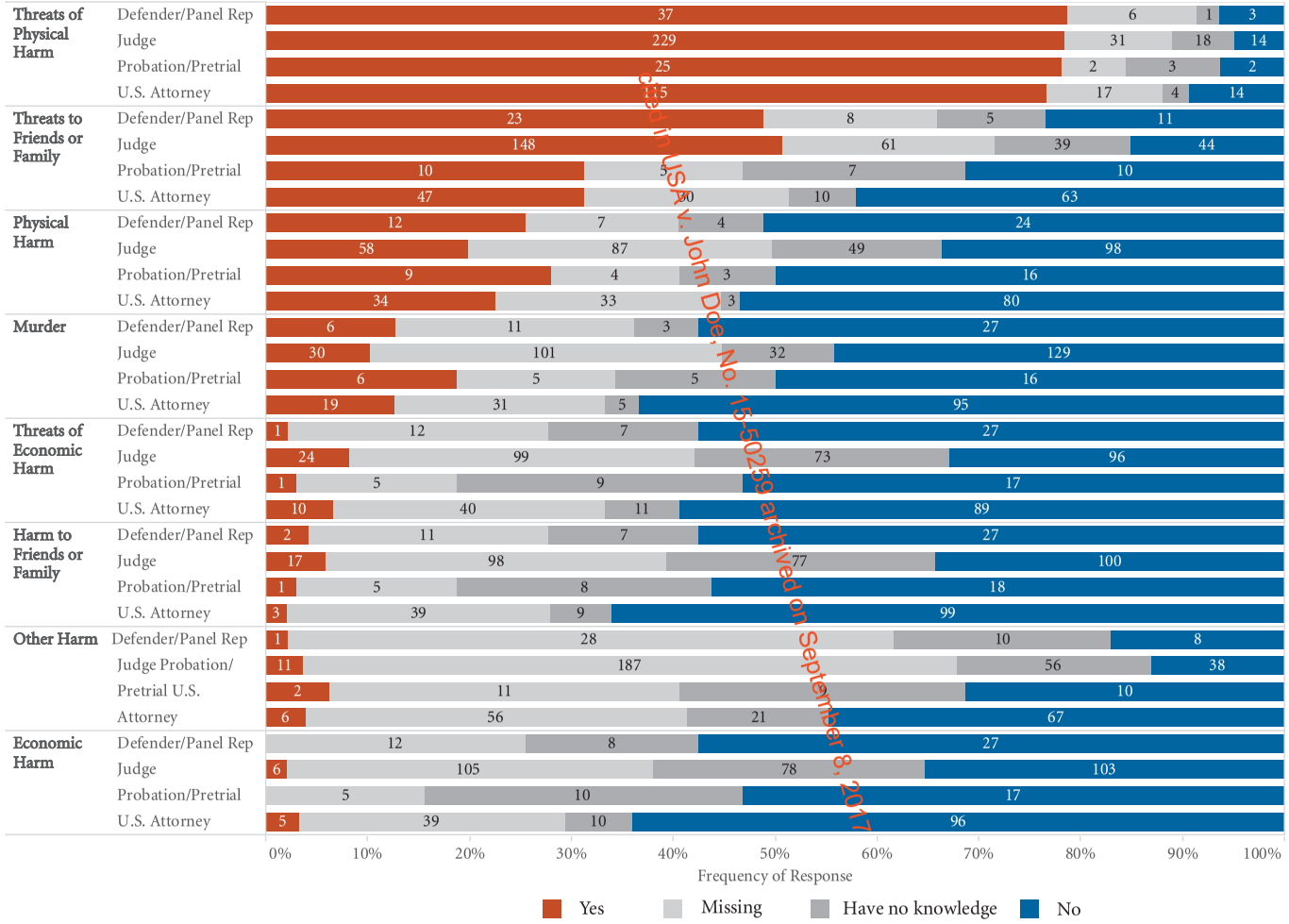
Summary of results on harm or threat to defendants/offenders

To summarize the findings regarding harm to defendants/offenders, respondents reported a minimum of 381 instances of harm or threat directed at defendants/offenders for their cooperation (or perceived cooperation) with the federal government over the past three years (Figure 2). A minimum of an additional 236 defendants/offenders experienced harm or threat, though we have no additional information on the circumstances of these events (Figure 7). When the harm or threat occurred, the defendant/offender was in some form of custody, including pretrial detention or incarceration. In many instances defendants/offenders were identified as cooperators by use of court documents, especially plea agreements or plea supplements, 5K1.1 motions, and docketing activity such as the presence of sealed entries and gaps in docket sequence numbers (Figure 6 and Table 5).

Harm or Threat to Witnesses

In addition to reporting information on the harm to defendants/offenders for cooperating with the government, the survey asked respondents to report on harm to witnesses. While the questions are largely the same as those for defendant/offender cooperators, the results are somewhat different. Overall, detailed information on harm to witnesses appears to be less readily available to respondents. Nonetheless, there is still sufficient information for examination.

Figure 8. Frequency of the Type of Harm or Threat Directed at Witnesses, by Respondent Group



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Types of harm or threat to witnesses

Figure 8 reports the types of harm or threat directed at witnesses thought to be cooperating with the government. Similar to defendants/offenders, the most common types of harm are threats of physical harm, threats to friends and family, and actual physical harm. At minimum, in the three-year period, respondents reported 229 instances where a witness was threatened with physical harm, 148 instances involved threats to a friend or family member, and 88 instances involving actual physical harm (murder or physical harm other than murder). Because some of the instances reported by defender, probation, and U.S. Attorney's Offices are almost certainly not duplicates of the instances reported by judges, the actual number of instances of harm or threat of harm to witnesses was likely higher.

Relatively few respondents chose "Other" as the type of harm or threat directed at witnesses. We report the details of these other types of harm in Appendix E, including attempted murder, contracting to kill a witness, general threats and harassment, and property damage. Table 6 shows the categorization of the "Other" categories.

Table 6. Categories of "Other" Harm or Threat to Witnesses Specified by Respondents

"Other" Categories of Harm or Threat	Number of Responses
Other	15
Internet/Community/General Threats	8
Property Damage	4
Attempted Murder	3
Existing Categories	2

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Location of witnesses at the time of harm or threat

Figure 9 shows the reported location of witnesses at the time the harm or threat occurred. Here we see a number of differences from the locations listed for the defendants. Witnesses were likely to be in pretrial detention (often because they are uncharged coconspirators or codefendants—as reported in the open-ended comments) or on pretrial release. At a minimum, 85 incidents occurred when the witness was in pretrial detention and 63 instances occurred when the witness was on pretrial release. The next most common locations for witnesses were "Other"—a minimum of 55 instances—and incarceration—a minimum of 49 instances. As Table 7 shows, the "Other" location for witnesses was almost always not in custody—i.e., they were at home, at work, or in their community—because they were uncharged. We report the complete list of locations in Appendix F. We should note that many respondents were unable to report the location of witnesses at the time the harm or threat occurred.

Figure 9. Frequency of Reported Location of Witness at the Time of Harm or Threat, by Respondent Group

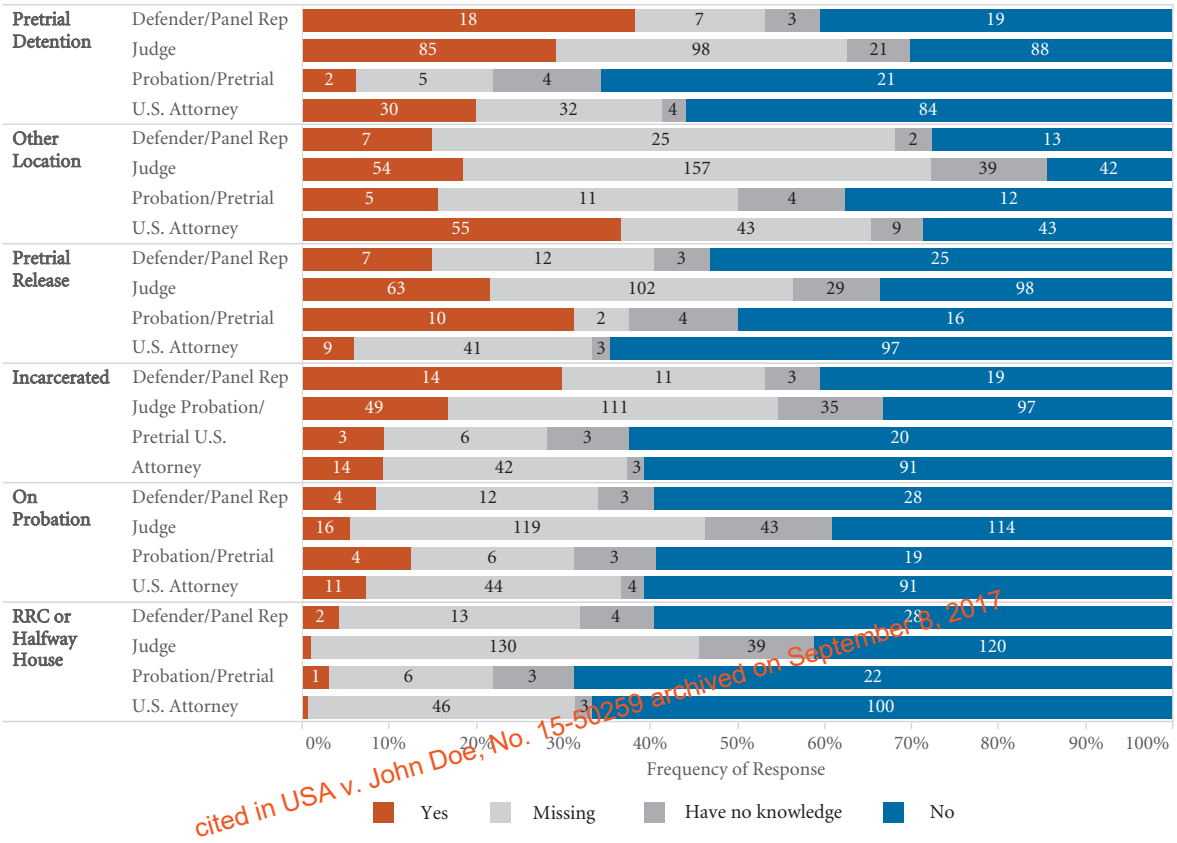

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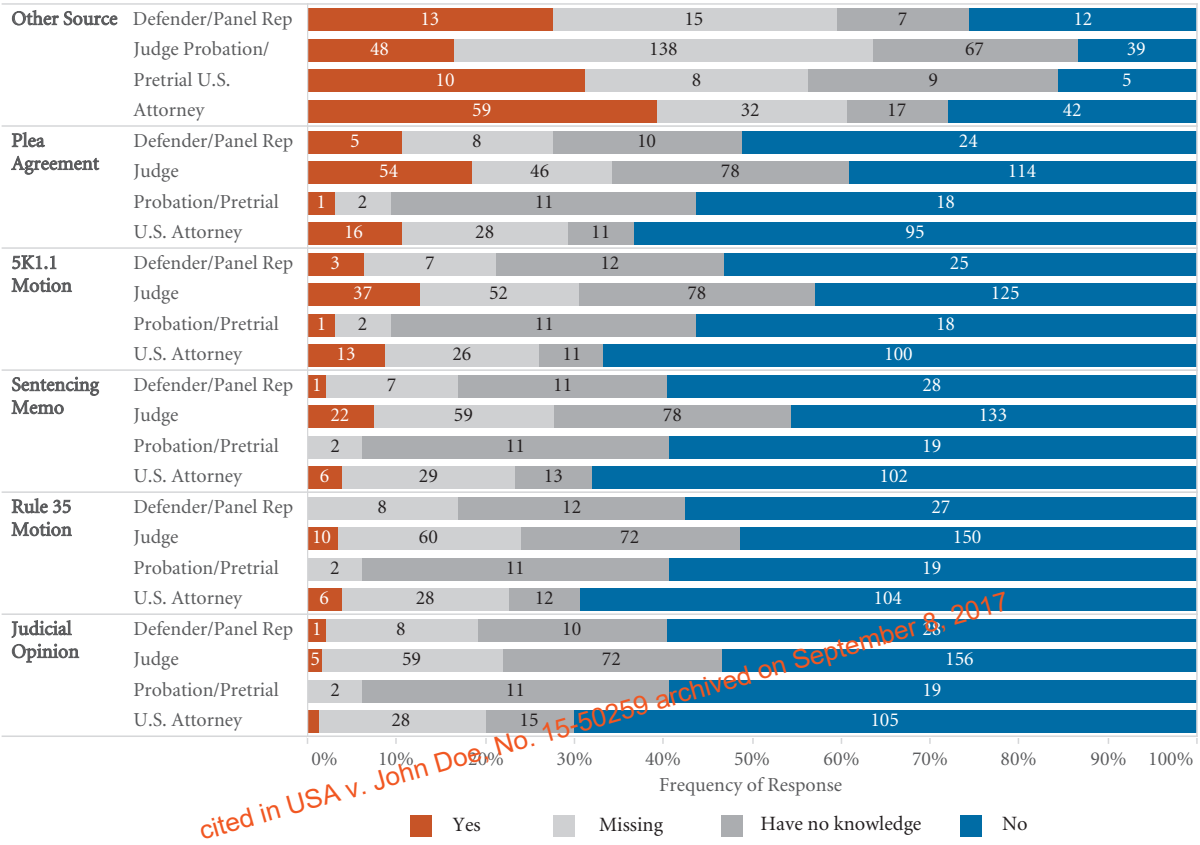
Table 7. Categories of "Other" Witness Locations Specified by Respondents

Categories of "Other" Locations	Number of Responses
Not in Custody of Any Kind	130
Other	21
Existing Category	4

Sources for identifying witnesses

The sources for identifying a cooperating witness also show a different pattern than we reported for the defendants/offenders. While respondents reported that cooperating defendants/offenders were identified in 5K1.1 motions or plea agreements, witness identification occurred most often through "Other" sources, discussed in more detail below. Figure 10 reports the sources used to identify cooperating witnesses and shows that at a minimum witnesses were identified through "Other" sources 59 times. Plea agreements or plea supplements were used to identify cooperating witnesses in 54 instances.

Figure 10. Frequency of the Use of Court Documents to Identify Witness Cooperators, by Respondent Group



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Similar to defendants/offenders, respondents often reported witnesses being identified through other court documents, especially testimony, witness lists, and during discovery. Table 8 reports the categorization of the specified responses, which are provided in Appendix G.

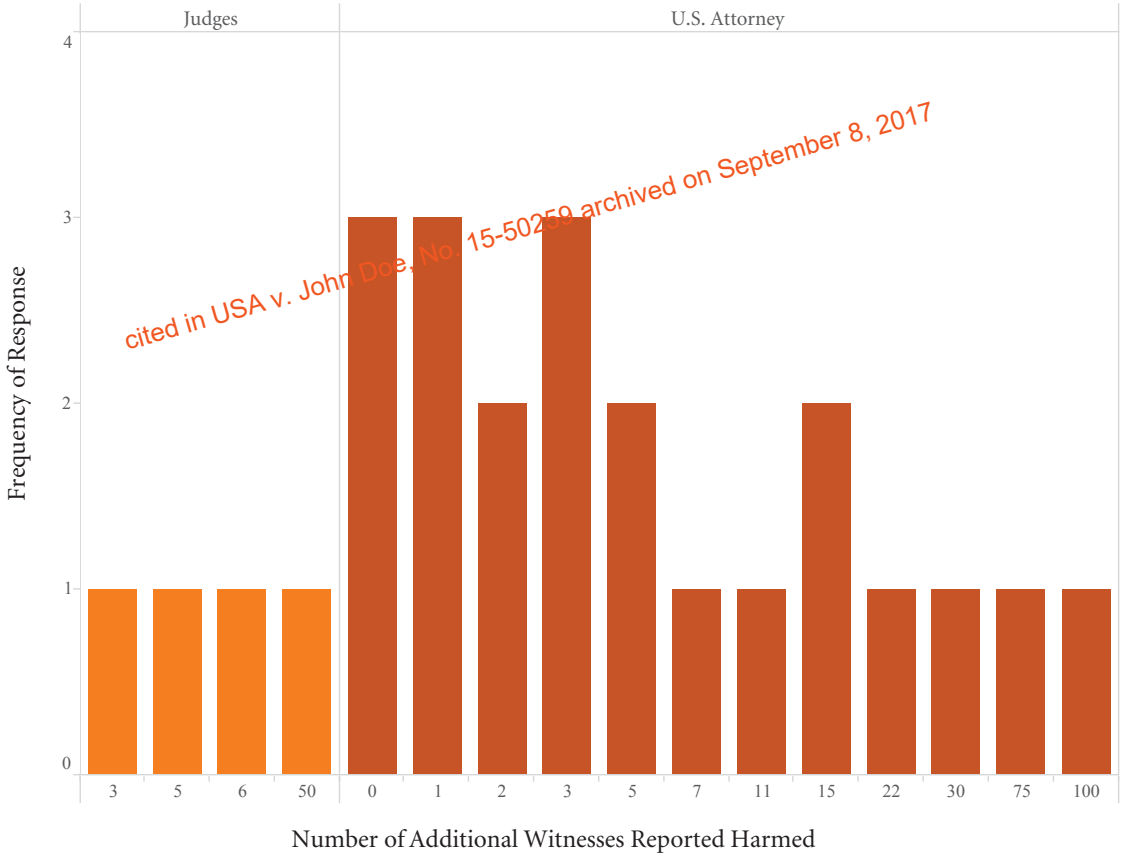
Table 8. Categories of "Other" Sources Used to Identify Witness Cooperators Specified by Respondents

Categories of "Other" Sources	Number of Responses
Other Court Documents/Proceedings	135
Codefendants/Known	15
Other	12
Suspicion	7
Talking to Agents/Debriefs/Government Disclosure	2
News	1

Additional instances of harm or threat to witnesses

We asked respondents reporting information about a fifth case of harm to witnesses to report any additional harm to witnesses from the past three years. Once again, we required the respondents to choose a number between 0 and 100. Figure 11 shows the reported number of witnesses. If we total the number of witnesses reportedly harmed, again assuming no duplicate responses, we find a maximum of 365 additional witnesses threatened or harmed in the past three years. U.S. Attorney's Offices reported an additional 301 instances of harm or threat to witnesses, while judges reported an additional 64 instances. As with defendants/offenders, while few respondents reported information on a fifth case, those who did were often reporting for an office. The office responses were more likely to report higher numbers of additional witnesses than individual respondents. It is worth noting, however, that no respondents from probation and pretrial services offices or federal defender offices reported additional instances of harm.

Figure 11. Frequency of Additional Instances of Harm or Threat to Witnesses



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Summary of results on harm or threat to witnesses

While respondents reported harm to witnesses less frequently than they reported harm to defendants/offenders, a minimum of 292 instances of harm or threat to witnesses occurred in the past three years (Figure 8). An additional 301 instances of harm or threat occurred, but we cannot report the details of these additional events (Figure 11). Witnesses were more likely than defendants/offenders to be out of custody at the time they were harmed, though many were also in custody as codefendants or uncharged coconspirators (Figure 9). Identification of witnesses often occurred through court documents, specifically witness lists, through testimony, and during discovery (Figure 10).

Additional Questions

In addition to questions about the frequency of harm to defendants/offenders and witnesses, the questionnaire included other items designed to shed light on harm to cooperators. We asked those questions only of the relevant respondent groups.

Defendant/offender requests for court documents or docket sealing

We asked federal defenders and CJA district panel representative's offices about the frequency with which their clients requested court documents to prove they were not a cooperator, and the frequency with which their clients asked them to seal all or part of the CM/ECF docket. For both questions, we asked respondents to enter a number between 0 and 100. The results in Figures 12 and 13 summarize the number of federal defenders and CJA district panel representatives who reported such requests, by number of defendant/offenders who made such requests. As the results demonstrate, many more defense attorneys report requests for court documents than requests to seal all or part of a CM/ECF docket. When we total the number of defendants/offenders requesting court documents, we find 1,941 requests, likely a low number given the frequency with which defense counsel reported "100 defendants" (the maximum permitted by the question format). Defense counsel also reported a total of 704 defendants/offenders requesting sealing all or part of their CM/ECF dockets.

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Figure 12. Frequency of Requests for Court Documents

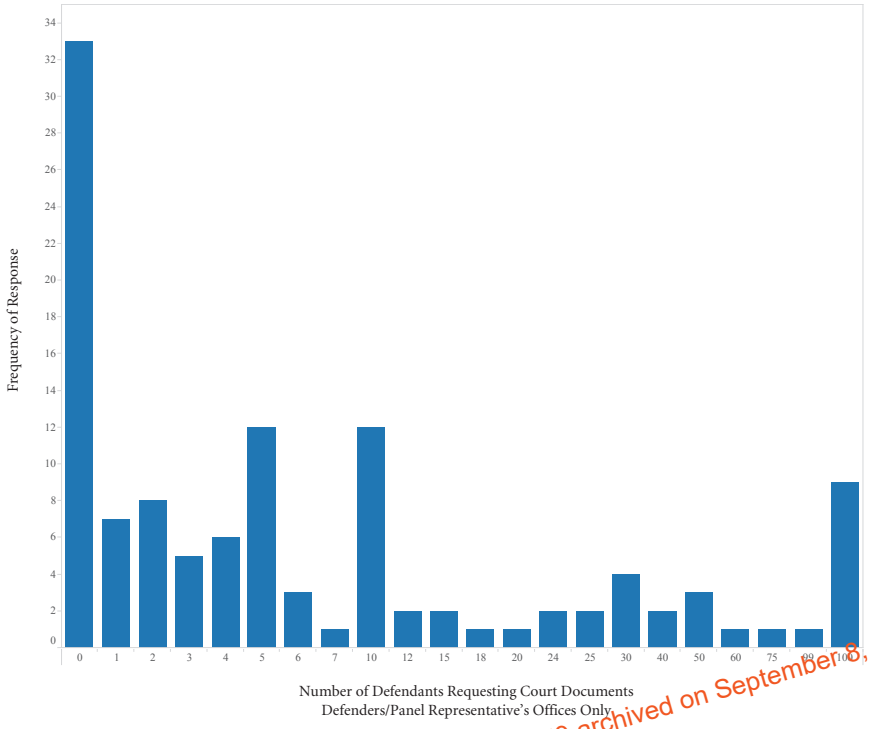

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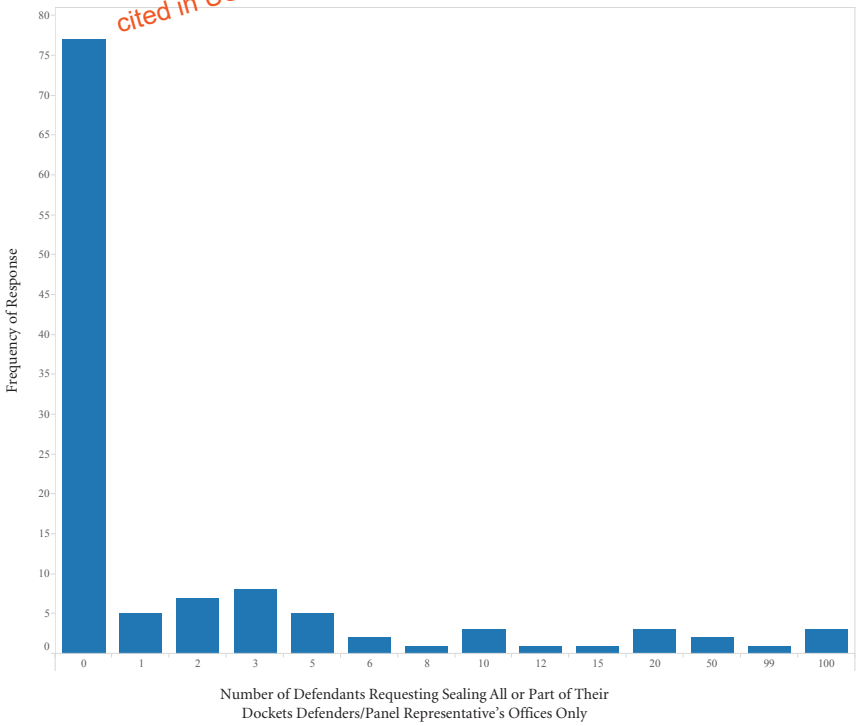
Figure 13. Frequency of Request for Docketing Sealing



Withdrawing or refusing cooperation

Both defense and prosecuting attorneys answered two questions about the frequency with which, in the past three years, defendants/offenders and witnesses withdrew offers of cooperation, or refused cooperation, because of actual or threatened harm. Once again, we asked respondents to report a number between 0 and 100. Figures 14 and 15 report the number of respondents who reported defendant/offender withdrawal or refusal of cooperation, and Figures 16 and 17 report the same information for witnesses. The number of defendants/offenders withdrawing offers ranged from a low of 197 (reported by U.S. Attorney's Offices) to a high of 247 (reported by defenders and panel representative's offices). The number of defendants/offenders refusing cooperation ranged from a low of 527 (U.S. Attorney's Offices) to a high of 758 (defenders and panel representative's offices). Respondents reported the number of witnesses withdrawing offers of cooperation less often. U.S. Attorney's Offices reported 174 withdrawals while defender and panel representative's offices reported 192 instances of witnesses withdrawing offers of cooperation. Respondents reported witnesses refusing to cooperate more frequently than withdrawing offers. The number of witnesses refusing cooperation ranged from a low of 364 instances (defender and panel representative's offices) to a high of 467 instances (U.S. Attorney's Offices).

Figure 14. Frequency of Defendants Withdrawing Cooperation

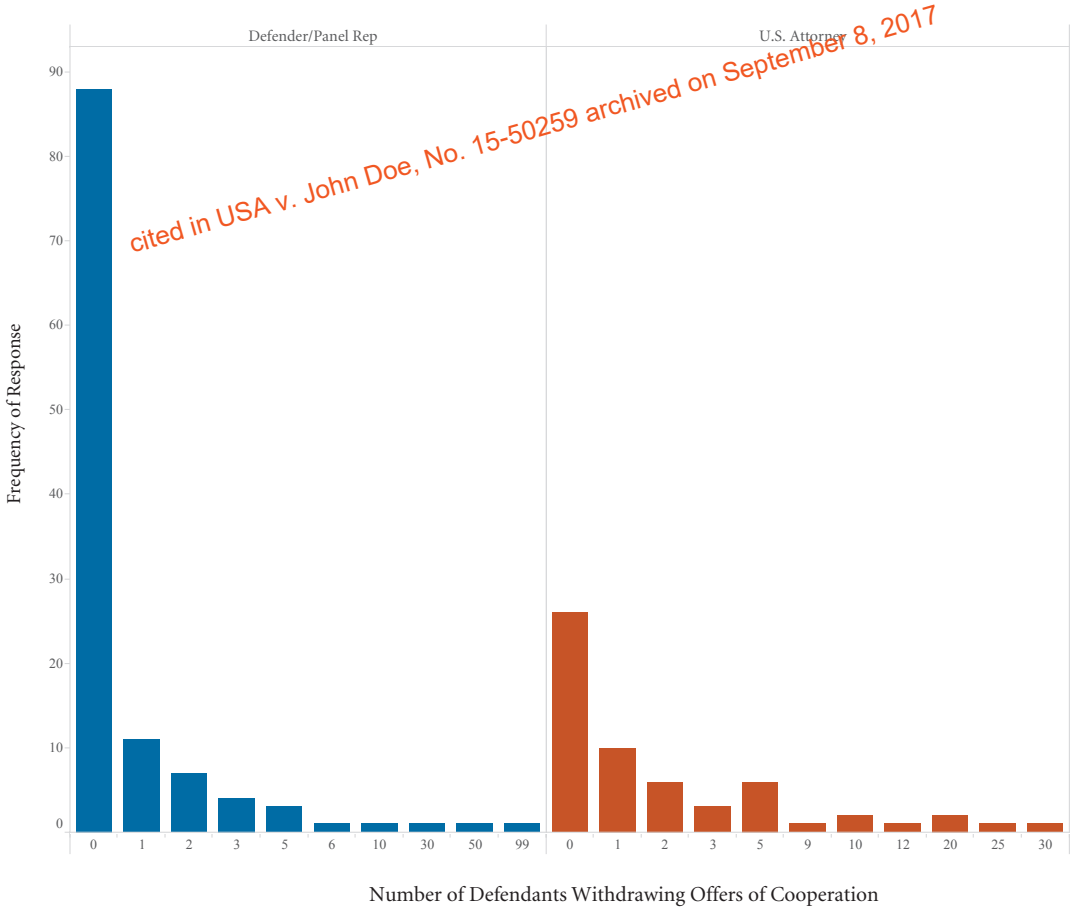


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Figure 15. Frequency of Defendants Refusing Cooperation

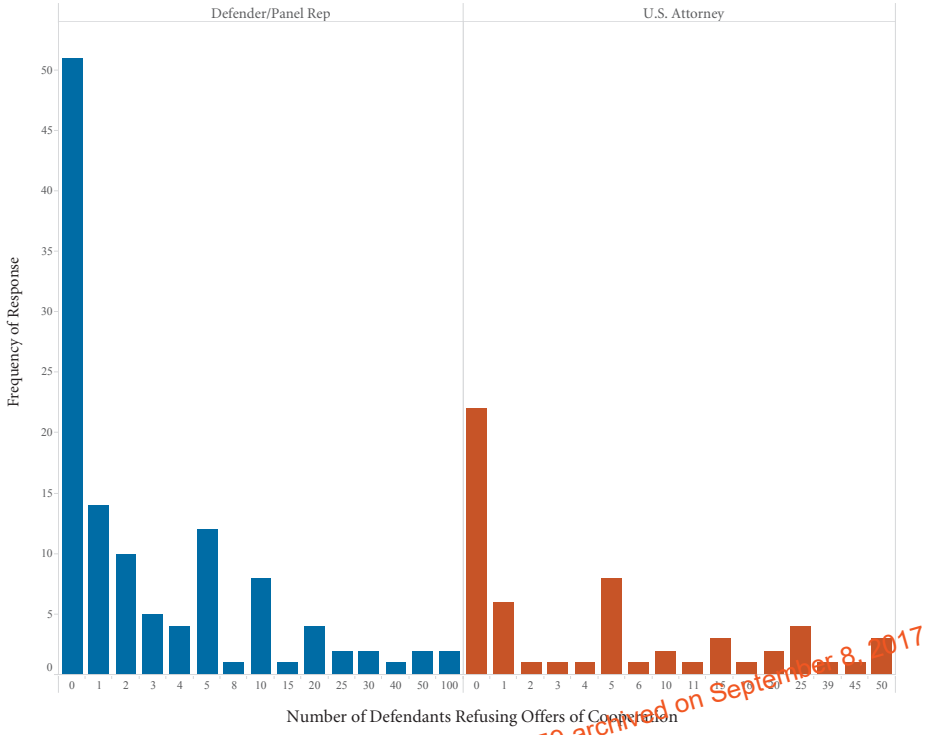

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Figure 16. Frequency of Witnesses Withdrawing Cooperation

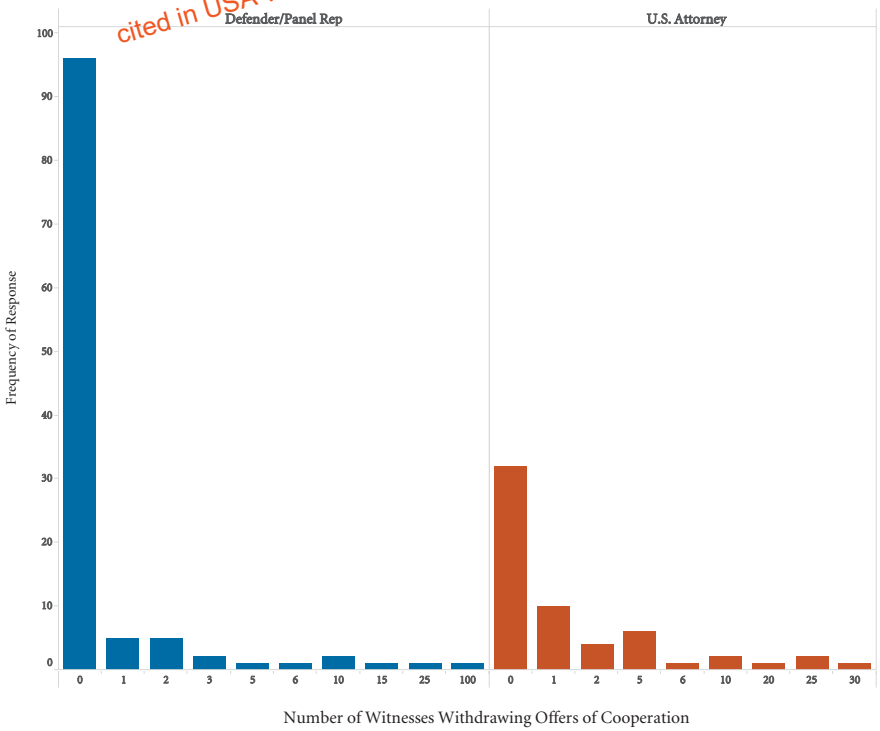
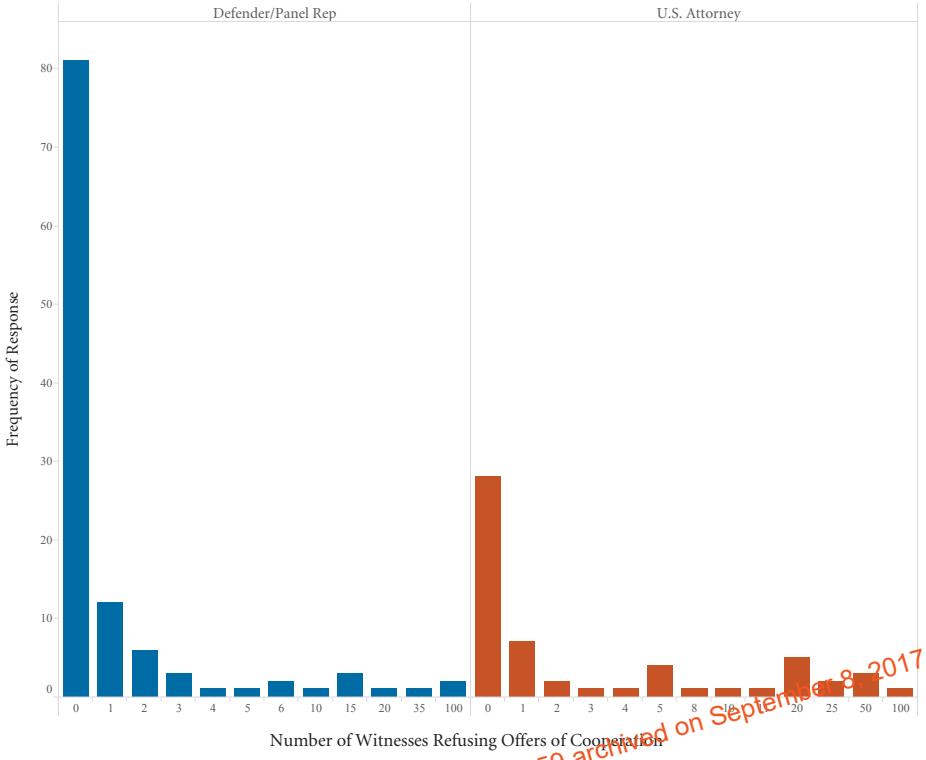


Figure 17. Frequency of Witnesses Refusing Cooperation



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Comparing the frequency of harm or threat in 2014 to 2013

We asked all respondent groups to compare the frequency with which defendants/offenders and witnesses were harmed in 2014 compared to 2013. Table 9 reports the results, but they should be interpreted with caution. The vast majority of respondents, across all groups, were unable to provide a comparison, choosing "I don't know" over all other options. Of the substantive categories, respondents most often reported the frequency of harm being about the same in 2014 compared with 2013. Given that respondents clearly did not have trouble remembering instances of harm, or the details of such harm, their inability to compare two years is more likely the result of the wording of the question or the difficulty of the task (for a question at the end of the survey) than a lack of harm one year to the next. The results should be read with these caveats in mind.

Table 9. Comparing the Frequency of Harm or Threat, 2014 to 2013, by Group

Respondents	Higher in 2014	About the Same in 2014	Lower in 2014	I don't know/missing	Total
Judges	32	147	15	480	**674**
Defenders/Panel Representative's Offices	10	44	5	67	**126**
U.S. Attorney's Offices	14	32	3	13	**62**
Chief Probation and Pretrial Services Offices	11	32	8	58	**109**

District steps to protect cooperating information

One final question on the survey, asked only of chief district judges, attempted to uncover actions taken by districts to protect cooperator information. The list of options provided (shown below) allowed respondents to choose multiple items. Table 10 shows the frequency with which chief district judges reported their courts taking these steps. No one chose "none of the above" and relatively few chose to specify an "Other" option, suggesting the categories covered the majority of steps taken by districts to protect information about cooperators.

Clearly the most common action taken by the district courts has been, at the request of parties, to seal documents containing cooperation information; sixty-six of the seventy-seven chief district judges who completed the questionnaire said their district had taken this action. Nearly half of the respondents also reported that their district seals, *sua sponte*, documents containing cooperation information and/or makes criminal documents appear identically on CM/ECF to obscure cooperation information. The other specific actions are less frequently used, as shown in Table 10. (We report the specified "Other" options in Appendix H.)

Table 10. District Efforts to Protect Cooperation Information

Method of Protecting Cooperation Information	Frequency of Selection
Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)	33
Sealing documents containing cooperation information *sua sponte*	37
Sealing documents containing cooperation information at the request of the parties	66
Ordering parties to redact cooperation information from documents	19
Restricting remote access of documents containing cooperation information	29
Allowing public access of documents containing cooperation information only in the courthouse or clerk's office	9
Removing documents containing cooperation information from public files	19
Requiring the entry of documents containing cooperation to be private entries in CM/ECF	21
Other (please specify) _____	7
None of the above	0

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Open-ended comments summary

At the end of the survey, respondents were offered an opportunity to provide additional comments. Over a third of all respondents chose to make additional comments, and they covered a wide range of topics. We read the content of these comments and found we could group them into twelve different categories. Comments that were especially lengthy or detailed were coded into multiple categories, with no comment falling into more than six categories. Table 11 below shows the frequency of comments in each category. For those categories where comments could take a negative tone, instead of the positive or affirmative tone implied by the category, the number of negative comments is reported below the main category heading.

Table 11. Open-Ended Comment Coding

Coding of Comments	Frequency
General comment about the frequency of harm	148
Harm is not frequent	15
General comments about the sources to identify cooperator	106
Court documents were not the source	4
Details about a specific incident	96
Nothing to report	85
Procedures for protecting defendants	81
General comment about harm in prison/prison culture	76
Takes issue with the survey[12]	33
Policy comments	29
Concerns about a national judiciary policy	7
Comments about refusal to cooperate out of fear	27
Refusals out of fear do not occur	1
Procedures to protect witnesses	15
"Missing"	2
Procedures for protecting juries	1

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Some categories required no additional coding for tone or nuance. For example, if a respondent provided additional information about an already reported event, or chose to add information about additional instances of harm, the comment was coded into the category for "details about a specific incident." Likewise, when respondents reported spe-

12. While most of the survey comments reported more information about the scope of harm or the policy implications of harm or threat, some respondents used the open-ended comments to take issue with the use of a survey to determine the scope of the problem, or to complain about the upper bound on the number of people they could report. Overall, these comments could be categorized as suggesting that the harm occurring is more than they were able to report in the survey.

cific procedures for protecting defendants, juries, or witnesses, we coded the comment into those categories. The comments falling into the four categories of details about incidents, or procedures to protect defendants, witnesses, or juries, provided interesting information about what has happened in the past, and how districts have worked to overcome these problems. Typically the procedures to protect defendants or witnesses included sealing, either as a general principle or by local rule, or obscuring docket entries, including substituting revised plea agreements for the original, or discussing cooperation in a court proceeding rather than through written motions.

Other categories, however, required some additional clarification. Comments about the frequency of harm, for example, could either suggest that harm or threats were frequent or infrequent. Of the 148 comments about the frequency of threat or harm in the district, only 15 suggested that harm or threats were infrequent (eight judges, five defenders, one U.S. Attorney's Office, and one chief probation and pretrial services office). At times the respondents noted that harm was infrequent because of recent steps taken by the district to better protect cooperation information. Other times, respondents were noting that harm to a specific group, such as witnesses, was infrequent. Lastly, respondents also noted they did not have or were not likely to be told of such threats, so they thought such instances were infrequent. Of course, the 85 respondents who specifically said they had nothing to report, because they didn't have criminal cases, could be included with other respondents who said harm was infrequent based on their experience. Nonetheless, even after combining "nothing to report" with the 15 respondents who said harm was infrequent, the tone of the comments overall would still suggest respondents found harm to be frequent rather than infrequent.

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The remaining 133 respondents who said harm was frequent used words such as "often," "every," "many," "most," "all," or "the vast majority," to describe how often cooperators were threatened, explicitly or implicitly, with harm or were victims of harm. Several of these respondents noted that the problems of threat and harm to cooperators are especially pronounced in drug and gang cases, as well as in certain geographic communities. Overall, when respondents were noting the frequency with which harm or threat occurred, they found it to be pervasive.

Comments about the sources used to identify cooperators typically provided information about which court documents were most likely to identify a cooperator, including those most frequently demanded in federal prisons when a new inmate joins a facility (discussed below). In fact, only 4 of 106 comments about sources used to identify cooperators explicitly said that court documents or docket activity were not used (three chief probation and pretrial services offices and one judge). The remaining 102 comments either mentioned a court document (the most common outcome) or were neutral with respect to court documents but focused on another source to identify a cooperator, typically the details of a specific incident. Those comments that did not explicitly mention court documents focused instead on other sources for identifying cooperators including "social media," "rats.com," "YouTube," or more generally "the internet." Of course, talk within a community, newspapers, movement in and out of the prison, and prior knowledge of the cooperator were also mentioned as sources of identification.

A final category of comments meriting further consideration was policy comments made by respondents. The twenty-nine respondents offering specific policy comments covered two dimensions. First are those who commented on whether a national policy was necessary or not. Seven of the twenty-nine respondents made comments about a na-

tional judiciary policy that could be considered negative in tone (four judges and three defenders). Included in this group were respondents' explicitly negative comments, such as "the need for blanket rules . . . is a canard," as well as more cautionary comments, such as "be sensitive to the public right to know." Other policy comments were more positive, suggesting a need for policy, though four suggested that this was an issue for the Department of Justice (DOJ) or, more specifically, the Bureau of Prisons (BOP) to address (three judges and one chief probation and pretrial services office). For instance, one respondent noted that the DOJ and the U.S. Attorney's Office do not consider protection of cooperators to be a priority, but they should. One comment noted that past efforts to work with BOP on this issue had not been successful. Seventeen other respondents suggested there was a need for national policy, made by the judiciary, or that the judiciary should do "something" about the issue. One judicial respondent's comment combined both elements, suggesting that this was a DOJ/BOP issue about which the judiciary needed to be concerned and take action.

Overall, while specific policy comments were rare, relative to the other types of comments provided, their tone could be categorized as suggesting a need for something to be done to protect cooperators. This is especially true if we consider all the comments as a group. In addition to the policy comments noted above, seventy-six respondents spoke about life in prison for cooperators, or prison culture in general, clearly noting a problem where there is an expectation of harm in prison for those who do cooperate or are unable to prove that they did not. These respondents consistently told a story of new inmates reporting to a specific individual (the "shot caller") in the prison and being required to provide their "paperwork" within a few weeks of coming to prison. If the inmates for any reason were unable to prove they were not a cooperator, they were told to request protective custody. These concerns prompted inmates to request their docket information, or (in the case of those who did cooperate) go so far as to request fake documents to protect them in prison.

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Moreover, the general comments about the frequency of harm more often suggested that threat or harm was a frequent occurrence, and this was true even after including in our count those respondents who said they had nothing to report. Further, the steps reported for protecting defendants, witnesses, and (in one case) juries, suggest that the concerns about harm are real enough for districts to make affirmative steps to better protect cooperators from harm. Despite these efforts, respondents noted that there continue to be problems. The fear of being harmed or threatened is affecting the willingness of defendants and witnesses to cooperate, a comment made by 26 respondents (with one defender/panel representative's office as the exception). Taken as a whole, but certainly not unanimously, the open-ended comments support the results reported above: harm is occurring, court documents are often the sources for identifying cooperators, and this is a problem for the criminal justice system.

Conclusion

To answer the question of how often cooperators, both defendants/offenders and witnesses, were harmed, we surveyed federal district judges, U.S. Attorney's Offices, the offices of the federal defenders and CJA district panel representatives, and chief probation and pretrial services offices. With a 71% response rate, and representation from all 94 judicial districts, we are confident that the reported results are representative of the harm experienced by

witnesses and defendants/offenders in the past three years. These groups reported a substantial amount of harm. Overall, respondents reported a minimum of 571 cases involving harm or threat. These instances of harm involved a minimum of 381 defendants/offenders and 292 witnesses; often, both were involved in the same case. Respondents reported a minimum of an additional 236 defendants/offenders and 301 witnesses harmed, but limits placed on the survey prevent us from knowing the details of such harm.

Respondents reported that the nature of harm or threat to defendants/offenders and witnesses was largely the same. Threats of physical harm and threats to friends or family occurred most frequently, and many respondents reported multiple types of threat made against the same defendant/offender or witness. It is worth noting, however, that defendants/offenders were more likely to be subject to multiple types of threat than witnesses were, though this difference could be the result of the availability of the information to our respondent groups.

We found, not surprisingly, that the location differed for defendants/offenders and witnesses when harmed or threatened. Defendants were most often in some form of custody (pretrial detention, pretrial release, or incarceration) while witnesses were not likely to be in custody, or, if they were in custody, they were in pretrial detention as a codefendant.

The sources for identifying cooperation by defendants/offenders and witnesses also differed somewhat, according to our respondents. While court documents and proceedings were overwhelmingly the source for identifying both types of cooperators, the specific sources are different. Defendants/offenders were identified in plea agreements, 5K1.1 motions, or through general docketing practices, especially the presence of a number of sealed CM/ECF docket entries or a sentencing reduction. Respondents also reported discovery and testimony as common sources for identifying defendant/offender cooperators. We found that witnesses, while also identified through court documents, were often identified through witness lists, because they give testimony in open court, or through discovery.

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Respondents also reported on the willingness of defendants/offenders and witnesses to provide cooperating information. Defense attorneys as well as prosecutors reported that, in the past three years, hundreds of defendants/offenders and witnesses withdrew offers of cooperation and refused cooperation out of concerns about harm or threat. These results are echoed in the open-ended comments of these two groups as well. Concerns about harm are so real defendants requested court documents to prove they were not a cooperator over 1,900 times in the past three years.

While respondents were able to report on specific instances of harm or threat in the past three years, they were largely unable to compare the amount of harm in 2014 to 2013. When they did answer, they reported similar levels of harm across the two years.

The final question, asked of chief district judges, sought to identify policy changes that might be considered to protect cooperating defendants/offenders and witnesses. As reported by respondents, the district courts have adopted a number of measures in an attempt to protect cooperators. Among these measures is the sealing of docket entries such as plea agreements, often *sua sponte*, to shield cooperation information. Some districts have taken the additional step of docketing all criminal cases the same way—for example, docketing blank sealed documents where no cooperation occurred. Respondents' answers to questions about sources used to identify cooperators, especially defendants/offenders, raise questions about the effectiveness of such steps. Although sealing documents may seem like a logical solution to protecting information about cooperators, the presence of sealed documents and gaps in docket sequence numbers by themselves are

considered enough by other inmates to identify cooperators and put them at risk of harm. The open-ended comments describe this phenomenon in detail. In these comments, respondents noted the problems inherent in sealing and made additional suggestions for protecting cooperating information, including a separate filing system for the public from that used by the courts. A small set of comments questioned the need for any policy for protecting cooperator information, as well as raising issues of public access to court documents and proceedings. We include all these suggestions in Appendix I.

Though the direction that policy should take is not clear from the information provided in this survey, the scope of the problem is. Respondents reported a substantial amount of harm, to both defendants and witnesses, resulting from use of court documents to identify cooperators. The problem occurs both during criminal prosecutions and once defendants (whether they cooperated or not) begin serving sentences in BOP and other facilities. Efforts to protect cooperating information, while in some instances successful, have not eliminated the problem of harm to cooperators. While respondents recognized that limiting access to these court documents would not completely eliminate harm to cooperators, there was general agreement that something needed to be done—by the judiciary, BOP, or both—to better protect cooperating information and reduce the risk of harm to defendants and witnesses assisting in criminal prosecutions.

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Appendix A: Survey Invitation and Questionnaires

Dear ${m://Title} ${m://LastName}:

There is a growing concern that information contained in publicly accessible court documents is being used to threaten or harm defendants in criminal cases because of their cooperation or suspected cooperation with the government. Some courts have already acted in a variety of ways to safeguard such documents.

We write as the chairs of three Judicial Conference Committees to ask for your help in collecting information that will assist our committees in making an important policy decision – whether to propose to the Judicial Conference the establishment of national procedures for protecting information in court documents indicating a defendant's cooperation, or intent to cooperate, with the government.

In an effort to measure the extent of this problem, we have asked the Federal Judicial Center to conduct a survey on our behalf to gather information on threats of harm to, or actual harm suffered by, defendants and witnesses in criminal cases because they were actual or suspected cooperators with the government.

District judges, federal prosecutors and defenders, CJA district panel representatives, and chief probation and pre-trial officers are being surveyed.

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When you click on the link below, you will connect to the survey. It will provide important information about how to respond. **Please be assured that all survey responses will be confidential and reported to the committees only in the aggregate.**

Thank you for your time. Your participation is greatly appreciated. Click on the link below to begin the survey. **Please complete the survey by March 17th, 2015.**

Sincerely,
Wm. Terrell Hodges, Chair
Court Administration and Case Management Committee

Irene M. Keeley, Chair
Criminal Law Committee

Catherine C. Blake, Chair
Defender Services Committee

Follow this link to the Survey:
${l://SurveyLink?d=Take the Survey}

Or copy and paste the URL below into your internet browser:
${l://SurveyURL}

Cooperators - Chief District Judges Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses on your docket because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases on your docket, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases on your docket in the last three years.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

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Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study, you may contact any of the three committee chairs or Dr. Margaret Williams, who is directing the study. If you have questions about the items in this survey, or technical problems with the questionnaire, Dr. Williams can be reached at 202-502-4080 or mwilliams@fjc.gov.

In cases on your docket over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

- ❍ Yes
- ❍ No
- ❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases from your docket.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

- ❑ Defendant
- ❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

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	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

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Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

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When the witness was harmed or threatened, he/she was . (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases on your docket from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

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Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases on your docket have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases on your docket have you learned were harmed or threatened in the past three years?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

To the best of your knowledge, what steps, if any, has your district taken to better protect cooperation information in court documents? (Check all that apply)

- ❑ Making criminal cases appear identically on CM/ECF to obscure cooperation information (such as requiring filing sealed supplements with a plea agreement)
- ❑ Sealing documents containing cooperation information sua sponte
- ❑ Sealing documents containing cooperation information at the request of the parties
- ❑ Ordering parties to redact cooperation information from documents
- ❑ Restricting remote access of documents containing cooperation information
- ❑ Allowing public access of documents containing cooperation information only in the courthouse or clerk's office
- ❑ Removing documents containing cooperation information from public files
- ❑ Requiring the entry of documents containing cooperation to be private entries in CM/ECF
- ❑ Other (please specify) _____
- ❑ None of the above

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases on your docket in the past three years.

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Cooperators - District Judges Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses on your docket because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases on your docket, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases on your docket in the last three years.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

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Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study, you may contact any of the three committee chairs or Dr. Margaret Williams, who is directing the study. If you have questions about the items in this survey, or technical problems with the questionnaire, Dr. Williams can be reached at 202-502-4080 or mwilliams@fjc.gov.

In cases on your docket over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases from your docket.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant
❑ Witness

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Did the defendant experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

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Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

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When the witness was harmed or threatened, he/she was . (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases on your docket from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

[NOTE THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases on your docket have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases on your docket have you learned were harmed or threatened in the past three years?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases on your docket in the past three years.

Cooperators - Federal Defenders and CJA Panel Representatives Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from your cases, not those of a colleague, and report information you or your staff consider to be reliable. Please consider only instances of harm or threats of harm from cases in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

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Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have any questions about the study or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In your cases over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant
❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

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	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

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Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases from the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

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[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from your cases have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from your cases have you learned were harmed or threatened in the past three years?

In the past three years, how many defendants, because of actual or threatened harm, requested case information (CM/ECF docket, pre-sentence report, etc.) to prove they were not a cooperator?

In the past three years, how many defendants, because of actual or threatened harm, requested all or part of their CM/ECF docket be sealed?

In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many defendants refused cooperation because of actual or threatened harm?

In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many witnesses refused cooperation because of actual or threatened harm?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

- ❍ Higher in 2014
- ❍ About the same in 2014
- ❍ Lower in 2014
- ❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from your cases in the past three years.

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Cooperators - Probation/Pre-Trial Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants/offenders or witnesses from your district because of their actual or perceived cooperation with the government. Please consider only defendants/offenders or witnesses from your district and report information you or your staff consider to be reliable. Please consider only instances of harm or threats of harm from cases from your district in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant/offender or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

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Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant/offender or witness by name.

Who to Contact. If you have any questions about the study or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In cases from your district over the past three years, have you learned of any defendants/offenders and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant/offender's or witness' cooperation with the government?

❍ Yes
❍ No
❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants/offenders or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

❑ Defendant/Offender
❑ Witness

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Did the defendant/offender experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant/offender was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant/offender request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

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Did the defendant/offender receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Were any of the following court documents used to identify the defendant/offender as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

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Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases from your district in the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

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Not including the defendants/offenders regarding whom you've provided information in this survey, how many more defendants/offenders from cases in your district have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases in your district have you learned were harmed or threatened in the past three years?

Was the number of defendants/offenders and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

❍ Higher in 2014
❍ About the same in 2014
❍ Lower in 2014
❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants/offenders and/or witnesses (or their family or friends) from cases in your district in the past three years.

Cooperators - U.S. Attorneys Preview

Survey Instructions

Scope of the Survey. This survey asks about information you may have received regarding harm or threats of harm to defendants or witnesses because of their actual or perceived cooperation with the government. Please consider only defendants or witnesses from cases prosecuted by your office, not those of a colleague, and report information you consider to be reliable. Please consider only instances of harm or threats of harm from cases in the last three years. We ask that you coordinate the responses among the members of your office to create a single response for the entire office. Please do not forward the survey link.

Definition of "Harm." "Harm" refers to:

- Actual or threats of economic harm
- Actual or threats of physical harm
- Murder

suffered by a defendant or witness (or their friends or family), inflicted by a third party in retaliation for cooperating (or for being suspected of cooperating) with the government. Harm can occur at any point in a case, from pre-trial through conviction or acquittal or any time thereafter.

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Confidentiality. All survey responses will be kept confidential and results will be reported only in the aggregate. Please do not identify any defendant or witness by name.

Who to Contact. If you have questions about the items in this survey, or technical problems with the questionnaire, please contact Dr. Margaret Williams at 202-502-4080 or mwilliams@fjc.gov.

In cases prosecuted by your office over the past three years, have you learned of any defendants and/or witnesses who were harmed or threatened (including harm or threats to friends or family) because of the defendant's or witness' cooperation with the government?

- ❍ Yes
- ❍ No
- ❍ I can't recall

Please think about the cases from the last three years for which you have the most information about actual harm or threats of harm to defendants or witnesses (or their friends or family). **This questionnaire asks a series of questions on up to five cases.** While you may not have all the information on each case, please answer as many questions as you can to provide a complete picture of the harm or threats of harm to each person.

[NOTE THIS SECTION WILL REPEAT UP TO FIVE TIMES.]

Thinking about the first case, who was harmed or threatened with harm? (Check all that apply)

- ❑ Defendant
- ❑ Witness

Did the defendant experience any of the following types of harm or threats? (Choose one per row)

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	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the defendant was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

Did the defendant request protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

Did the defendant receive protective custody or placement in a special housing unit?

❍ Yes
❍ No
❍ I can't recall

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Were any of the following court documents used to identify the defendant as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Did the witness experience any of the following types of harm or threats? (Choose one per row)

	Yes	No	Have no knowledge
Threats of economic harm	❍	❍	❍
Actual economic harm	❍	❍	❍
Threats of physical harm	❍	❍	❍
Actual physical harm	❍	❍	❍
Murder	❍	❍	❍
Threats to friends or family	❍	❍	❍
Actual harm to friends or family	❍	❍	❍
Other (please specify)	❍	❍	❍

When the witness was harmed or threatened, he/she was... (Choose one per row)

	Yes	No	Have no knowledge
in pre-trial detention	❍	❍	❍
on pre-trial release	❍	❍	❍
incarcerated post-conviction	❍	❍	❍
in an RRC or halfway house	❍	❍	❍
on probation or supervised release	❍	❍	❍
elsewhere (please specify)	❍	❍	❍

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Were any of the following court documents used to identify the witness as a cooperator (or suspected cooperator) with the government? (Choose one per row)

	Yes	No	Have no knowledge
Judicial opinion	❍	❍	❍
Rule 35(b) motion	❍	❍	❍
§ 5K1.1 motion testimony/transcript	❍	❍	❍
Plea agreement or plea supplement	❍	❍	❍
Sentencing memorandum	❍	❍	❍
Other (please specify)	❍	❍	❍

Are there other cases prosecuted by your office in the past three years in which you learned of a defendant or witness being harmed or threatened?

❍ Yes
❍ No
❍ I can't recall

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

[NOTE: THIS IS THE END OF THE REPEATING SECTION]

Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases prosecuted by your office have you learned were harmed or threatened in the past three years?

Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases prosecuted by your office have you learned were harmed or threatened in the past three years?

In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many defendants refused cooperation because of actual or threatened harm?

In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm?

In the past three years, how many witnesses refused cooperation because of actual or threatened harm?

Was the number of defendants and/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 compared to 2013?

- ❍ Higher in 2014
- ❍ About the same in 2014
- ❍ Lower in 2014
- ❍ I don't know

Please use the space below to provide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases prosecuted by your office in the past three years.

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Appendix B: Other Types of Harm or Threat to Defendants

Categories of Other Harm	Description
Property damage	Animal
Property damage	destruction of property
Property damage	homes or automobiles [shot] at while occupied
Property damage	property damage
Property damage	The home that he and his family resided in was shot up a day before he was scheduled to testify
Property damage	Family house shot at
Property damage	Shot window out of residence
Property damage	they burned his house down
Property damage	Defendant's home was fired upon by unknown individual.
Internet/community/general threats	One offender [redacted] claims to have been shot at leaving the Residential Reentry Center after providing a drug test. A second [offender] [redacted] advised she had repeated threats at the gas station where [she worked] and on Facebook postings. A third offender [redacted] [is receiving] threats in the community and on [Facebook].
Internet/community/general threats	isolation at prison due to threats
Internet/community/general threats	made uncomfortable
Internet/community/general threats	Potential threat due to offender at RRC testifying against another offender's brother
Internet/community/general threats	Believed he [cooperated] but did not and he continues to receive threats
Internet/community/general threats	Although not physically harmed, defendant was physically grabbed when the threat was made against him.
Internet/community/general threats	Defendant's status as a cooperator was put on the internet.
Internet/community/general threats	Flyers posted in his neighborhood that he cooperated.
Internet/community/general threats	Name posted on Top Snitches Facebook page
Internet/community/general threats	told family members to put his name on rats.com
Internet/community/general threats	After testifying against co-defendants, intimidated via activity around home
Internet/community/general threats	Note on floor [of] halfway house identifying defendant as cooperator
Internet/community/general threats	person contacted offender's mother at her residence and his wife, via Facebook, and make some veiled verbal threats and name calling

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Categories of Other Harm	Description
Internet/community/general threats	Intimidation; showed up at work and in the neighborhood
Internet/community/general threats	veiled threats via text message
Internet/community/general threats	Video / YouTube Rap Video Threat
Existing categories	One offender [redacted] claims to have been shot at leaving the Residential Reentry Center after providing a drug test. A second [offender] [redacted] advised she had repeated threats at the gas station where [she worked] and on Facebook postings. A third offender [redacted] is receiving threats in the community and on [Facebook].
Existing categories	Implications of cultural beliefs/acts that may harm defendant/offender and family
Existing categories	Arson of mother's house killed six people
Existing categories	Shot 3 times
Existing categories	[Threats] were made regarding the safety and welfare of defendant's family members in [redacted]
Existing categories	As with the last question answered, I have had multiple defendants in pretrial detention face threats for themselves or family members abroad if they proceeded to cooperate
Existing categories	Cultural beliefs/acts that may harm defendant and family.
Existing categories	In [immigration] drug cases routinely defendant and family are threats by drug lords
Existing categories	was assaulted in the middle of trial testimony
Other	Especially true in codefendants' providing substantial assistance
Other	threats to prosecution and defense counsel
Other	[Missing Comment]
Other	Media and Courtroom Testimony
Other	relocated 4 times

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Appendix C: Other Locations at the Time of Harm or Threat to Defendants

Categories of Other Locations	Description
Not in custody of any kind	after completion of imprisonment and supervised release
Not in custody of any kind	less than a year following his termination of supervised release
Not in custody of any kind	Not arrested
Not in custody of any kind	not charged
Not in custody of any kind	post conviction and [sentence]
Not in custody of any kind	the defendant was harmed prior to being charged due to his cooperation
Not in custody of any kind	Witness- out of custody
Not in custody of any kind	not yet charged
Not in custody of any kind	upon release
Not in custody of any kind	one cooperator was uncharged at the time of the threat
Not in custody of any kind	pre-arrest
Not in custody of any kind	Prior to arrest - narc traffickers in [redacted]
Not in custody of any kind	non-incarcerated family members in [redacted]
Other forms of custody	pre sentencing release
Other forms of custody	state custody on another charge
Other forms of custody	witness protection program
Other forms of custody	Threats were numerous, starting while on bond and continuing into time on probation.
Other forms of custody	While awaiting sentencing.
Other forms of custody	The defendant was arrested on new criminal charges.
Other forms of custody	USMS lock-up pending a court proceeding
Other forms of custody	Custody
Other forms of custody	in [redacted] following deportation while on supervised release
Other forms of custody	USMS lock-up pending court proceeding
Other	During the course of the investigation
Other	For family members none of these applies
Other	I don't remember

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Categories of Other Locations	Description
Other	defendant absconded pretrial release supervision and was living in [redacted]
Other	the threat - made to defendant - was of harm to his himself or his family
Other	[missing comment]
Other	suspected cooperating witness during drug conspiracy

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

Appendix D: Other Sources to Identify Defendants

Categories of Other Sources	Description
Suspicion	After the target's arrest, the defendant was suspected of cooperating. When the defendant was arrested (and in pre-trial detention) he was threatened. I took proactive steps to prevent disclosure of information during the court proceedings.
Suspicion	co-defendant suspicion
Suspicion	co-defendant [suspicions]
Suspicion	Defendant in an [redacted] RICO gang case was suspected by other incarcerated gang members of cooperating with law enforcement as to the murder of a police officer, and he was stabbed in a federal detention facility.
Suspicion	gossip
Suspicion	gossip
Suspicion	prison gossip
Suspicion	rumor
Suspicion	rumor of cooperation
Suspicion	rumor of cooperation
Suspicion	The Defendant was released with conditions and the co [defendants] were under the belief that anyone released was cooperating with the [government].
Suspicion	word of mouth
Other court document/proceeding	302 report after debriefing
Other court document/proceeding	a criminal complaint unsealed in a related case identified statements made by the defendant upon his arrest
Other court document/proceeding	A plea agreement that was not filed and was presumed to include a substantial assistance provision because it was filed under seal
Other court document/proceeding	a request letter to the judge to use the offender as an informant
Other court document/proceeding	A tape recorded conversation between the D and the CI was disclosed in discovery. Other Defendants obtained a copy of that recorded call and threatened the D and her family as a result.
Other court document/proceeding	affidavit

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Categories of Other Sources	Description
Other court document/proceeding	After live testimony
Other court document/proceeding	Again, it is an issue with BOP inmates obtaining Docket Sheets.
Other court document/proceeding	BOP inmates demanded the defendant's docket sheet, and looked for "holes" in the docket sheet--which corresponded to sealed motions, plea agreement attachments, sentencing memorandum, and the like. From those sealed docket entries, they correctly surmised the defendant was a cooperator.
Other court document/proceeding	Change in Offender's length of time listed in BOP data base
Other court document/proceeding	CI Agreement
Other court document/proceeding	co-defendant discovery
Other court document/proceeding	Community became aware client would testify at trial of co-defendants. Threats were then made to defendant and family
Other court document/proceeding	court-ordered discovery
Other court document/proceeding	Courtroom testimony
Other court document/proceeding	courtroom testimony
Other court document/proceeding	Courtroom [testimony]
Other court document/proceeding	Criminal Complaint
Other court document/proceeding	criminal complaint
Other court document/proceeding	DEA 6
Other court document/proceeding	debrief statement provided in discovery to target's [attorney]
Other court document/proceeding	Defendant did NOT cooperate but was threatened until produced clean docket sheet as proof
Other court document/proceeding	Defendant's cooperation was noted in a memorandum of interview that was produced to the defense in discovery. Report is that members of criminal organization will attend sentencing to hear if there are any references to cooperation.
Other court document/proceeding	Defendant's Motion to Vacate
Other court document/proceeding	disclosure of cooperation in discovery to codefendant
Other court document/proceeding	disclosure pre-trial
Other court document/proceeding	Discovery
Other court document/proceeding	Discovery

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Categories of Other Sources	Description
Other court document/proceeding	Discovery
Other court document/proceeding	Discovery
Other court document/proceeding	discovery
Other court document/proceeding	Discovery
Other court document/proceeding	Discovery
Other court document/proceeding	Discovery
Other court document/proceeding	Discovery
Other court document/proceeding	discovery
Other court document/proceeding	Discovery
Other court document/proceeding	Discovery
Other court document/proceeding	Discovery Documents
Other court document/proceeding	discovery documents
Other court document/proceeding	discovery file
Other court document/proceeding	discovery file
Other court document/proceeding	discovery file
Other court document/proceeding	discovery file
Other court document/proceeding	discovery from co-defendant
Other court document/proceeding	discovery in state case
Other court document/proceeding	discovery information
Other court document/proceeding	Discovery material
Other court document/proceeding	Discovery material was distributed into community.
Other court document/proceeding	discovery materials
Other court document/proceeding	Discovery materials
Other court document/proceeding	Discovery materials
Other court document/proceeding	Discovery materials to codefendants
Other court document/proceeding	Discovery of co-defendants
Other court document/proceeding	discovery provided to counsel of codefendants
Other court document/proceeding	Discovery provided to the party who issued the threat
Other court document/proceeding	discussion during sentencing
Other court document/proceeding	docket
Other court document/proceeding	Docket entries would allow inference

cited in USA v. John Doe, No. 15-50259 archived on September 8, 2017

Categories of Other Sources	Description
Other court document/proceeding	docket entry scheduling change of plea
Other court document/proceeding	docket reports of filings under seal
Other court document/proceeding	docket sheet
Other court document/proceeding	docket sheet
Other court document/proceeding	Docket sheet
Other court document/proceeding	docket sheet
Other court document/proceeding	Docket sheet had sealed filings
Other court document/proceeding	ECF-docket report
Other court document/proceeding	everything sealed
Other court document/proceeding	evidence and transcripts from co-defendant's trial
Other court document/proceeding	evidence at co-defendant's trial
Other court document/proceeding	FBI 302
Other court document/proceeding	Gave testimony on conduct of others within prison setting.
Other court document/proceeding	government witness list
Other court document/proceeding	Grand jury transcript.
Other court document/proceeding	He testified in a public trial but he was transported with the people against whom he testified.
Other court document/proceeding	I read about the issue in the PSR
Other court document/proceeding	in PSR & SOR
Other court document/proceeding	[indictment]
Other court document/proceeding	indictment
Other court document/proceeding	indictment
Other court document/proceeding	inference from docket entry
Other court document/proceeding	J&C, Presentence Report
Other court document/proceeding	J&C, Presentence Report
Other court document/proceeding	J&S, docket sheet - sealed documents
Other court document/proceeding	J&S, presence of sealed items on docket
Other court document/proceeding	Jencks
Other court document/proceeding	Judgment obviously reflecting a reduction from a mandatory minimum
Other court document/proceeding	Letter from counsel
Other court document/proceeding	memos with redactions

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Categories of Other Sources	Description
Other court document/proceeding	Modification of Pretrial Conditions of Release Order
Other court document/proceeding	motion for transfer
Other court document/proceeding	motion practice
Other court document/proceeding	Motion to Seal - sealed justification
Other court document/proceeding	Motion to Seal-sealed justification
Other court document/proceeding	NJ state discovery
Other court document/proceeding	[observers] at plea and sentencing
Other court document/proceeding	Of these documents, only the [redacted] Circuit opinion publicly identified defendant as a cooperator; however BOP inmates confronted the defendant and obtained a copy of his Docket sheet, which showed gaps in entries for sealed documents. From these gaps, BOP inmates correctly deduced defendant had cooperated.
Other court document/proceeding	Order Setting Conditions of Release
Other court document/proceeding	Police report provided in discovery
Other court document/proceeding	police report, co-defendant
Other court document/proceeding	Presentence Investigation
Other court document/proceeding	Presentence Investigation
Other court document/proceeding	Presentence Investigation Report
Other court document/proceeding	presentence report
Other court document/proceeding	presentence report
Other court document/proceeding	presentence report
Other court document/proceeding	Proffer
Other court document/proceeding	Proffer agreement, GJ testimony in discovery file
Other court document/proceeding	proffer statements
Other court document/proceeding	Proffer-DEA Released to defense attorneys.
Other court document/proceeding	Prosecutor's Statement and quotes copied from PSI
Other court document/proceeding	Prosecutor's Statement or copies of PSI
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	PSR, GJ, Discovery

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Categories of Other Sources	Description
Other court document/proceeding	PSR, GJ, Discovery
Other court document/proceeding	PSR, GJ, Discovery
Other court document/proceeding	related state court documents
Other court document/proceeding	report of proffer
Other court document/proceeding	Rule 16 discovery (search warrant affidavit—although the defendant was referred to generally as CS. I took proactive steps to seal other information to prevent additional disclosure.
Other court document/proceeding	scheduling a change of plea appearing on the docket
Other court document/proceeding	search warrant affidavit
Other court document/proceeding	sentencing transcript
Other court document/proceeding	sentencing transcript
Other court document/proceeding	Statement of Reason
Other court document/proceeding	Statement of Reasons
Other court document/proceeding	Statement of Reasons
Other court document/proceeding	Statement of Reasons
Other court document/proceeding	Statement of Reasons
Other court document/proceeding	statement to police
Other court document/proceeding	Suspected source was an ATF report provided in discovery as Jencks material prior to a suppression hearing.
Other court document/proceeding	Testified against co-defendants
Other court document/proceeding	testified in public trial
Other court document/proceeding	testified vs co- deft.
Other court document/proceeding	Testimony and Media
Other court document/proceeding	Testimony at trial
Other court document/proceeding	The defendant was believed to be a cooperator because he was on bond (after a drug arrest) when the main target of the investigation was arrested.

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Categories of Other Sources	Description
Other court document/proceeding	[T]he defendant was forced to sign a letter requesting docket sheets. These docket sheets were to be used to determine whether the defendant cooperated with the [government]. The letters of request were sent to the US Probation Office and the Clerk's Office. [We] [redacted] chose not to send the requested documents to the defendant. The defendant's mother contacted the probation officer [who] wrote the pre-sentence report to advise of threats being made against her son (the defendant).
Other court document/proceeding	The defendant's name was noted in the grand jury testimony on a state case in which she provided testimony as a witness and received credit for on her federal case.
Other court document/proceeding	[T]he document being requested was the docket sheet which specifically indicates if the documents are sealed. We chose not to send the defendant his docket sheet as he requested.
Other court document/proceeding	The Presentence Report
Other court document/proceeding	[Trial] court paperwork would be used to determine if defendant had a 5K1.1
Other court document/proceeding	transcript/discovery
Other court document/proceeding	transcript/discovery
Other court document/proceeding	transcripts/discovery
Other court document/proceeding	transfer of inmate to attend court
Other court document/proceeding	trial testimony
Other court document/proceeding	trial testimony
Other court document/proceeding	trial testimony
Other court document/proceeding	Trial witness list
Other court document/proceeding	trial witness list
Other court document/proceeding	Under seal hearing in magistrate court
Other court document/proceeding	under seal not disclosed
Other court document/proceeding	witness disclosure
Other court document/proceeding	witness list
Other court document/proceeding	witness list
Other court document/proceeding	Witness lists
Other court document/proceeding	Witness lists
Other court document/proceeding	writ

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Categories of Other Sources	Description
Other court document/proceeding	writ
Other court document/proceeding	writ
Other court document/proceeding	writted back
News	A newspaper article regarding the plea was published in [redacted]. The article made reference to my client's cooperation and named one of the person against whom he cooperated.
News	[newspaper] report about trial
News	Newspaper
News	Newspaper article
News	Government Detention Motion - which was quoted in news article
Talking to agents/debriefs/ government disclosure	At initial arrest, deft was seen talking to agents by his co-defendants.
Talking to agents/debriefs/ government disclosure	Defendant at government's request called drug distributor while he was under detention.
Talking to agents/debriefs/ government disclosure	Defendant was identified because he came to the courthouse for debriefs on days when he did not have a scheduled court hearing.
Talking to agents/debriefs/ government disclosure	FBI advised PO/offender
Talking to agents/debriefs/ government disclosure	Government disclosure
Talking to agents/debriefs/ government disclosure	Government's disclosure of the defendant's cooperation in other unrelated cases.
Talking to agents/debriefs/ government disclosure	Govt. revealed cooperation in preparation of trial
Talking to agents/debriefs/ government disclosure	Jailhouse observation
Talking to agents/debriefs/ government disclosure	Observed cooperating
Talking to agents/debriefs/ government disclosure	questioning by FBI
Talking to agents/debriefs/ government disclosure	The defendant provided [information] that was used by law enforcement to contact the person. The law enforcement contact was used as identification that the defendant was a cooperator.
Talking to agents/debriefs/ government disclosure	Trips out of jail to proffer, where no court hearing was scheduled.

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Categories of Other Sources	Description
Talking to agents/debriefs/ government disclosure	Was pulled from the facility for multiple debriefs with agents.
Talking to agents/debriefs/ government disclosure	Was pulled from the jail and brought to meet with agents.
Co-defendants/known	codefendant
Co-defendants/known	Co-defendant
Co-defendants/known	direct threat [from] father against his son in person
Co-defendants/known	Ex-boyfriend
Co-defendants/known	from a co-defendant
Co-defendants/known	info from other co-defendants
Co-defendants/known	info from others involved in case
Co-defendants/known	info from witnesses in case
Co-defendants/known	Information [received] from other defendants
Co-defendants/known	known cooperation
Co-defendants/known	One defendant's attorney told the attorney for another defendant of his [client's] cooperation
Co-defendants/known	statements by co-conspirators
Co-defendants/known	The defendant is one of many defendants in a large [redacted] gang prosecution. Cooperators in this gang are routinely murdered. This defendant has pleaded guilty and everything possible is being done to assure his safety, including the use of sealed filings and proceedings
Co-defendants/known	The defendant self-identified himself as cooperating against a co-defendant
Other	A 5K1.1 [motion] was filed but the defendant was shot prior to the sentencing. It is no exactly clear as to how the defendant was identified as a cooperator.
Other	extra-judicial knowledge
Other	Murdered due to cooperation
Other	narcotics traffickers in [redacted]
Other	Not sure. Was killed within a day or two of arrival at prison.
Other	other

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Categories of Other Sources	Description
Other	The defendant was believed to be cooperating (post-indictment); daughter (who was believed to be an anonymous source to law enforcement) was assaulted. I took proactive steps to prevent the disclosure of sensitive documents.
Other	Unknown
Other	[Unknown]
Other	USAO submitted
Other	Was FBI Informant

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Appendix E: Other Types of Harm or Threat to Witnesses

Categories of Other Harm	Description
Attempted murder	Attempt to Murder
Attempted murder	contract to kill witness
Attempted murder	Defendant [solicited] the killing of witness
Other	[missing comment]
Other	Agents developed information that the defendant was associated with a gang and was part of a plan to kill an ATF agent and an AUSA.
Other	defendant was going to be a witness
Other	Disclosure of suspicion that person was a cooperator
Other	economic harm to family
Other	free world
Other	Other
Other	Other
Other	promise of gifts for favorable testimony
Other	relocation
Other	same as mentioned earlier
Other	Same person
Other	The person was not a defendant in the particular criminal action but was perceived by defendants as a cooperator. The perceived witness was in custody on a different matter.
Other	The witness was the defendant who cooperated and testified
Other	under seal
Internet/community/general threats	3rd party [harassment]
Internet/community/general threats	being ostracized by defendant's family and community
Internet/community/general threats	[harassment] of sex trafficking victim by posting pictures
Internet/community/general threats	identity of cooperator posted on [YouTube]
Internet/community/general threats	nonspecific threats via social media

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Categories of Other Harm	Description
Internet/community/general threats	threat that defendant would sue the witness for defamation or other civil money damages or that the witness could be prosecuted for perjury if willing to testify against the defendant
Internet/community/general threats	threatened by defendant
Internet/community/general threats	threatened multiple times
Property damage	destruction of property
Property damage	homes and automobiles [shot] up while occupied
Property damage	The witness' apartment was burned
Property damage	Witness' home was riddled with bullets from a high-powered weapon and a child was narrowly missed on the eve of the witness/ testimony.
Existing categories	In this case, the [threatening] conduct occurred prior to the arrest and was part of the criminal conduct/charges. There was a threat of physical harm to a potential witness.
Existing categories	threats of murder

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Appendix F: Other Locations at the Time of Harm or Threat to Witnesses

Categories of Other Locations	Description
Not in custody	A victim not under Court supervision and not in custody
Not in custody	abroad
Not in custody	At his workplace
Not in custody	at home
Not in custody	at home
Not in custody	at home - not accused
Not in custody	at large
Not in custody	at [liberty] with no pending charges
Not in custody	at liberty
Not in custody	at place of employment
Not in custody	at residence
Not in custody	Case not yet charged
Not in custody	[civilian] witness
Not in custody	[civilian] witness
Not in custody	[civilian] witness
Not in custody	Community
Not in custody	community
Not in custody	Community
Not in custody	Community
Not in custody	cooperating witness
Not in custody	FBI agent
Not in custody	Free
Not in custody	free
Not in custody	Free
Not in custody	Free
Not in custody	Free from custody
Not in custody	free world
Not in custody	free world

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Categories of Other Locations	Description
Not in custody	Had not yet been charged. She was cooperating with the government.
Not in custody	Home
Not in custody	home
Not in custody	Home
Not in custody	Home
Not in custody	home - not a co-conspirator
Not in custody	Home and Work
Not in custody	home and work
Not in custody	Home and Work
Not in custody	Home and work
Not in custody	Home and Work-FBI Case Agent
Not in custody	Home County
Not in custody	in community
Not in custody	in community/not [an] offender
Not in custody	in his/her community
Not in custody	in his/her community
Not in custody	in home
Not in custody	In home or automobile
Not in custody	In one case a [defendant's] former lawyer was threatened with [murder]. In another a bank robbery witness was killed two weeks post trial. Was a brother of the defendant who was acquitted.
Not in custody	in the community
Not in custody	in the community
Not in custody	informant was not in custody; he was a paid CI
Not in custody	living at home
Not in custody	living at home
Not in custody	living at home
Not in custody	living at home
Not in custody	living in the community where the other defendants lived
Not in custody	Living with a suspect
Not in custody	living with Defendant [(fiancée)]

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Categories of Other Locations	Description
Not in custody	lured away from her home by defendant
Not in custody	no pending charges
Not in custody	No pending charges
Not in custody	non-defendant
Not in custody	non-incarcerated family member of witness and witness
Not in custody	non-incarcerated family members
Not in custody	normal residence
Not in custody	Not arrested
Not in custody	not arrested
Not in custody	Not charged
Not in custody	not charged
Not in custody	Not charged
Not in custody	Not charged
Not in custody	not charged. cooperating with government
Not in custody	not facing charges
Not in custody	NOT IN ANY KIND OF CUSTODY
Not in custody	not in custody
Not in custody	Not in custody
Not in custody	not in custody
Not in custody	Not in custody
Not in custody	Not in custody
Not in custody	Not in custody
Not in custody	not in custody- not charged
Not in custody	not in custody though had an attorney and was attempting to cooperate
Not in custody	Not in custody.
Not in custody	not in [custody]
Not in custody	Not under Court supervision or custody
Not in custody	On street
Not in custody	on the street
Not in custody	On the street.
Not in custody	on the streets

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Categories of Other Locations	Description
Not in custody	on the streets
Not in custody	on the streets
Not in custody	out
Not in custody	out of custody
Not in custody	out of custody
Not in custody	out of custody witness
Not in custody	public
Not in custody	some witnesses were not charged.
Not in custody	Someone fired a gun at a confidential informant in a bar after his picture was posted online identifying him as the source for a defendant's indictment
Not in custody	the assailant and witness were not locked up
Not in custody	The threat of harm occurred prior to the initial arrest.
Not in custody	The [threatening] conduct occurred prior to the initial arrest of the defendant.
Not in custody	The witness was not charged with a crime
Not in custody	The witness was not charged with any crime
Not in custody	the witness wasn't in the criminal [system]
Not in custody	trial witness, not in custody
Not in custody	Uncharged
Not in custody	under investigation
Not in custody	under investigation
Not in custody	[unindicted] witness not in custody
Not in custody	[non-incarcerated] witness
Not in custody	[non-incarcerated] witness
Not in custody	was a trial witness
Not in custody	was a witness
Not in custody	was just witness
Not in custody	Was not charged
Not in custody	while in the community
Not in custody	Witness in Community
Not in custody	Witness not charged
Not in custody	Witness not charged

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Categories of Other Locations	Description
Not in custody	Witness not charged
Not in custody	Witness not in custody
Not in custody	witness not in system
Not in custody	witness was a citizen
Not in custody	Witness was a [redacted] Police officer in the murder of a [law enforcement officer]. He testified at pre-trial hearings in a hood and with the courtroom closed. The case involved in the death of the agent and the elimination of 3 to 5 other [redacted] that were aware of the circumstances leading up to the [officer's] killing.
Not in custody	witness was an informant and a police officer giving information about police corruption
Not in custody	witness was an informant living in society
Not in custody	witness was an informant who was shot at
Not in custody	witness was at liberty
Not in custody	witness was child victim
Not in custody	witness was the victim
Not in custody	witnesses not in system
Other	[missing comment]
Other	a business owner
Other	co-defendants, criminal
Other	confidential source
Other	cooperator
Other	court-ordered discovery
Other	defense attorneys were threatened
Other	For family members none of these applies
Other	I had a person convicted of sexual assault threaten the victim's family after a jury verdict
Other	in courtroom testifying
Other	in [redacted]
Other	in state court proceeding
Other	Individual was a member of organized crime.
Other	known to defendant
Other	paid cooperator

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Categories of Other Locations	Description
Other	returned to the danger zone
Other	still in the conspiracy
Other	The person was a cooperating witness for the government who may have been a coconspirator as well as friend of defendant but do not know if government ever charged cooperator.
Other	under seal
Other	was a confidential informant
Other	witness protection
Existing category	It is my understanding that the witness was on supervised release
Existing category	Post conviction release
Existing category	Post-plea pre-sentence release
Existing category	the witness, a gang member, testified for the government in a trial before one of my colleagues. The witness would have been a witness in my court in a case related to similar issues, but he was murdered [redacted]. The witness was not in custody at the time of his death, but I believe he was on supervised release.

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Appendix G: Other Sources to Identify Witnesses

Categories of Other Sources	Description
Suspicion	all were by word of mouth that he was a cooperator
Suspicion	jail house talk
Suspicion	rumor
Suspicion	suspicion of [co-conspirators]
Suspicion	The witness was murdered [because] it was believed that he was a snitch
Suspicion	word of mouth
Suspicion	word on street
Other court document/proceeding	affidavit
Other court document/proceeding	All documents reflecting cooperation are sealed.
Other court document/proceeding	announced as a witness during the trial
Other court document/proceeding	ATF Agent's Report
Other court document/proceeding	Audio tapes that were used to charge an obstruction count.
Other court document/proceeding	believe child protective services call disclosed cooperation
Other court document/proceeding	case is pending; witness roles revealed in discovery
Other court document/proceeding	Change of plea notice on ECF
Other court document/proceeding	co-defendant discovery
Other court document/proceeding	complaint
Other court document/proceeding	Court testimony
Other court document/proceeding	Court testimony
Other court document/proceeding	court-ordered discovery
Other court document/proceeding	court-ordered discovery
Other court document/proceeding	Criminal Complaint
Other court document/proceeding	Criminal Complaint
Other court document/proceeding	criminal complaint
Other court document/proceeding	Deduced from docket sheet
Other court document/proceeding	Defendant learned that witness appeared before grand jury
Other court document/proceeding	discovery
Other court document/proceeding	discovery

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Categories of Other Sources	Description
Other court document/proceeding	discovery
Other court document/proceeding	discovery
Other court document/proceeding	discovery
Other court document/proceeding	discovery
Other court document/proceeding	Discovery
Other court document/proceeding	discovery
Other court document/proceeding	Discovery
Other court document/proceeding	discovery
Other court document/proceeding	Discovery
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Other court document/proceeding	Discovery
Other court document/proceeding	discovery
Other court document/proceeding	Discovery
Other court document/proceeding	discovery
Other court document/proceeding	Discovery Documents
Other court document/proceeding	Discovery documents — Agent reports
Other court document/proceeding	discovery material
Other court document/proceeding	Discovery material
Other court document/proceeding	discovery materials
Other court document/proceeding	discovery materials
Other court document/proceeding	Discovery provided to defense counsel for the person against whom the witness testified.
Other court document/proceeding	Discovery revealed identity
Other court document/proceeding	discovery to defendant
Other court document/proceeding	Docket Sheets
Other court document/proceeding	fact of sealed filings

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Categories of Other Sources	Description
Other court document/proceeding	fact of sealed filings
Other court document/proceeding	FBI 302
Other court document/proceeding	FBI 302
Other court document/proceeding	FBI 302 and trial testimony
Other court document/proceeding	Grand Jury testimony & discovery
Other court document/proceeding	grand jury transcript
Other court document/proceeding	grand jury transcripts/discovery
Other court document/proceeding	Grand Jury Transcript
Other court document/proceeding	Gvmt witness list
Other court document/proceeding	identified in pretrial
Other court document/proceeding	identity of informant made clear by discovery
Other court document/proceeding	indictment
Other court document/proceeding	Informant was identified after video surveillance was produced by the [government] in discovery
Other court document/proceeding	informant's role made clear in discovery
Other court document/proceeding	Interview report provided in discovery
Other court document/proceeding	Investigation reports
Other court document/proceeding	Jencks Act Material turned over in advance of trial despite protective orders prohibiting defendant from keeping a copy in the jail
Other court document/proceeding	[Jencks] r. 16 materials
Other court document/proceeding	Letter from USAO to Defense Counsel
Other court document/proceeding	police report
Other court document/proceeding	police report
Other court document/proceeding	police report describing witnesses cooperation provided in discovery
Other court document/proceeding	Police reports
Other court document/proceeding	police reports
Other court document/proceeding	Police Reports and proffer statements
Other court document/proceeding	Possible the [redacted] Police report when one of the suspects was apprehended in [redacted].
Other court document/proceeding	Presentence report
Other court document/proceeding	presentence report
Other court document/proceeding	pretrial service report

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Categories of Other Sources	Description
Other court document/proceeding	pretrial witness list
Other court document/proceeding	Proffer report provided in discovery
Other court document/proceeding	Prosecutor's Statement and copies of PSI
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	PSR
Other court document/proceeding	Public testimony as [cooperating witness]
Other court document/proceeding	recordings
Other court document/proceeding	related state court documents
Other court document/proceeding	role of witness made clear in discovery
Other court document/proceeding	role of witness made clear in discovery
Other court document/proceeding	rule to show cause hearings
Other court document/proceeding	saw investigation information
Other court document/proceeding	sealed trial witness list
Other court document/proceeding	search warrant
Other court document/proceeding	search warrant affidavit
Other court document/proceeding	sentencing docs
Other court document/proceeding	state complaint
Other court document/proceeding	state complaint and state search warrant
Other court document/proceeding	State court discovery and plea documents.
Other court document/proceeding	subpoena
Other court document/proceeding	testified against codefendant
Other court document/proceeding	Testified at trial
Other court document/proceeding	Testified in a Court Proceeding
Other court document/proceeding	Testifying
Other court document/proceeding	testimony
Other court document/proceeding	Testimony at hearings
Other court document/proceeding	Testimony at probable cause hearing
Other court document/proceeding	testimony in trial of co defendant

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Categories of Other Sources	Description
Other court document/proceeding	testimony of the witness
Other court document/proceeding	The witness was threatened and then badly beaten following his testimony before me
Other court document/proceeding	The witness was verbally threatened in the [courthouse], and was targeted as a [snitch] by use of Facebook and Instagram
Other court document/proceeding	the writ that identified him as a government witness was circulated at the jail
Other court document/proceeding	They were identified by not being publicly filed like codefendants' documents
Other court document/proceeding	transcript of trial
Other court document/proceeding	trial
Other court document/proceeding	trial testimony
Other court document/proceeding	Trial testimony
Other court document/proceeding	trial testimony
Other court document/proceeding	trial testimony
Other court document/proceeding	trial testimony
Other court document/proceeding	trial transcript
Other court document/proceeding	trial witness list
Other court document/proceeding	withdrawal from the case
Other court document/proceeding	withdrawal from the pending case
Other court document/proceeding	witness list provided in advance of trial pursuant to court order
Other court document/proceeding	Witness lists
Other court document/proceeding	Witness lists
Other court document/proceeding	Witness Statements
Other court document/proceeding	witness testified at trial
News	newspaper
Co-defendants/known	circumstances of drug sale
Co-defendants/known	cooperating co def
Co-defendants/known	defendant knew witness had disclosed information
Co-defendants/known	Defendant knew witness was present at time of crime and observed events
Co-defendants/known	in a [redacted] Mafia case the word got out that the wife of a co-conspirator was going to be a witness and she was [targeted] to be killed.

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Categories of Other Sources	Description
Co-defendants/known	known to defendant
Co-defendants/known	known to defendant
Co-defendants/known	known to target
Co-defendants/known	known to target
Co-defendants/known	Named co-defendant in indictment
Co-defendants/known	source disclosure
Co-defendants/known	statement by defendant
Co-defendants/known	The witness was previously employed by the defendant, and he knew she planned to testify against him.
Co-defendants/known	unindicted co-conspirators
Co-defendants/known	usually identified as family members of the cooperating defendant
Talking to agents/debriefs/ government disclosure	Observation in jail
Talking to agents/debriefs/ government disclosure	Seen talking with authorities on a routine matter
Other	[missing comment]
Other	His lawyer disclosed
Other	I meant to share the following information as it relates to type of harm experienced by the witness. The victim was a witness in a criminal case in which her son was murdered. The victim (the young man's mother) was raped and nearly killed.
Other	Not sure how Marshal Service learned of the hit but the suspect was apprehended across the street from the court house at the time the [witness] was testifying,
Other	Not sure. he was killed within a day or two of arrival at prison
Other	on the streets
Other	Other
Other	other
Other	Other
Other	same as mentioned earlier
Other	under seal
Other	Was detained as a material witness in alien smuggling case.

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Appendix H: Other Steps to Protect Cooperation Information

Other Steps Taken, Specified by Chief District Judges
Info regarding cooperation at plea or sentencing heard at sidebar and then sealed
Not mailing out PSRs on request.
sealed portions of transcripts in every guilty plea and sentencing
The cooperation provisions of a plea agreement are in a separate document, not filed with the Clerk of Court, and maintained only [by] the judge and the prosecutor and the defense attorney. Also, the prosecutor's sentencing memo describing cooperation is not filed—indeed even a non-cooperator's sentencing memo is not filed, so that there is no way to determine by deduction that a defendant "must" be a cooperator. Finally, any sentencing transcript is redacted for cooperating information before it is published on the docket.
unaware of clerk's procedures
US Attorney has taken steps to remove references to cooperation in hearings and documents. Court is discussing better ways to protect PSRs.
We have levels of access and access restriction and use those on a case by case basis.

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Appendix I: Open-Ended Comments

Categories	Open-Ended Comments
Missing	[missing comment]
Nothing to report	[During] my tenure as a judge in the [redacted district], none of the defendants/witnesses in any of the criminal cases I presided over were ever harmed or threatened to my knowledge.
Nothing to report	I have handled only one criminal case in the past 8 years—and there were no threats in that one. Sorry I can't be of any help.
Takes issue with the survey	I am extremely uncomfortable participating in this survey. Your questions cross or come perilously close to crossing the line into attorney-client confidentiality. Had I possessed concrete information concerning harm or threats, I probably would have decided to assert the privilege. A lawyer is not likely to have acquired the type of information the survey seeks except by privileged communication, especially given the parameters the survey places on how to answer the question. It does not solve the problem to promise that the information will remain confidential; the disclosure is [to] be complete once the question is answered. In addition, your survey form demanded specific numerical answers. I do not keep records concerning this issue. So, in particular, my answer to the question "how many requests for file materials to show that they were not a cooperator?" is an estimate based upon my best recollection of the number of inquiries I might have received over the last several years. In a three year parameter, the number may very well be "1". Finally, in my experience, it is virtually impossible to quantify refusals to cooperate based upon threats to personal safety. There are a myriad of moral, ethical, legal and other factors, different in each case, that a client might weigh—and properly so—in reaching a decision about whether to provide information concerning associates. Because the question of whether to cooperate is intensely and uniquely personal, many lawyers, myself included, consider their fiduciary duty to be met by listing those factors and letting the client reflect upon them alone, or with loved ones. Decisions, as far as I can tell, are made after balancing all such factors. It is very rare that the decision is based upon any single one.

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Categories	Open-Ended Comments
General comment about harm in prison/prison culture	The prison environment is very difficult and tense, both in my [redacted] and [redacted]. Paperwork is demanded, and people - even people who exerted a fair amount of power on the street - are genuinely intimidated.
Procedures for protecting defendants; general comments about the sources to identify cooperator	On [redacted], [redacted] adopted Standing Order Regarding Sealing Documents Filed in Criminal Matters. The Order provides prior authorization for the Clerk of Court to file, under seal, documents from pro se defendants seeking reduction of sentence based on cooperation. Filings by counsel under 5K1.1, Rule 35 and section 3553(e) must be accompanied by a motion to seal. [redacted]
Procedures for protecting defendants	The threatened person wrote the court advising of a threat. The court [conferred] with the defense atty and the Government atty. Also the court called the warden of the prison in the presence of the attorneys and made them aware of the alleged threat
Procedures for protecting defendants; general comment about the frequency of harm	I generally will ask defendants whether they or any member of their family has been threatened as a part of the plea colloquy in an [appropriate] case. Not infrequently they will either answer yes or no. If I think from the facts or [circumstances] that it is likely that threats have occurred I will ask whether they would tell me truthfully whether such a threat had been made. It happens [a lot] in drug and immigration related cases.
Details of a specific incident	I am aware of a large drug conspiracy case that involved a threat to a prosecutor and myself. The prosecutors in the case informed me that threats had been made against co-defendants in the case.
Details of a specific incident	I had a large number of defendants in a heroin case which involved two murders and several threats.
General comment about the frequency of harm	I have had 2 or 3 defendants explain why, as former felons, they possess weapons all the while knowing that doing so is a violation of their [supervised release]. On these occasions, the defendants have persuasively explained to me that gang members or other criminal actors threaten to kill the defendants if they will not re-engage with gang/criminal activities. They knowingly possess guns in violation of [supervised release] to protect themselves and family. This is not linked to perceived or actual cooperation with the government, but is responsive to the "additional information about harm or threats of harm...in the past three years."

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Categories	Open-Ended Comments
Procedures for protecting witnesses	It is difficult to determine how many of our witnesses were harmed or threatened as a result of their cooperation in our cases. We take preventive measures to assure witness safety and often relocate witnesses as soon as they begin cooperating. There are times when our witnesses are threatened in their communities because they are suspected of cooperating or they are recognized by the defendant and threatened or harmed. When that happens we immediately bring them in and offer them relocation services. It is a rare case when our witnesses are identified as cooperators through court proceedings (other than at trial) or court documents because all such documents are placed under seal. Because the [redacted district] has a high witness retaliation rate, we wait until the last possible moment to disclose the names of our witnesses and cooperators.
General comment about the frequency of harm	It seems the perception of harm/ threat is greater earlier in the process, due to the associates co-defendants have made.
General comment about the frequency of harm; details of a specific incident; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Most threats (real or perceived) are in drug cases. Defense attorneys routinely ask that absolutely no record of their clients' cooperation be shown anywhere in the record, including plea agreements and 5K1 motions. One defendant was so worried about being identified as a snitch that he asked to be sentenced to his statutory mandatory minimum [redacted] in prisonment) even though he qualified for a 5K1 motion at sentencing. He had been told by other defendants that when he showed up at his designated BOP facility, he would be asked to provide his Pre-Sentence Report or J&C as "proof" as to whether or not he was a rat.
Details of a specific incident; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	1) Social media has been used to post discovery. 2) We had one defendant who managed to get a criminal associate hired at the law firm of a co-defendant out of desperation to determine whether anyone was cooperating, including the co-defendant. 3) Inmates regularly abuse "legal mail" privileges to send written threats to witnesses and judges while in BOP custody; 4) We had a defendant go pro se in an attempt to undermine a protective order which limited dissemination of discovery; 5) We had to relocate a witness and their entire family after he was [threatened] at gunpoint; 6) We had a witness who was shot [at] by two males, each [carrying] a gun. Had they not missed, he would have been dead; 7) threats against judicial officers have required recusal of the USAO, necessitating appointment of an SAUSA and costly travel and lodging expenses. In one such case, our AUSA was required to make [redacted] overnight air trips to another District and was out of town in a hotel during [redacted] [a] long trial.

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Categories	Open-Ended Comments
General comment about harm in prison/prison culture; general comment about the frequency of harm	A BOP investigator in a civil rights case testified in my court that upon entry into the FCIs he has worked in, new inmates are routinely and quickly confronted and made to produce their sentencing "paperwork" by a deadline to prove that they did not cooperate with authorities. The inmates are told that if they cannot do so, they should seek protective custody (usually by requesting transfer into the "secure" (maximum security) unit, or face violence from other inmates. An inmate corroborated this account.
Details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants	A co-defendant in a multi-defendant drug conspiracy flipped and testified for the Government. He was being housed in the Metropolitan Correctional Center on a different floor from the other defendants. One day during trial, the defendant and the cooperator were brought over in the same van.
Details of a specific incident; procedures for protecting defendants	A defendant in a drug conspiracy indictment before another judge in this district conspired with others to kidnap 2 defendants on pretrial release with cases before me, have the defendants transported to [redacted], then murdered. The 2 defendants cooperated with law enforcement, one posing for pictures as having been shot in a bathtub, and the government filed 5K motions for reduction.
Details of a specific incident	A defendant's home was burned down when his cooperation was made known. A mother and her daughter (both witnesses) were threatened with a gun and were directed to submit affidavits prepared by the defendant regarding why they would not testify before the grand jury. A defendant made it known that anyone who testified against him would be shunned in a small rural [community]. In a case in which a member of the conspiracy was murdered for stealing drugs, cooperators described pressure from Defendant and his family members to not submit to pressure from government.
Procedures for protecting defendants	Again, all the cases were filed under seal
Procedures for protecting defendants	All of my knowledge is anecdotal, and non-specific. We work hard to use preventive measures identified above to avoid these situations.
General comment about the frequency of harm	Almost all inmates request Docket. I am certain they are pressured to get that information but I know of no actual threats of harm that leads them to make this request.
General comment about the frequency of harm; general comment about harm in prison/prison culture	Almost all of our clients who are sentenced to incarceration call the office from the designated institution and request some court document to prove that they have not cooperated.
Nothing to report	Although the issue is occasionally raised in criminal cases I believe that the threat to family/friends was only remotely credible on one [occasion] and the specifics were lacking.

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Categories	Open-Ended Comments
Details of a specific incident; procedures for protecting defendants; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	An offender under supervision reported being assaulted on more than one occasion while in BOP custody. Another offender under supervision reported being severely beaten while in BOP custody and threatened several times while on supervised release. One officer reported preparing presentence reports for a [redacted] defendant drug conspiracy where numerous defendants cooperated. The cooperation activities were only disclosed through confidential memorandums and sentencing memorandums filed under seal. The case agent and a defense attorney reported one cooperating defendant and his/her family received numerous violent threats from other codefendants and members of the community, which caused the cooperating defendant's family to move to another city. The defendant's name and the words "rat" or "snitch" was written numerous times on the walls of the Marshals' holding cells.
Nothing to report	As noted we have no documented instances of harm or threats in these types of cases so they were neither higher nor lower from one year to the next.
Takes issue with the survey	Asking how many defendants and witnesses refused cooperation is asking for an unknown, because we don't know if a defendant or witness was interested in cooperating or why they chose not to do so. We also do not know whether threats were directed to potential witnesses.
Details of a specific incident	[redacted] I presided over a trial of a heroin kingpin. All of his co-defendants pleaded guilty and none testified against him. However, one of the co-defendants had [a] death threat from a [redacted] cartel. This may have been because the co-defendant was suspected of cooperating with the government, although the co-defendant did not have a cooperation agreement provision in his written Plea Agreement.
Policy comments	Be [sensitive] to the public's right to know about the details of criminal cases even those that involve a potential for harm to cooperators.
General comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator	Before taking senior status, I had a fairly heavy criminal caseload. Given the number of cases, it is difficult for me to remember all the ones in which cooperating defendants and witnesses received threats. In 2014, for example, I held [redacted] sentencing hearings. Very few of those involved simple immigration cases. Most were drug conspiracies, fraud type offenses, and firearms offenses. There are often concerns in the drug cases about retaliation against cooperators. The drug gangs do their best to obtain court documents indicating who cooperates and who does not. I am sure that I have had many criminal defendants, their family members, and witnesses in criminal cases who have received threats. One was the victim of a drive-by shooting in retaliation.

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Categories	Open-Ended Comments
General comment about the frequency of harm	Belligerent attitude among and between defendants and their respective witnesses has intensified; threatened murders of relatives of defendants is much more common and whether they have occurred may not be available information to the Court. Whatever "restraints" on behavior that may have previously existed, they have vanished!
Details of a specific incident; procedures for protecting defendants	Both of the offenders experienced threats of physical harm to self and family while on supervised release; and didn't request or receive protective custody of special housing unit placement.
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Clients call to request PSR and court documents to document that they are not cooperating. I have recently heard that convicts are more apt to be requested info from other [redacted] inmates. I question whether convicts from [redacted] cooperate after conviction and threaten or force other [redacted] inmates to provide information proving that they are not "rats".
Details of a specific incident; general comment about harm in prison/prison culture	co-defendant died under suspicious circumstances while at the detention center
General comment about the frequency of harm; general comment about harm in prison/prison culture	Co-Defendants and witnesses who cooperate are often threatened even though their cooperation is to be confidential. [Occasionally] actual physical violence occurs. There is clearly an element of [intimidation] present in the detention and prison facilities.
General comment about harm in prison/prison culture; general comment about the frequency of harm; procedures for protecting defendants; procedures for protecting witnesses; details of a specific incident; general comments about the sources to identify cooperator	Comments offered by AUSAs: / / / Comment 1: Defense attorneys often ask about whether it is possible to leave cooperation out of plea agreements or to seal plea agreements. Defendants who are considering cooperation are concerned about the presence of sealed 5K motions being a red flag for cooperator status with other BOP inmates, and many fear general reprisal upon reaching the BOP. The above case is a good example of this prisoner notion of being considered "soft" if one is housed in prison with a "snitch." The defendant was suspected of having a gang connection to the ultimate instigator of the violence, but his accomplices were motivated to help simply in order to remove a cooperator from their midst, or to "check the snitch off the block." / / Comment 2: The threat of harm is always a major issue in prosecuting gang cases. It is difficult to determine when there have been actual threats that we do not know of, and when the reluctant witness fears retribution in the future, but nothing has been threatened yet. In general, a substantial number of potential witnesses to gang violence appear nervous about cooperating, and it takes a great deal of effort to get people to cooperate. / / Comment 3: We are seeing an increase in defense attorneys telling us that their clients don't want to cooperate nor do they want us to put a cooperation provision in their plea agreements – and are [leery] of sealed entries in their dock-

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Categories	Open-Ended Comments
	et sheets because when they get to prison, the cooperation or sealed entries are taken to mean they are snitches. Not sure if they are concerned only about harm to themselves, but the harm to their families, especially those back home in [redacted]. / / Comment 4: I have one defendant who cooperated in a state case. He was never explicitly threatened, but life on the street doesn't require explicit threats. When we first met this defendant he refused to discuss the source of the counterfeit currency he was caught distributing. In fact, he got it from some gang members in [redacted] area, but wouldn't discuss it with us. He did tell us that he wouldn't talk about the currency because he knew that members of the gang would come after his mother. He was never threatened, but there was no need of a threat. / / I don't know exactly what the survey is trying to capture, but it's missing a big problem. There need not be an actual threat to shut down cooperation, as the above example shows. I recall other anecdotes but they're older than three years. / / Comment 5: Threats from the Cartels in [redacted] continue to be an issue. One defendant and her children were forced to flee and face prosecution here because of threats to her regarding possible cooperation of her and her husband. A material witness in that same case has been pursuing asylum from the Immigration Court out of [redacted].
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	cooperating defendants who are incarcerated are routinely asked to show their plea agreements to prove they are not cooperating with the government
Details of a specific incident	[redacted], who agreed to cooperate with the government, was murdered the very night of her first interview. Two defendants in a multi-defendant drug conspiracy case were charged with her murder. One was convicted by jury of murder, one pleaded guilty to the murder charge.
General comment about harm in prison/prison culture; general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	Defendants are frequently confronted and asked to provide their Docket Sheet upon arrival at their BOP facility. That Docket Sheet is then examined by other inmates for sealed documents that create "gaps" in the Docket Sheet sequential numbering. Any gaps are viewed with suspicion--as the inmates usually correctly assume those are sealed motions, plea agreements, orders, and memorandum related to cooperation. The defendant is then labeled a cooperator. This forces the defendant into protective custody, or leads to assaults, harassment, threats, and other behavior. I have tried to work with BOP Legal Counsel to ban BOP inmates from having Docket Sheets (much like the BOP bans PSRs, which were excluded from inmate possession for similar reasons). I have not heard back from BOP legal counsel on the issue.

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Categories	Open-Ended Comments
General comment about harm in prison/prison culture; general comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator	Defendants are threatened with bodily harm when they arrive at their designated institutions by the prisoners that are designated the "shot callers". Before the defendants are permitted to be on the yard, he must show his paper work, (plea agreement and judgment). Some have requested their presentence report which is not permitted in the possession of an inmate. One defendant was beaten so bad, he was hospitalized. He did not cooperate, but rather another inmate with the same name. The prisoners received the information after having had family and friends look up the defendant's name.
General comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Demands by inmates for new inmates to supply a copy of their Plea Agreements and sentencing transcripts for verification that they were not cooperators. Failure to provide the required information meant they were considered to be "rats"
Details of a specific incident; procedures for protecting witnesses; procedures for protecting defendants	During our office's prosecution of multiple defendants who were part of a local [redacted] gang, a cooperating witness ("CW") was threatened with death, and so were members of his family in [redacted]. The Government arranged for members of the CW's family to be brought to the United States for their safety. Following their arrival, the Government provided funds for the CW's family members to change residences due to additional threats from the defendants. During this prosecution, eight of the defendants who cooperated with the Government sought and received custodial wit-sec protection due to likely retaliation and threat assessment. / / During our office's investigation of several gang members of [redacted] descent, 3 cooperating defendants were threatened while in custody. / / During our office's prosecution of several corrupt police officers involved in illegal drug activities, the confidential informant ("CI") was threatened via text message by one of the defendants. Prior to receipt of the threat, the Government had already arranged for the CI to be relocated out of state for his protection. /
Details of a specific incident; procedures for protecting witnesses; procedures for protecting defendants	Each of the cases that I have had involving witnesses have been victims of domestic violence where the defendant is on supervised release and I am informed that the defendant has threatened the victim. It is brought to my attention through a supervised release revocation report. The case with the cooperating defendant being threatened and put into protective custody was also brought to my attention due to a pretrial services officer informing me.
Policy comments; general comment about the frequency of harm; general comments about the sources to identify cooperator	Electronic dissemination of case information, particularly when informants are involved, is problematical for incarcerated defendants. It makes motion and appellate practice cumbersome, and it is nearly impossible to control sensitive information to the detriment of defendants and government witnesses as well. As a defense attorney, I much prefer that these matters not be publicized.

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Categories	Open-Ended Comments
General comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	Every client sent to BOP asks for a copy of their docket sheet, even the clients who did cooperate. The cooperating clients want us to somehow amend the docket sheet so there are no sealed documents. Meanwhile, as someone who also represents the people who are cooperated against, I know that finding out information about cooperation efforts, even though it's important impeachment evidence, is becoming more and more difficult.
Nothing to report	Fear of the prosecutor and agents more prevalent fear.
Nothing to report	Fortunately, I have none to report
General comment about the frequency of harm	Have been a number of cases where illegal alien defendants were participants in drug distribution in U.S., usually as low-level couriers or mules, for a relatively nominal payment of money, but not otherwise a significant part of the drug operation. Many report having been threatened, or having their families threatened, in [redacted] by drug cartels operating there. The government has conceded, in at least some of the cases, that the threats and risks are real.
Details of a specific incident	Higher in 2014 due to Robbery Case where four Defendant's/witnesses were assaulted or threatened.
Nothing to report	I am a new Judge appointed in [redacted]
Nothing to report	I am a recently appointed judge, and have no criminal docket at this time.
Nothing to report; takes issue with the survey	I am not aware of any harm or threats in the past 3 years. Thus, in answering this question I was not sure whether to select "I don't know" or "about the same"....
Nothing to report	I am not aware of any instances where cooperators were threatened or harmed.
Nothing to report	I am not aware of any reported incidents or threats to defendants from our district.
Nothing to report; general comment about the frequency of harm	I am relatively new to the bench. But this has been going on for years.
Nothing to report	I am Senior Status and have not handled any criminal [cases] for the last three years.
General comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting witnesses; general comments about the sources to identify cooperator	I am very concerned about cooperating witnesses once they get to prison, whether they cooperated initially and received a benefit for cooperation at their initial sentencing or later got a Rule 35. Even though we try to protect them by sealing certain documents, allies of those who want to know for improper reasons can access the court file from outside of prison, and they do. When a sealed Order in an otherwise dormant file shows up, you can just about bet it is a Rule 35 reduction, and allies of others in prison know that. I had one instance of where I somehow found out about such an inquiry being made for others in prison.
Nothing to report	I began my service as a federal district court judge on [redacted]

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Categories	Open-Ended Comments
Nothing to report	I believe I had one and possibly two alleged threats to family members, but all of it was hearsay and not much collaboration.
Takes issue with the survey; general comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	I believe the survey calls for speculative answers. To the extent such threats or harm can be linked [with] any court activity, which is speculative itself, if there is a link, it is the following: if anyone who wants to do harm to a so-called cooperator is sophisticated in any [respect], they know that the word "sealed" on any court docket means only one thing: a cooperation provision is part of the case. / The fact of cooperation cannot be kept from the public [vis-à-vis] the specifics of the cooperation. At sentencing the judge of course must announce the amount of time being reduced from the sentence for cooperation. The details of the cooperation are never placed on the record except in the rare case where the defendant chooses to.
General comment about the frequency of harm; general comments about the sources to identify cooperator	I believe there was a concern that threats are generated from those who gain access to public documents that discuss cooperation or potential cooperation by a defendant in custody.
General comment about the frequency of harm; comments about refusal out of fear	I can not recall threat of harm to cooperators but do recall 1) defendants and family members who [were] threatened/harassed because people thought the defendant was cooperating or might do so, and 2) defendants who declined to proffer and help [themselves] because people might think they were cooperators
Takes issue with the survey; general comment about the frequency of harm; general comment about harm in prison/prison culture; comments about refusal out of fear	I can only answer for defendants because that's whom we represent. I can't answer for witnesses. / Limit of 100 is insufficient to express number of defendants who 1) request court documents to show they didn't cooperate (virtually all of those incarcerated make this request, so many hundreds; 2) I can't quantify number of defendants who refuse to cooperate out of fear. This is a constant theme and vastly exceeds 100.

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Categories	Open-Ended Comments
Nothing to report; general comment about the frequency of harm; policy comments	I cannot recall the last time a client, defendant or witness in a matter I was involved in was threatened in any way. In my practice, which overwhelmingly involves the representation of federal defendants and witnesses in federal criminal matters, the threat or risk of harm has not presented itself in years. The extent to which such is an issue depends on the nature of the case and the defendants involved in it. For example, in my district, the risk of harm to a cooperating defendant or witness in a health care fraud case is typically much lower than that faced by a similar defendant or witness in large scale drug trafficking case where the leaders of the conspiracy remain free while a low ranking conspirator is enlisted as witness in an ongoing investigation that has yet [to] result in additional arrests and charges against the leaders. I also perceive that defendants and witnesses in many cases, including drug trafficking and other organized criminal activities, are more likely to cooperate today than in the past. It is more common and there is less taboo therefore associated with "cooperating" among defendants and witnesses. The current mechanism whereby the parties must articulate to the court why something should be sealed appears to be working. The purported need for blanket rules allowing court records and documents to be sealed or shielded from the public is a canard.
Nothing to report	I can't recall any others
Takes issue with the survey; general comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator; comments about refusal out of fear	I could not accurately answer the previous questions with a number. We frequently have clients call asking for their file and/or docket to prove they are not cooperators - even client who have cooperated. Most [do] not claim they are being threatened but some do. I cannot quantify how many call but it is often. Most ask that the cooperation portion of a plea agreement be placed under seal (that is not automatically done here). 5K motions and anything referencing cooperation (e.g. mtns to adjourn) are under seal. I cannot quantify. I will say that most often when they want to withdraw it is because they do not want to be exposed as a cooperator through testimony but not necessarily because they've already been threatened. It is a concern they will be threatened/harmed once their name is on a witness list. Since most cases plea, cooperators are not exposed. We also have clients who choose not to cooperate. Some make that choice because they do not want to help the government or turn on their family/friends. Others are scared of retaliation. I cannot quantify this because we do not necessarily ask our clients why they are making this decision. / / I don't know if this is helpful. I am sorry that I cannot provide a number.

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Categories	Open-Ended Comments
Nothing to report; Takes issue with the survey; policy comments	I do believe that this is an important issue. But it is my opinion that Judges are the least likely to have knowledge of what happens after his/her case is closed.
Nothing to report	I do not recall receiving reports of harm or threats of harm experienced by any defendant, witness, or family or friends of a defendant or witness from cases on my docket in the past three years.
General comment about the frequency of harm; general comment about harm in prison/prison culture	I do not recall specifics but I do recall being informed (primarily in connection with sentencings that defendants have been threatened in detention facilities and/or their families threatened with physical harm in connection with actual or suspected cooperation. All in drug cases, some of which also involved charges of violent crime (including murder) against the person to whom the threats were attributed.
Nothing to report	I do not see any change in harm, threats, or worries about harm over the last three years (or over the last [redacted] years, for that matter). Clients are often worried about retaliation; however, I have never seen any evidence or stories about actual harm.
Details of a specific incident; Takes issue with the survey	I don't recall any cases involving witnesses being harmed or threatened before 2014. The harm experienced by a witness' family was a drive-by shooting of the family home allegedly arranged by one of the defendants.
General comment about the frequency of harm; Takes issue with the survey; general comments about the sources to identify cooperator	I got tired of answering the same way but I probably see 15 or so cases per year where a cooperating defendant in pretrial custody is [threatened] based on the knowledge he is cooperating based on debriefing statements placed in the [discovery] file of co-[conspirators].
Details of a specific incident; general comment about the frequency of harm	I had a multi-defendant case arising out of brutal assault of an expelled member of the [redacted]. All but one of the defendants pled. Three or four testified for the Government in the trial of the one defendant who went to trial. The "rule" of this [redacted] gang is that one does not get out of it alive. Those who testified were under threat of death, and one in particular — who had a prior State sentence to serve — sought (unsuccessfully) a deal to avoid having to serve his State term in the State prison for fear that he would be killed. The Assistant U.S. Attorney who led the initial prosecution was removed from handling further [redacted] cases at his request after he received death threats. / / Frequent death threats are made in illegal alien trafficking cases, to control the illegal aliens until transportation fees are collected, and occasionally some of these aliens are called as witnesses. / / An assistant U.S. Attorney and [I] are currently under death threats from a detained defendant awaiting sentencing on convictions including on one count of solicitation to commit a crime of violence.

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Categories	Open-Ended Comments
Details of a specific incident	I had one cooperating witness who was concerned about potential threats once he was sentenced and started serving his custodial sentence. His main area of concern, however, centered around his deportation to [redacted] and the threat of harm facing him from drug cartels in [redacted].
Details of a specific incident	I have a large drug case involving about [redacted] defendants. Two of them claim that they were threatened not to cooperate.
Details of a specific incident	I have a pending case involving a local gang and allegations of 2 or more killings of cooperating witnesses.
Nothing to report	I have been a judge [redacted].
Nothing to report	I have been on senior status for [redacted] and have not had a criminal docket for the past three years.
Nothing to report	I have been on the bench less than [redacted].
Nothing to report	I have been on the bench less than [redacted].
Nothing to report	I have been on the bench only [redacted] and have had my criminal docket for only [about] [redacted]. I have am not aware of any threats thus far experienced by defendants and/or witnesses, or their family or friends.
Nothing to report	I have had counsel represent that there may be a potential threat of harm to a defendant or witness; however, I do not believe that there has been any actual harm or threat of harm. Or, maybe, I have just not been made aware.
Nothing to report	I have had no problems with threats of harm to clients or witnesses. If I ever had any issues, I am sure I could work with the government and the court to handle them on a case-specific basis.
Details of a specific incident; general comment about the frequency of harm	I have had one case in which a codefendant was murdered just before he was scheduled to appear for a change of plea. I have had other cases in which I learned that a witness was [threatened] but I cannot recall whether any of those instances occurred within the past three years.
Nothing to report	I have no information that any defendant or witness was harmed or threatened due to perceived or actual cooperation.
General comment about the frequency of harm; policy comments; general comments about the sources to identify cooperator	I have no other specific information to provide, but have the impression that the US Department of Justice and US Attorney's offices do not consider the protection of cooperating defendants (and to a lesser extent witnesses) to be much of a priority, despite the rapid increase in electronic access and search capabilities in recent years. Perhaps this is reflective of better information about the real threat to an incarcerated individual's relative safety, but fear there is a certain amount of fatalism (even cynicism) about what can be or should be to follow through on these protections. Instead, prosecutors seem to be defaulting on their telling the potential informant that, while efforts will be made to protect them, at the end of the day their safety cannot be assured.

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Categories	Open-Ended Comments
Nothing to report	I have not been advised of any threats to anyone
Nothing to report; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator; comments about refusal out of fear	I have not had any clients that, to my knowledge before or after, were threatened or harmed because of cooperation. I can tell you that the CW in jail is that other inmates at the FCI's they will be assigned to, will have access to their judgment and other docs and so will be able to tell if an inmate was granted a 5K or a reduced sentenced for cooperation and they fear retribution for that. The effect is to limit D.'s willing to cooperate. I have had a handful, maybe 6, cases in the past 3 years that the fear of retribution prevented their cooperation.
Nothing to report; general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; comments about refusal out of fear	I have not had defendants/witnesses who have received actual threats or have been harmed because of cooperation or possible cooperation. However, it is common that defendants do not wish to have a cooperation provision in the plea agreement because of safety concerns. Those concerns are two-fold. One is the general concern about their family who will remain in the community. The other concern is that the paperwork at BOP will indicate they are cooperating. The fact that a defendant's cooperation is not kept secure by BOP is a major factor keeping many defendants from desiring to cooperate.
Nothing to report; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	I have not known of documents or transcripts to have been used. Typically it is the movement of the prisoner/witness in and out of the facility to meet with the AUSAs which enlighten fellow inmates.
Nothing to report	I have not received any information that defendants who are serving time after sentencing have been threatened in prison for cooperating.
Details of a specific incident	I have one case where the parties' attorneys have expressed serious concerns about any possible threats being made to the defendant during the cooperation period, especially because he is in custody.
Nothing to report	I have only been a District Judge for [redacted].
Nothing to report	I have only been a federal judge for [redacted]. During my tenure, I have not experienced harm/threats to witnesses or cooperators in any of my cases.
Nothing to report	I have only been a judge for [redacted].
Nothing to report	I have only been on the bench for [redacted].
Nothing to report	I have only been on the bench for [redacted].
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	I have only heard of threats to prisoners where their cooperation was discovered through reference to their plea agreements or 5K petition. I have no first hand knowledge of such activity in cases on my docket.
Nothing to report	I have only served as USDJ since [redacted] so I have a limited basis to compare.

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Categories	Open-Ended Comments
Nothing to report	I have polled all current officers and supervisors and they do not recall [any] incidents within the past three years.
General comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture; policy comments; general comments about the sources to identify cooperator	I have practiced actively in the [redacted] since [redacted]. Only one defendant (during the 90's) has been the subject of credible threats during a case and he was appropriately given a place to live outside of town by the FBI for a brief period. It is not infrequent that clients communicate from prison about cooperation allegations, including two or three times during the last three years. Clients have requested their PSR, docket sheet, phony letters from the US Attorney's office or from me. I am not aware of any client being the subject of actual harm. The current system of sealing cooperation agreements does not offer protection since plea agreements are public and anybody can do the math and compare guideline levels to actual sentences. Now that the Guidelines are discretionary, there is a risk of being falsely accused of being a cooperator if one gets a reduced sentence for some other reason. / / My view is that the only way to protect defendants is for less of the docket to be public records.
Details of a specific incident; Takes issue with the survey; general comment about the frequency of harm	I have presided over the [redacted] [trials] lasting [redacted]; The [redacted] that were [redacted]; subsequent subsets of [redacted] trials [redacted]; The [redacted] trials [redacted] and numerous other cases involving organized criminal gangs [redacted]. Cooperating witness and [witness] intimidation are standard and the present procedures highlight their cooperation and endanger witnesses. / I did not limit my comments the last three years. / [redacted]
Nothing to report	I just became a judge in [redacted] so I can't compare . . .
Nothing to report	I just took the bench on [redacted].
Details of a specific incident; general comments about the sources to identify cooperator	I know of only one case in the past three years. The case involved the exportation of military grade munitions. Once his cooperation was published in the local paper, his family in [redacted] asserted that they were compelled to move. His wife reported that [someone] shot into her vehicle, she added that her son was beaten up, and that they live in constant fear.
General comment about the frequency of harm	I learn from defense lawyers about threats. They learn about threats from [their] clients. Typically I do not learn of the details. I also am not told if the defendant requested protection. Lawyers are very reluctant to give much information about threats because sharing [details] may place their clients at further risk. I believe this is a problem that is under reported to the courts.
Nothing to report	I only became a judge in [redacted], so I have no basis for comparison.
Details of a specific incident; general comments about the sources to identify cooperator	I only recall one person who, when filing a 2255, requested it be sealed due to fears of threats as he had been a cooperating defendant.

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Categories	Open-Ended Comments
Details of a specific incident; general comments about the sources to identify cooperator	I recall one case where I was informed that a cooperating witness was subjected to threats, including on the internet, for participating in the trial
Details of a specific incident; general comments about the sources to identify cooperator	I recall only the one case I have previously described and the Motion to Vacate at issue and the opinion were issued in 2014 but defendant's allegation of being [harassed] by inmates based on the opinion were raised in 2015
Details of a specific incident; general comments about the sources to identify cooperator	I recently sentenced a defendant who had from jail instructed his girlfriend to identify a co-conspirator on rats.com for cooperating.
Procedures for protecting defendants	I require all documents that reference cooperation or potential cooperation to be filed under seal. I also seal transcripts. I have sealed or moved sentencing hearings.
Nothing to report; Takes issue with the survey; general comment about the frequency of harm	I spoke with [redacted] and was told if i did not recall a specific number I should respond with the number "0", which I have done. / / Also this survey is too absolute in its questioning. A whole host of factors may go into the client's decision to cooperate or not, not only the fear of harm or retaliation. So any cause and effect analysis is misleading. Suffice it to say that fear is present in almost any drug case where there is cooperation.
Details of a specific incident	I took the oath in [redacted], so I have a limited data set from which to answer. / / The one case I described, where a shot was taken aimed at an informant, (which missed), is the only incident with which I am familiar.
General comment about harm in prison/prison culture; general comment about the frequency of harm; details of a specific incident	I tried to indicate that every client who is sent to BOP requests their "paperwork" to prove they are not a cooperator. The number is much higher than I indicated but the survey did not accept the number I put in so I dropped it to 10. A client has two weeks to produce their documents once they enter BOP to prove they are not a cooperator otherwise they are subjected to physical harm. One client was beat senseless with a lock in a sock, he suffered severe head wounds. They are all threatened once they arrive in BOP custody.
General comment about the frequency of harm; policy comments	I understand that the only way generally for a defendant to receive a departure, is to cooperate, the extension of that cooperation can not only lead to a dangerous situation for the defendant, but also for the officer supervising that defendant. It is critical that the AUSA and the agents advise officers of a defendant's cooperation, so that they are not put in an unnecessary high risk situation.
Nothing to report	I was confirmed in [redacted], so I am unable to make a comparison between 2013 and 2014.
Details of a specific incident; comments about refusal out of fear	I was dealing with defendants associated with the [redacted] drug cartel. Cooperators and their family members were under constant threat. Numerous defendants refused to protect their family members in [redacted].
Nothing to report	I was not on the bench in [redacted].

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Nothing to report	I was off of our criminal law draw for most of the past three years. I went on the draw for about three months in about [redacted], and drew three long cases and, therefore, took myself out of the criminal draw again. The trials were [redacted] weeks, respectively. So, I probably have little to add to this survey.
Nothing to report	I was sworn in on [redacted], so my experience is very limited.
Nothing to report	I would not have information about this because it is not a matter ordinarily brought to my attention.
General comment about the frequency of harm; comments about refusal out of fear	I wrote 15 for the number for people who withdrew. It is likely higher. We are in [redacted] where many of our clients are so fearful, b/c of the environment, that we can't even get clients to have a safety valve interview. Clients would rather do their mandatory minimum than be labeled a "snitch." Dozens and dozens of our clients refuse to cooperate out of fear and the threats.
General comments about the sources to identify cooperator	if there are sealed pleading on the docket sheet, the assumption is that client is cooperating
Nothing to report	I'm a new judge and therefore do not have relevant information.
General comment about the frequency of harm; policy comments	I'm afraid my lack of recollection does not allow me to recount the many more instances over the [redacted] years I have been on the bench in which cooperating defendants have been afraid after they have provided information. My experience is that there is a complete disconnect between the United States Attorneys Office and the Bureau of Prisons such that once a defendant is no longer needed, he is discarded and the interest and knowledge in how best to protecting him or her is minimal to non-existent. There is no sense of commitment to the safety of the cooperator for the duration of his term in custody or upon release.
Details of a specific incident; general comment about the frequency of harm	In a large drug trafficking case, a witness/cooperator received a threat via letter. The letter was sent to the witnesses/defendant's family. The FBI is investigating the case. Often, in other cases, many defendants allege that they will be harmed for cooperating - however it's difficult to verify if any actual harm might befall them.
Details of a specific incident; general comment about the frequency of harm; general comments about the sources to identify cooperator	In approximately 2010 there was a huge upsurge in drug conspiracy cases involving violence. Two of the cases that I make reference to in this survey involved RICO drug conspiracies. One of the cases was a RICO drug conspiracy involving a [redacted] gang. It was through trial testimony that I learned of the extensive use of court documents (particularly PreSentence Investigation Reports and Plea Agreements) in prison to identify cooperators.

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Categories	Open-Ended Comments
Procedures for protecting defendants	In coordination with the District Court, we have implemented a procedure to keep cooperation provisions of plea agreements under seal. Standard non-cooperation plea agreements are filed and appear on PACER. Cooperation provisions in all cases are contained in Supplemental Plea Agreements which are filed under seal using a single Magistrate (MJ) case number.
Procedures for protecting defendants; general comment about the frequency of harm; details of a specific incident	In every 5K motion there is a section about potential harm — most of the time the government says there are no known threats but that given the cooperation threats are a possibility — my experience has been that they disclose the threats orally at sidebar at sentencing, because they don't want to write the details down, so we don't have records and my memory is not great about individual cases. The most blatant example I had involved a [redacted] store selling T-shirts with the cooperator's photo and the words "[cooperator's name] is a snitch" — but the knowledge did not come from court, people learned of it during the investigative stage.
Details of a specific incident; general comments about the sources to identify cooperator	In [redacted], the defendant on supervised release in my case testified before a federal grand jury in an unrelated matter. He was murdered in [redacted] in [redacted]. It appears that the defendants in the unrelated matter found out about his grand jury testimony.
Procedures for protecting defendants	In multiple Defendant drug cases where a Defendant has cooperated, I am seeing situations where the defense attorney and prosecutor schedule a meeting with me to explain the Defendant is cooperating; however, because of safety concerns for the defendant and his family members, they do not want the docket to reflect any notations to a sealed proceeding. Instead of the U.S. filing a sealed 5k motion, there is a Rule 11(c)(1)(C) plea agreement to a specific sentence or to a specific range and the joint request by defense counsel and the prosecutor is to accept the plea agreement without making any reference on the record to the defendant's cooperation for personal safety reasons. / / My clear preference would be for a sealed 5k motion for downward departure for substantial assistance; however, I have agreed to the off the record procedure requested by defense counsel and the prosecutor because I do not want to see any harm come to the defendant and/or his or her family members.
General comment about harm in prison/prison culture; general comment about the frequency of harm	In my cases, many of my clients have contacted me to obtain transcripts of their sentencing hearings, or copies of the dockets in their cases so that they can show other inmates that they did not cooperate. They have told me that other inmates require this information so that they can prove that they are not "snitches."

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Details of a specific incident; general comments about the sources to identify cooperator	In one case prosecuted recently, the informant /witness was threatened after the defendant's family posted the tapes of the undercover buys the informant made on YouTube. The tapes had been provided to the public defender as discovery. The public defender turned these over to the defendant's family, and subsequently, the family posted the videos on-line. The office has addressed this problem with the public defender to ensure that such an episode will not be repeated.
Details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	In one case, the defendant was involved with members of violent known street gangs, such as [redacted], but who also would engage in unaffiliated acts of violence for hire in connection with their drug trafficking activities. The defendant used information obtained pursuant to the Jencks Act to ascertain the identities of potential witnesses, some of whom were incarcerated, some of whom had pled guilty but were at liberty (of these some received veiled threats not to testify and one was assaulted- presumably in connection with his anticipated testimony). This defendant also tried to provide economic assistance to one cooperator to buy his silence by providing commissary money and providing money to his family. / / In the third case, the defendants involved in assaulting a perceived cooperator were members of a violent ethnic criminal group. The assault occurred without any concrete proof that the alleged cooperator was, in fact, cooperating on their case. In fact, the person was not providing information on their case. The assault was videotaped in the federal jail facility. Additional comments provided via email: There are certain circumstances that may serve as signs to defendants or persons trying to identify who is cooperating with the government in a criminal case or ongoing investigation. For example, --- If the person has pled guilty and the sentence has been held in abeyance for any unusual length of time, usually more than 3 or 4 months. --- If the person pled guilty to a prosecutor's information as opposed to an indictment before there was an indictment filed. --- Because incarcerated defendants who have been convicted by guilty plea (or sometimes trial) are pressured by other inmates to obtain a copy of their presentence report to prove they are not cooperators, our district's Probation Department no longer mentions the defendant's cooperation with the government or the possibility of a 5K1.1 motion as a possible departure factor in the presentence reports. Any cooperation is addressed in the sentence recommendation, which is not sent to the prison officials, and is submitted to the court separately from the presentence report.

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Details of a specific incident; general comment about harm in prison/prison culture	In one instance, a defendant attempted to recruit an inmate incarcerated with the co-defendant cooperator to harm the cooperator. In another instance, a spouse of a co-defendant (who was also a defendant) in a drug conspiracy case was raped by members of a gang involved in the conspiracy because she agreed to cooperate with the government.
Details of a specific incident; comments about refusal out of fear	In one of the cases on which I worked as a magistrate judge, a confidential informant was murdered the day after agents arrested a number of participants in a drug conspiracy. In another case involving multiple defendants who were involved in a drug conspiracy, one of the [redacted] defendants who was a minor player in the conspiracy but who had information about at least one of the leaders of the conspiracy, declined an opportunity to cooperate with the Government out of concern for his family. In that case, we learned that another member of the conspiracy was paying the defendant's attorney fees and was participating in decisions about the defense provided to the defendant. I removed the defense attorney and appointed new counsel for the defendant.
Procedures for protecting defendants; general comment about harm in prison/prison culture	In our Court [redacted] we have local rules that allow the sealing of such documents as Motions for 5Ki.i and 3553 relief, Sentencing memorandum, Guilty Plea Memos and Agreements when cooperation of the pleading defendant is at issue. We cannot (and I would not) seal an entire case file, but orders to seal enough documents in a case will be revealing on the docket to those assisting a defendant target. Pre-sentence Investigation reports should not cite cooperation of any defendant, either. / Separating the cooperator(s) in a particular case who are all housed [in] the same facility is also a challenge, but the effort must be made by the prosecutors as well as the FDC and BOP.
Procedures for protecting defendants	In our district, all sentencing memoranda, 5K motions, and plea agreement cooperation agreements are sealed by default. I believe this has been very effective in controlling the effect on cooperating defendants and witnesses.

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General comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	In the [redacted], the United States Attorney's Office ("USAO") prosecutes a number of cases annually charging defendants who are members of violent street gangs, organized crime groups, and large-scale drug trafficking organizations. One of the central tenants of many of these organizations is that those who cooperate with law enforcement against these organizations are automatically targeted for murder or some other form of physical harm. As a result, it is not at all unusual for cooperating defendants and cooperating witnesses to receive threats directed by the criminal groups they are cooperating against. (Although, chiefly as a result of the great care that is typically taken to protect cooperating witnesses and defendants from harm, it is rare for these threats to materialize into actual harm that befalls these individuals.) / / As a result of the nature of the threat faced by cooperating witnesses and defendants who cooperating against some of the violent criminal organizations prosecuted in the [redacted], the USAO routinely seeks permission to file under seal with the court pleadings -- such as sentencing memoranda and plea agreements -- that disclose the fact a defendant or witness is cooperating with the government; and district courts in the [redacted] regularly provide authorization for the government to file such pleadings under seal. While this may provide some measure of protection for individuals who cooperate with the government, it is not a fool-proof method of concealing an individual's cooperation from those who may want to do him or her harm, as the fact that such a pleading has been filed under seal may alone signal to a member of one of these groups that a particular individual is cooperating and these groups often need only to speculate that an individual is cooperating before seeking to do him or her harm.
General comment about the frequency of harm	In the [redacted], we have a large percentage of defendants who cooperate with the government. The majority of threats are coming from drug cartel members who reside in [redacted] and travel back and forth across the border. Most of the defendants who report the threats state they have been kidnapped, beaten, and threatened by the cartel. The threats usually extend to the defendant's family members as well.

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General comment about the frequency of harm; general comments about the sources to identify cooperator	In the vast majority of the cases, rumors led to threats of harm or assault. However, the co-defendant or unindicted co-conspirator had no proof that the defendant was actually cooperating.
General comments about the sources to identify cooperator; details of a specific incident; procedures for protecting defendants	In this district both plea agreements outline the government's intent to request a sentence reduction for cooperation and the Statement of Reasons is still considered by the Court as a public document and thus is available with the judgment on CM/ECF. / / Of the two offenders threatened while on supervised release -- one we made arrangements to transfer supervision to another district and the other one is currently in process of attempting a transfer. The current one being threatened was sentenced in a different district.
Procedures for protecting defendants; nothing to report; policy comments	In this district we have very few threats of harm. We believe taking actions to seal information for a minority of persons for the explicit reason of making the information more difficult to obtain, will harm the majority of our clients by making otherwise public information secret and by depriving them of potentially exculpatory or mitigating information (what agreements other similarly situated persons have obtained, how to compare others convicted of the same offense, etc.). We strongly oppose this idea for those reasons. In addition, some courts of appeals look unfavorably on sealing any documents and have strict rules as to when and how documents can be sealed.
Details of a specific incident; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	In [redacted], the defendant [redacted] was a local rap artist in [redacted]. [redacted] compiled and released a rap video on YouTube that identified (by name) government cooperators. The government was successful in having the video removed from YouTube. This occurred in [redacted]. On a separate matter, we have received information in the past that inmates in BOP custody were being required to provide other inmates with a copy of their presentence report in order to confirm that they were not cooperating with the government. No specific case references are [available].

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Categories	Open-Ended Comments
Details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants; procedures for protecting juries	In [redacted], the government arrested [redacted] people involved with a very violent drug conspiracy known as [redacted]. Most of those arrested were held at the Federal Detention Center, and although there were separation orders, the A.U.S.A. reported to the Court a large number of threats made by the organization leaders [redacted]. The organization took the position that even a defendant's guilty plea qualified as cooperation, even if that defendant provided no further assistance against other co-defendants. The Court broke the organization up into three groups for trial and tried four individuals in the first of the three groups, resulting in convictions for all four. The Court ordered an anonymous jury and the U.S. Marshals escorted jurors to and from the juror parking lot from undisclosed locations. None of the defendants has cooperated against his or her co-defendants, though some have pleaded guilty. Those who have pleaded guilty have made clear that they are putting in a plea for themselves only, not agreeing to cooperate against any of their co-defendants.
General comments about the sources to identify cooperator	It appears most harm was done by people who knew them previously, not [through] court documents or information made public through judicial means.
General comment about the frequency of harm; general comments about the sources to identify cooperator	It appears that more uncharged witnesses (not defendant-witnesses) are threatened, than defendants. Additionally, it appears that frequently, at least at the earlier stages of the cases, the witnesses are identified through conclusions drawn from discovery (even if redacted to protect identity for a time). Additionally, in many cases there are not actual threats, but an expressed fear by the defendant of cooperating due to concern for self or family. Many such defendants express concern through their counsel about the sealing of the cooperation agreement and how it appears on the court's docket (such as whether there is a missing number on the docket).
General comment about the frequency of harm; general comment about harm in prison/prison culture	It is a recurrent theme. I could have continued to answer yes over and over again in this survey. I often read it in PSR where the officer states that the defendant and/or his family was threatened when they learned or suspected that he was cooperating. So I really wasn't thinking of one specific case but of many. Everyone seems to find out in jail about who is a snitch!

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Categories	Open-Ended Comments
Takes issue with the survey; procedures for protecting defendants; general comments about the sources to identify cooperator; general comment about the frequency of harm	It is almost impossible to know the exact number of witnesses or defendants who have been threatened from information learned or acquired from PACER. In our district, plea supplements contain the information about cooperation and the potential for downward departures. They are filed under seal. However, one can see that there is a sealed document by the fact that a numbered document is [missing]. Likewise, 5K1.1 motions are filed under seal. However, again the missing document number and the proximity to sentencing is a give away. The same is true for Rule 35 motions, filed under seal with a missing number and shortly thereafter an Amended [Judgment] is filed. Furthermore, witnesses and cooperating defendants, when threatened, generally do not know how the assailant learned of their cooperation.
Policy comments	It is essential that we develop and implement on a national basis uniform procedures and practices to reduce or eliminate the risk of harm to cooperators arising out of public access to court records. My district, [redacted], has developed procedures to do so, but these will be of little effect unless [these] procedures, or something similar to them, are adopted throughout the country.
General comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; policy comments	It is increasingly true that defendant's worry they will be asked, either during pre-trial incarceration or once placed in the Bureau of Prisons, for their plea paperwork to see if they have cooperated. Refusing to provide it is considered proof of cooperation. I have had a court allow me to submit the plea paperwork with a cryptic reference to a sealed document outlining the cooperation and its 5K benefits. We definitely need a way to help [defendants] who cooperate from being put in this predicament.
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	It is now regular BOP inmate practice to demand "papers" to determine whether another provided cooperation and assistance to the government, or is a convicted sex offender where minors were involved. Inmates regularly request copies of their docketing statement, judgment and commitment order, and statement of reasons section.
Nothing to report	I've been in this position for less than a year, so my perspective on the questions is very limited.
Details of a specific incident; procedures for protecting defendants; general comments about the sources to identify cooperator	I've [only] been on the bench [redacted]...so not a lot of context to respond. I had one case where the potential for 5K1.1 was mentioned in the plea agreement. Later, the FPD asked permission to substitute a revised plea agreement (so it would appear as the "original" [agreement] on the docket), deleting reference to cooperation because of threats conveyed to defendant's family. My clerk has also reported anecdotal instances of "rough and [suspicious]" looking people coming to the [public] viewing terminal to see plea agreements and/or 5K motions.

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Details of a specific incident; general comments about the sources to identify cooperator	Just the one incident mentioned earlier. It occurred in a multi-defendant drug case. The witness was a defendant in a related multi-defendant drug case and was seen coming back from court. Unclear how one of the defendants (the one who threatened him) knew he had cooperated.
General comment about harm in prison/prison culture; general comment about the frequency of harm	Many clients who were sentenced to a BOP facility have requested court documents that confirm that they were not cooperators.
General comment about harm in prison/prison culture; general comment about the frequency of harm; procedures for protecting defendants; comments about refusal out of fear	Many of our clients request their paperwork after they report to BOP and tell us that if they do not prove they were not cooperating they will be in physical danger. In our district we routinely seal matters on the docket and close hearings that are related to cooperation. We do not track numbers - but we often have witnesses refuse to be interviewed by us in fear that cooperation will tag them as a "snitch" and place them in physical danger.
General comment about the frequency of harm	Many of the threats were made by the defendants appearing before me of actual and potential witnesses against them. I have seen correspondence and transcripts of phone calls containing such threats.
Procedures for protecting witnesses	Many of those [threatened] went into witness protection.
General comment about harm in prison/prison culture; general comment about the frequency of harm	Many requests for transcripts because of demands from other inmates in prison to prove that the defendant was not a cooperator. Some threats to defendants whose sentencing hearings have been postponed when co-defendant trials are postponed because they are assumed to be cooperating.
Comments about refusal out of fear; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	Many times defendants will refuse to cooperate because of threats to family, friends or themselves. There is also the fear of the unknown when they reach BOP, as it is common knowledge that "cooperators" are targeted. Further, all of our plea agreements contain boilerplate language regarding cooperation, so anyone in this district could be identified as a cooperator even when they did not cooperate. We also receive many variances on factors other than cooperation, and defendants are concerned that the variances, though not related to cooperation, may target them in prison. We routinely give a copy of the sentencing memorandum we prepare to clients. 5K motions prepared by the government are not shared with us.
General comment about the frequency of harm	Most cases involved illegal aliens with ties to drug cartels in [redacted]. Defendants feared for their [families'] safety. Whether actual threats or simply fear arising out of the retributive reputations of the cartels was the cause of reluctance to provide information, I cannot say.
Procedures for protecting defendants; general comments about the sources to identify cooperator	Most information is anecdotal. No hard details are available. It is our practice to seal any filing or proceeding that references cooperators, except the testimony of a cooperator in open court.

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General comment about the frequency of harm; general comments about the sources to identify cooperator	Most of the cases involve individuals in either pretrial detention or release status who were threatened by individuals (often co-defendants) who knew the "victims" were assisting the government either after arrest, or had cooperated with law enforcement prior to arrest. I believe very little of the information about cooperators was gleaned through court documents, mostly it was by word of mouth or from the street.
General comment about the frequency of harm; details of a specific incident	Most of the cases where I have clients who reported threats of harm arise in in drug conspiracy cases, mostly involving [redacted]. The reported threats have been both implied and explicit. The implied threats typically involve someone telling the defendant they know where he lives or where his family lives. One [explicit] threat involved discussions as to whether to cut the defendant's fingers off or kill him.
General comment about the frequency of harm; general comments about the sources to identify cooperator	Most of the problems our clients face are because of the nature of their charges, eg child pornography cases. Those clients are very concerned about the privacy of their court files and records.
General comments about the sources to identify cooperator; nothing to report	Most of the threats came as a result of actual trial testimony by the defendants/offenders who were threatened. I have no information in any of the cases that points to court documents being used to identify the defendants/offenders as cooperators.
General comment about the frequency of harm; procedures for protecting defendants	Most requests to seal cases have been due to the protection of the ability of a defendant to cooperate without the possible targets learning of the Defendant's agreement to cooperate which would impede the Defendant's ability to lure into traps the government has devised for the cooperation. I have not heard of any person who was a witness to a case to whom a threat was made.
Comments about refusal out of fear; general comment about harm in prison/prison culture	Mostly gang defendants and witnesses don't want to cooperate because of actual or perceived harm and the need to prove they are not cooperators by sufficient documentation when they enter the bureau of prisons
Details of a specific incident	my client that was harmed was attacked while in transit--he was threatened several other times, also while being transported to/from court or facilities
General comment about the frequency of harm; comments about refusal out of fear	My clients are concerned about harm to themselves or family in cooperation cases but I have not had any clients decline to cooperate for that reason.
Nothing to report	My judgeship began in [redacted].

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Categories	Open-Ended Comments
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	My [only] [information] about possible harm to witnesses comes from occasional comments by agents or AUSAs that detained defendants have been "reaching out" to persons outside the jail to have them, in turn, contact persons believed to be [cooperators]. I don't know how often this happens, but assume that it's not uncommon. AUSAs & USMS Deputies would be better sources of data. / / I do know that prison inmates are being called on to get and provide to others copies of their PSRs and, perhaps, transcripts of sentencings. Docket sheets containing sealed plea agreements or sentencing [memoranda] area big red flag.
Takes issue with the survey	My responses to the two previous questions left blank is: fewer than 10.
Nothing to report	N.A.
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	N/A
Nothing to report	n/a
Nothing to report; procedures for protecting defendants	Neither my staff nor I can remember any instance in the past three years of defendants or witnesses being harmed or threatened because of that person's cooperation with the government. In fact, I can't remember any such instance in my [redacted] on the bench. / I know we are careful in my jurisdiction to seal sentencing memos and transcripts of sentencing hearings whenever cooperation is involved or at least whenever I am requested to do so by defense counsel or the government. It is also, of course, possible that we just haven't heard of harms or threats that occur after our cases are closed but I am [sensitive] on the subject and would remember if it had come to my attention.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses	Neither the USAO nor law enforcement agencies track this data, so we have been compelled to provide estimates. Further, it is not clear what the survey means by a witness "withdrawing an offer of cooperation" as opposed to "refusing cooperation." Witnesses, especially in drug and violent crime cases, frequently live in urban areas where "snitching" carries enormous danger. Law enforcement agents commonly hit a wall of silence in a community, stemming largely from the fear that powerful groups will kill witnesses who are seen as providing information to the government. Frequently, this wall of silence can be penetrated only if we manage to arrest and detain many members of the group, freeing residents of fear of retaliation.

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Categories	Open-Ended Comments
Nothing to report; procedures for protecting defendants; general comments about the sources to identify cooperator	No client has reported harm or threats of harm in the last three (3) years. Requests for docket info have decreased since the [redacted] has instituted a policy of sealing ALL plea agreements, not just those entitled Plea and Cooperation Agreements. Those who have asked in the last three (3) years do not report harm or threats of harm in their requests as those requests are probably being screened by those threatening/doing the harm, but that cannot be verified.
Nothing to report	No harm or threats occurred.
Nothing to report	No incidents.
Nothing to report	no threats occurred to my knowledge
Nothing to report	No threats or harm that I am aware of
Nothing to report	No threats, thus no change.
Nothing to report	None
Nothing to report	None known.
Nothing to report	None of my cases that I supervised have experienced threats or harm.
Details of a specific incident; comments about refusal out of fear	None of my clients were actually harmed. I had one defendant whose family in another country was threatened. He refused to cooperate.
Nothing to report	None of these matters have been brought to my attention.
Nothing to report	None that I can recall, after checking with my Courtroom Deputy and my Probation Officer liaison.
Nothing to report	None that I know of.
Nothing to report	not applicable
Nothing to report	not applicable, because [I'm] not aware of any such threat to a witness or defendant in any of my cases.
Nothing to report	Not aware of any harm or threat of harm
Nothing to report	Not sure this is a real issue in our district.
General comment about the frequency of harm; policy comments; takes issue with the survey; comments about refusal out of fear	Obviously, gang and prison inmate prosecution create the greatest threat of actual violence and potential for frightening witnesses from testifying. While "transparency" is at the bedrock of our judicial system, with gang, organized crime, and prison prosecutions transparency comes at a high price when cooperators are an integral part of the prosecution or investigation. Questions 2 and 4 require a highly speculative response. My experience shows that a large number of potential witnesses and defendants are [deterred] and therefore refuse to cooperate because they perceive danger to themselves or their families. I would [not] know if they didn't tell me or refuse an offer, so, my quantification of the numbers is speculative.

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Categories	Open-Ended Comments
Details of a specific incident; procedures for protecting defendants	On the first defendant, that individual was placed in protective custody after being harmed/shot. / With respect to the second defendant, that individual was housed in protective custody in a hotel. / With respect to the third defendant, that individual had physical harm but declined any protective custody.
Details of a specific incident; procedures for protecting defendants	One additional threat to report (can't go back in survey). Offender on supervised release, cooperated against fellow gang members, separated while in custody and USPO work to keep him separate during supervision activities. Threat was actual physical harm.
Details of a specific incident; procedures for protecting defendants	One case in which a defendant on TSR was murdered after [testifying] in court (gang related) and another case were we had to transfer or move a pretrial defendant to another district.
Details of a specific incident; general comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; comments about refusal out of fear	One client got [his] face slashed in as a result of his cooperation. Numerous clients request information in order to show they did not cooperate. This number includes clients who did cooperate, but who may not have received a sentence reduction or whose plea agreement did not contain cooperation language. These clients believe they will be harmed if other inmates believe or find out the client cooperated. Two clients requested having solitary confinement protection because they could not provide the BOP docket report to other inmates, since the BOP docket report would show a reduction for cooperating with the government. No one recalls any instances where witnesses were threatened. Third party cooperators have backed out due to perceived danger.
Details of a specific incident; procedures for protecting defendants	one client had to be placed in the BOP witness protection program due to the severity of the threats against him by other BOP inmates.
Details of a specific incident; comments about refusal out of fear; general comment about the frequency of harm; general comment about harm in prison/prison culture	One client knew of a witness murdered in [redacted]. He flatly refused to cooperate. He received life after conviction at trial. I have many clients who ask for 'fake' documents. One client was beaten while in prison and did lengthy time in segregation. This problem has increased much in last 2 years. Not sure why.
Details of a specific incident; Takes issue with the survey	One defendant was charged with witness intimidation. Also, I assume the survey includes the gov't threatening witnesses with charges or perjury, misprision, and/or conspiracy.
Details of a specific incident	One instance of a threat to family members. This was addressed by both counsel. If my docket is any example, threats and harm do not appear to be a significant problem in this district.
Details of a specific incident	One of the cases was actively cooperating. The other case involved co-defendants who had been boyfriend/girlfriend and were both out on release.

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Categories	Open-Ended Comments
General comment about harm in prison/prison culture; comments about refusal out of fear; general comments about the sources to identify cooperator	One of the main concerns regarding defendants /offenders in our district is the safety valve requirement. Once in custody and after they plea, [an] inmate has to demonstrate to other inmates that he/she is not cooperating with the government. As proof of this, they have to show their plea agreement and [often] they are not willing to comply with the safety valve for fear of retaliation
Details of a specific incident; procedures for protecting defendants	One offender was victimized twice by [redacted] gang members in [redacted]. He was placed in a hotel for 30 days for safety and relocated to [redacted].
Procedures for protecting witnesses; details of a specific incident	One witness was placed in the WITSEC program after cooperating. Testimony was not needed because all defendants pleaded guilty. The witness was not a successful participant in the programs due to rule violations.
General comment about the frequency of harm; policy comments; procedures for protecting defendants	Other than a general concern about a possible threat, I am unaware of a specific threat or attacks made to a specific defendant /witness, and I have handled a fairly heavy criminal docket involving "drugs and guns" for years. AUSAs have also mentioned to me that until recently there was no reason for alarm, but all of a sudden there is a big push either by defense lawyers and/or DOJ to have everything sealed for 35b's or 5k1s. This is despite that there is not one documented incident that I am aware of in all the cases that I have handled of a problem. Many are advocating sealing everything of a cooperative nature now but this is in my opinion inconsistent with any empirical evidence that i am aware of and the first amendment right of the public to know about court proceedings and filings. / / /
General comment about the frequency of harm; procedures for protecting defendants	Our district has had numerous [redacted] cases and security is usually increased during trials/sentencings because of rumors of threats. I have very limited information regarding those threats or rumors.
Procedures for protecting defendants; general comment about the frequency of harm; general comments about the sources to identify cooperator	Our practices have changed in recent years to make docket and in court references more oblique and less suggestive of cooperation. Often we [refrain] from discuss[ing] 5K1 documents and we [camouflage] them on the docket. We have been informed with increasing frequency that codefendants purchase transcripts of hearings regarding an alleged cooperating defendant and/or witness and manage to access electronic dockets with help from others on the outside. These procedures require some careful management by the judge and others involved in the process.
General comment about the frequency of harm	Please keep in mind that my courthouse sits [redacted]. I hear from hundreds of defendants that they were threatened and/or harmed in [redacted] immediately prior their offenses in the [redacted]. For those who believe that narcotics traffickers are not dangerous criminals need to come sit in my court and hear/see the real stories of what happens in [redacted] by such traffickers.

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Categories	Open-Ended Comments
Nothing to report	Please note that my statistical sample is quite small, in that I am a relatively new judge ([redacted] on the bench).
General comment about the frequency of harm	Primarily I recall threats against AUSAs and/or one defense or public defender.
General comment about harm in prison/prison culture	Prison gangs are an on-going problem.
General comment about the frequency of harm	Reported threats typically are brought to the court's [attention] by defense attorneys during the sentencing hearing, and mostly pertain to families outside the United States in drug trafficking cases. I am unaware of any reported threats being carried out.
General comment about the frequency of harm; details of a specific incident	Reports of threats against cooperating defendants are routine in this district. Actual harm is more rare, but it occurs. I have been personally involved in two cases in [redacted] in which witnesses were murdered.
General comment about harm in prison/prison culture; procedures for protecting defendants	Seems to me the real problem is what occurs after the cooperators begin serving a prison sentence. It is there that fellow prisoners request "proof" that the individual did not cooperate. It's there, too, where some have to seek refuge in the SHU. At least in my experience, it isn't that big of a problem pretrial.
General comment about the frequency of harm; general comments about the sources to identify cooperator	Some cooperators are so fearful that they do not want to receive 5K1.1 reductions to their sentences, nor do they want any mention of cooperation in court records or in court proceedings. In some instances, defendants who have not cooperated, or those who did cooperate but did not want a sentence reduction, request copies of the sentencing transcript and presentence report so that they can "prove" that did not cooperate.
General comment about the frequency of harm; general comments about the sources to identify cooperator; procedures for protecting defendants	Some of the threats were vague in my opinion. I only recall one case with specificity, but believe the frequency of the issue has not increased in the last year. Frankly, when a motion is filed by the government under seal at or about the time of the defendant's sentencing-- if it is identified as a motion filed by the government, a reader of the docket could [easily] surmise the sealed motion is a 5K1.1. I am unsure but believe the "sealed motions" are now listed as sealed documents and the filer is not identified. This is how it should be.
Details of a specific incident	The answers to the questions on this page are [estimates] based on conversations with prosecutors in our office.

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Categories	Open-Ended Comments
Procedures for protecting defendants; policy comments	The better prosecutors and criminal defense bar have become much more sophisticated in keeping documentation reflecting cooperation by third party witnesses as well as defendants out of the public eye- i.e. no initial formal arrest paper work and/or bond allowing the defendant to cooperate fully prior to being formally charged which in many instances is driven by a post-cooperation negotiated plea to a particular offense that is actually capped in terms of available sentencing options- such as the 48 month maximum sentence for use of the telephone in a drug conspiracy. In other instances plea agreements are negotiated on the basis of specific relevant conduct that may defacto serve to cap the sentence without the Court necessarily having to formally become involved with the matter of the defendant's cooperation. / / Finally, given the fact that the sentencing guidelines are advisory, along with today's more infrequent use of the 21 U.S.C. 851 enhancement, there are more cases being processed without the Court ever having to address the subject of a reduced sentence under U.S.S.G. 5K1.1 or Rule 35(b). / / All of that said, there will never be a perfect solution to the dilemmas faced by defendants, witnesses, prosecutors, defense attorneys, as well as judges. All we might do collectively is to reduce where possible the wrong people learning about who is or has been a cooperating defendant or witness. Truly, the long-standing practice of sealing documents as well as formal sentencing hearings has not served the laudatory goal of providing anything close to a measure of protection for cooperating defendants. /
Details of a specific incident; general comments about the sources to identify cooperator; general comment about the frequency of harm	The case I described earlier in this survey was one in which, if I recall correctly, a warrant was not sealed and retaliation was either threatened or likely. I am aware of other anecdotal instances in which prosecutors and defense attorneys have felt retaliation was likely, but I am not aware of any details. Often these instances are revealed when a prosecutor or defense attorney asks during sentencing to disclose cooperation information at the bench.
Details of a specific incident; general comments about the sources to identify cooperator	The case [referenced] was [redacted], in which [redacted], a member of [redacted], learned that another member of [redacted], [redacted], was quoted in [redacted] presentence report as identifying [redacted] as a made member of the [redacted]. The page from the presentence report was shown to [redacted], [redacted], who ordered a hit--the murder--of [redacted]. [redacted] was convicted of the murder at trial.

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Categories	Open-Ended Comments
General comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants	The [climate] is worsening for everyone, cooperators and non-cooperators, especially in prison. It is reported by clients in our District and nationwide that when you arrive in prison you are given a certain length of time to prove through your documents that you are not a snitch. Without such proof, you are not allowed safe access to the prison yard. If you can't prove that you are not a snitch you end up in segregation or bouncing from prison to prison or worse.
General comment about harm in prison/prison culture; general comments about the sources to identify cooperator; general comment about the frequency of harm	The consistent theme that we have heard about regarding defendants or offenders in our District, is incarcerated offenders being coerced or threatened while in BOP custody or RRC facility (pre-release) if they did not try to get a copy of their presentence investigation, or plea agreement and provide it to the threatening party. The threatening party is usually doing this to ascertain whether an offender has been a cooperating witness or received a sentence reduction for cooperation (snitching) to government officials.
Details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	The Defendant in question not only made a deal with the Government, he actually testified at a jury trial against the other two defendants. There was no question but that his file contained plea deal specifics, and that the co defendants knew what the deal was (it was brought out on cross examination before the jury). When he went to prison for his part in the crimes, we did everything we could to protect his location, as well as his identity, but it somehow leaked about his true identity.
Details of a specific incident	The defendant referenced was residing in our District and case agents relocated the individual to another District.
Details of a specific incident	The defendant/witness referred to in this survey is the same person.
Procedures for protecting defendants; general comment about the frequency of harm	The district court has adopted split plea procedure by which cooperation agreements are protected. We have seen no change in the level of threats to witnesses and/or cooperating defendants based on this procedure.
Procedures for protecting witnesses; general comments about the sources to identify cooperator; general comment about the frequency of harm; general comment about harm in prison/prison culture	The [redacted] attempts to obtain protective orders in cases involving cooperating witnesses, and does not allow that information in the jails. Nonetheless, targets and defendants infer who the cooperators are from review of their discovery and spread the word about their cooperation in the jail. We have prosecuted two witness retaliation cases in the past three years, and have investigated several others. In the past several years, threats against cooperators have increased, and pre-trial separation orders have been ineffective in avoiding confrontations.
Procedures for protecting defendants; general comments about the sources to identify cooperator	The documents where it was apparent that someone was cooperating were filed under seal. However, sophisticated reviewers of docket entries usually presume that that means cooperation.

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Categories	Open-Ended Comments
Nothing to report	The entire current staff of probation officers were polled. There were no other cases identified.
Details of a specific incident; general comment about harm in prison/prison culture; procedures for protecting defendants; general comment about the frequency of harm	The first case I mentioned involved very serious assaults on the defendant who provided useful cooperation relating to a number of cases. He was threatened and then beaten in two different prisons before finally being provided what appears to be secure housing. He was also in pretrial detention for many years in unacceptable segregated isolation because of the recognition he was in the process or would cooperate. (In my experience, defendants who cooperate during pretrial supervision often end up being housed in the most segregated and restrictive conditions.) This particular defendant's son, who was incarcerated in a state facility, was also threatened in connection with his father's cooperation. Viable threats were made against the family members also—who as a result had to move from their home. / / The main pattern involved in other cases involves defendants who are in pretrial detention who face threats on the safety and welfare of the family members at home in [redacted] or [redacted] if they cooperate. We often do not end up knowing what happens under these circumstances. These defendants usually are too scared to even alert authorities regarding the threats.
Takes issue with the survey; general comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; procedures for protecting defendants; policy comments	The format of this survey was troublesome for me because this is not a yes/no/# of cases issue. I don't have exact numbers, but I can say that in the last 5 years, the number of present and former clients who have demanded that I provide them their discovery or sentencing documents to show to other inmates to prove that they are not cooperating has skyrocketed. The demand to see PSR's is very high also, which causes problems for inmates because a lot of jails/prisons will not allow inmates to receive them in the mail. Many inmates are branded as snitches who are not actually cooperating, but there is often no way to prove that they are not cooperators. Additionally, a lot of my clients do not want to ask to go into PC because it is a horrible way to serve their sentences and the fact that they requested PC once will follow them around to other institutions and increase the likelihood that they will be placed their against their wills, for institutional safety. I honestly don't know how to balance a defendant's right to review the evidence against him with protecting him from harm based on suspicion, sometimes baseless, that he is cooperating.
General comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	The government regularly claims that cooperators are at risk but have never cited an example. AUSAs want files sealed to conceal cooperation agreements even AFTER the cooperators testified in open court in front of the defendant. Fear is rampant. I have a [redacted] participant who testified twice against a [co-conspirator] in a case which lasted more [than] [redacted]. She was never concerned.

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Categories	Open-Ended Comments
Procedures for protecting defendants; policy comments	The harm or threats of harm experienced by my clients was directly related to the practice of one Judge who refused to seal documents in his cases and NOT to the practice or Local Rule with respect to sealing. This particular Judge's philosophy was 'this is a public courtroom, the public should have access.' As a consequence, and to avoid harm, many clients were advised of his practice and urged to factor that practice into the decision on whether or not to offer assistance.
Details of a specific incident	The last two cases, individuals went to the homes of defendants' families and threatened them, if defendant cooperated.
General comment about the frequency of harm; general comments about the sources to identify cooperator	The most common threats and attempted acts of harms, that I have encountered, occur when a defendant or a witness is a member of a well knit group of friends, gang members or connected families. Some of the acts of intimidation are not assisted by the contents of court orders, opinions or events in open court. Community knowledge of events is a common source of information about who is (or might be) allied with police or prosecution. But there are incidents where a witness or a defendant's role for the prosecution is uncovered only because lawyers and judges do not consider the danger to cooperators. There are general incentives (in gang cases) to promote a policy of harming snitches within local culture.
General comment about the frequency of harm; general comments about the sources to identify cooperator; details of a specific incident	The most frequent [occurrence] of threats is with cooperating non-defendant witnesses. Their cooperation is revealed through discovery: disclosure of immunity letters and interview reports. I had one witness kidnapped and beaten due to cooperation during investigation. Several other witnesses have been threatened once the witness list for trial is released.
Takes issue with the survey; general comment about the frequency of harm	The number 50 is a plug number because you would not accept a three figure number. These sorts of threats happen so routinely in gang and drug cases that i have lost count. The number of times I have become aware of such threats is EASILY in the hundreds.
General comment about the frequency of harm; procedures for protecting defendants; general comments about the sources to identify cooperator	The number of instances of threats were down in 2014 because the number of cases were down dramatically. Most defendants request that counsel alter court documents because inmates demand the plea agreements, court docket entries, and a [transcript] of the proceedings. If the inmate does not turn over the documents, they claim they are beaten. Sealing the documents would not be helpful in these cases. The larger problem is that co-defendants learn of cooperation against them and then disseminate the information to other co-defendants or unindicted co-conspirators. Mentally challenged defendants and older defendants seem to particularly be at risk.

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Categories	Open-Ended Comments
Procedures for protecting defendants; general comment about the frequency of harm; general comments about the sources to identify cooperator	Additional comments provided over email: For more than three years we have following a practice of attaching a sealed supplement to every Statement in Advance of Plea regardless or whether there is a cooperation agreement or not. We do this to avoid it being apparent on the docket whether there is a cooperation agreement. Prior to our court adopting this practice, we received regular comments from counsel that defendants were subjected to threats and accusations once they arrived at the prison. I have not received similar comments since we adopted this practice. I hope this may be of help.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	The numbers listed above are only place holders to enable us to complete the survey. What numbers we do have and the relevant explanations are attached below. / / Not including the defendants regarding whom you've provided information in this survey, how many more defendants from cases prosecuted by your office have you learned were harmed or threatened in the past three years? / / 113 – This number is based on separation memos filed with the USMS to keep cooperators separated due to safety concerns and covers the years 2012 thru 2014. It may overstate the number of threats from co-defendants as most of these separation requests are based on concerns of AUSAs and may not necessarily involve an actual threat. / / Not including the witnesses regarding whom you've provided information in this survey, how many more witnesses from cases prosecuted by your office have you learned were harmed or threatened in the past three years? / / 22 – This number is based on the number of times the USAO provided assistance to witnesses to relocate due to concerns for their safety. This number probably under-estimates the actual number as it does not include those witnesses assisted by investigative agencies or witnesses who relocate on their own. / / / In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm? / / While there is anecdotal evidence of defendants who withdraw offers of cooperation out of fear of retaliation, exact numbers are not known. But it is believed to be rare. / / In the past three years, how many defendants refused cooperation because of actual or threatened harm? / / We do not keep records of defendants who refuse to cooperate because of actual or threatened harm. However, regularly we do have defendants who offer to plead guilty and decline to cooperate in any way against their co-defendants for fear of retaliation. / / In the past three years, how many witnesses withdrew offers of cooperation because of actual or threatened harm? / / Again, we have no specific number; it does happen, but it is rare. / / In the past three years, how many witnesses refused cooperation because of actual or threatened harm? / / Unknown / / / Please use the space below to pro-

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	vide any additional information about harm or threats of harm experienced by defendants and/or witnesses (or their family or friends) from cases prosecuted by your office in the past three years. / / In every case involving gangs, illegal narcotics, violent crime and now even some white collar crimes, our office is very sensitive to the safety of cooperators, be they defendants or witnesses. And while we don't currently have a specific system for tracking threats against cooperators, anecdotally, we know it happens regularly. / / In the last three years, the U.S. Attorney's Office has provided assistance in [redacted] different cases to witnesses and/or their families to temporarily or permanently relocate due to concern for their safety as a result of their cooperation with the government. And while not specific to the last three years, people have been murdered on suspicion of being a government witness, even when they were not. In the same time period, our office has sponsored [redacted] defendants to the Federal Witness Security Program, and we anticipate [redacted] more this year. / / There are several ways by which cooperation becomes known. The criminal element has its own intelligence system which can be very effective. In a recent case we learned members of a gang were accessing PACER to look for documents to confirm cooperation. The most common method to signal cooperation seems to be the delay between a guilty plea and sentencing. If the defendant is not sentenced in a timely manner and removed to BOP, he is suspected of cooperating and may be at risk. Even at BOP, inmates are demanding that newly arrived inmates provide copies of their plea agreements or transcripts of plea proceedings to verify they were not cooperators. / / At times, as a result of a motions hearing or of the discovery process, witness information is obtained. Most of the direct assistance to witness mentioned above [redacted] is a result of one of these two events. / /
Comments about refusal out of fear; details of a specific incident; general comments about the sources to identify cooperator; general comment about the frequency of harm	The offenders are reluctant to report the threats/harm to law enforcement since in some instances, the individuals reside in the same community; some have gone back to their prior criminal associates to seek support--could pose a risk to returning to the "gang lifestyle;" all incidents have been reported to federal or local authorities, but very little action has been taken; one offender asked for political [asylum] as threat was overseas; offenders are not aware of how the information "leaked and the threats are coming by way of messages sent by unknown individuals or means (e.g., unknown texts, callers).
Details of a specific incident; general comments about the sources to identify cooperator	The one case I recall involved a witness testifying at trial, and the threats came from defendant's family.

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Details of a specific incident	The only cases reported as possible threats involved co-defendants (both female) who has been continuously threatened and abused throughout the course of the offense generally. Once they made the decision to cooperate, there were no further threats or intimidation, but the women remain fearful based on both actual and threatened harm to them during the course of the offense. There is nothing to indicate that the fact of their cooperation resulted in additional threats or actual harm in either case.
Details of a specific incident	The only incident I am aware of is the alleged murder of an FBI informant in a bank robbery case. I do not recall the details of how the informant's identity may have been disclosed. The U.S. Attorney never prosecuted the murder. He would have additional information that I do not have.
General comment about the frequency of harm	The only information the office has relative to threats are a number of allegations from defense attorneys that a client or family member was threatened. None of the allegations have been confirmed as being valid or related to the case being prosecuted.
Details of a specific incident	The prison guard was accused of "diming" the defendant. Never able to verify.
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	The rate of former clients (defendants) incarcerated at BOP facilities requesting copies of the their plea agreement, final judgment order, docket sheet, and sentencing transcripts, rose dramatically in calendar year 2014.
General comments about the sources to identify cooperator; general comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture	The Rule 35 and 5K process is problematic. Our judges are resistant to routinely sealing these motions. We are increasingly hearing from cooperators about information taken from public filings being posted on sites such as "Who's a Rat". Additionally, threats to witnesses and cooperating defendants often result when the defendant learns from the discovery process that a particular co-defendant or witness is cooperating. Lately, we have begun hearing from cooperators in the BOP that when they leave their assigned institution on an ASR they are branded a cooperator and are retaliated against when they return.
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear; details of a specific incident; general comments about the sources to identify cooperator	The survey asked for overall numbers regarding harm or threats of harm to defendants and witnesses over the last three years. Our office does not have a system that captures such data, and therefore accurate numbers were difficult to collect. Individual Assistant United States Attorneys who are currently in the office tried to provide information based on their recollection of cases and incidents. Accordingly, we do not feel like we have an adequate quantitative result. Moreover, the actual numbers reported do not provide an adequate picture of the seriousness of the problem as, in our District, the fear of being identified as a cooperator because of fear of harm or retaliation has dramatically

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	reduced the number of individuals willing to provide information to the government and testify against others. Indeed, the experience in our District is that we are unable to get individuals to cooperate because of their fear that something will happen to them or their family if they do. This seems to be an increasing problem over the years. One reason for this change is the increased focus on drug trafficking organizations with connections to [redacted]. Defendants and witnesses are worried about violence against themselves as well as their families in [redacted]. For example, one AUSA noted that in her last three cases that involved drug trafficking organizations that had connections to [redacted] (all large, multi-defendant cases, which used wiretaps), none of the defendants or putative defendants would cooperate for fear of retaliation against them or their families, both in [redacted] and [redacted]. In addition, in the violent crime cases, witnesses will often refuse to provide information, from the earliest stages of the investigation, to law enforcement for fear of retaliation. Even when we have had success in obtaining their testimony through grand jury testimony, these same witnesses will often refuse to testify at trial or will provide [a] different version at trial. The witnesses do not want to be perceived as cooperating with the government. / / Accordingly, in response to the questions above regarding how many witnesses and defendants refused cooperation because of actual or threatened harm, the answer that we want to provide is "many." A precise number is not available. It is very difficult for us to capture how many witnesses and defendants have told us that do not want to cooperate because of the risk. It seems to happen regularly in violent crime and drug trafficking cases. / / In addition, the stigma of being a cooperator/perceived as a cooperator seems to be so problematic that we have heard from defense counsel that even if their client/defendants provide safety valve proffers pursuant to USSG 5C1.2, they receive word from co-defendants/others in the organization that they are at risk of retaliation. The number of safety valve proffers has reduced dramatically, and the repercussions of refusal are less significant (since there has been a policy decision to apply few mandatory minimum sentences in drug cases). / / The document that most signals that someone is cooperating is a sealed plea agreement. If a plea agreement is sealed, it is a "red flag" alerting others that a particular defendant is cooperating, as there is no other reason to seal the plea agreement. / / Moreover, in most of our threat incidents, the cooperating witnesses/defendants were also identified through the discovery process. Many witnesses had to be moved for their safety. /

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Details of a specific incident	The threats arose in a RICO case involving a gang. Some of the members of the gang cooperated with the Government, and they and their families were subjected to threats from the gang.
General comment about the frequency of harm	The threats I see only arise in (1) gun prosecutions of street gang members and (2) drug cases in which the witness or defendant has direct ties to [redacted] dealers.
Details of a specific incident; general comment about the frequency of harm	The threats involved were between rival families while a co-[defendant] who was a member of one family was cooperating against a member of another family during a co-[defendant's] trial. These types of threats are somewhat typical between the large extended families [redacted].
General comments about the sources to identify cooperator; details of a specific incident; general comment about the frequency of harm	The USAO for the [redacted] prosecutes major crimes committed by or against [redacted]. In such cases cooperators are readily identified by defendants and their families. This circumstance routinely leads to attempts to intimidate witnesses. Additionally, in at least one public corruption case from a [redacted] who cooperated with the government as a witness was the target of an attempt to oust him from office. That effort is believed to be motivated by a desire to retaliate against the witness for his cooperation. / / /
Details of a specific incident; general comment about the frequency of harm; policy comments; procedures for protecting defendants; general comments about the sources to identify cooperator	The worst case I had involved the murder of several family members of two defendants (mother and son) to punish them for losing a substantial amount of contraband and also to intimidate them into not cooperating. Credible threats against defendants are frequent. I do not recall a precise number, but they are credible enough to keep the defendant from cooperating and receiving a lower sentence. Additional comments provided over phone: Respondent completed the survey with information, but he really focused on the last year and not the last three years. He said he feels like this happens 2-4 times per year in his district, and it is most often the defendants. Defendants will qualify for the "safety valve" but then not take it out of concern of being harmed. He suggested that the committees consider two levels for a filing system. Current CM/ECF only protects information through sealing. The sealed event still provides a record, and drug traffickers know how to read the dockets for what this sealed information is really saying. If there were a public version and a private version of the docket you could better protect the information. Sealing everything just triggers an alarm. He had a case involving a drug conspiracy where the main defendant was the brother of a high level member of a drug cartel. He told his lawyer he would not cooperate because he was concerned about the safety of his family and his

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	wife's family back [redacted]. The lawyer had the [redacted] contact people in [redacted] to obtain information about the cartel [redacted]. This information was provided to federal authorities so the defendant could receive the benefits of cooperation. Nothing was ever signed, and the judge was made aware of the cooperation only through conversations with counsel, both prosecution and defense. If there were a private version of the docket this information could be recorded, even noted in a pre-sentence report.
General comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants	There are frequently threats of harm to defendants' families since my docket is close to [redacted]. In specific cases, such as the [redacted] trial, there were threats to defendants, witnesses, families, etc. In the gang conspiracy cases, there are usually threats to defendants, witnesses and family members. I am not aware of any documents [identifying] any person individually, but, of course, I do not know what happens once the BOP gets custody. All 5K motions and orders are filed as are Rule 35 motions and orders and Presentencing memos are also sealed at sentencings, but have to be unsealed for appeal and other post sentencing actions.
Nothing to report	There has been no actual physical harm to a defendant to my knowledge. Defendants are more concerned with perceived harm and very few [ever] receive an actual threat of harm.
General comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator; procedures for protecting defendants	There is a disconnect in the Bureau of Prisons between Washington senior management and the experience on the ground. I believe senior management has expressed the view that harm to cooperators while incarcerated is minimal. We have a federal prison in the district and have talked to the warden. He has indicated that the problem is significant and half of his [Special] Housing population consists of cooperators in protective custody. There are also a variety of other means those intent on harming cooperators are using to gather cooperation data. I presume there will be space elsewhere in the survey to report those findings. Additional comments provided in email: Those who are seeking to identify and verify cooperation of various defendants are extremely sophisticated. They are using a variety of means to gather information. By way of example, they are requiring incarcerated, suspected cooperators to obtain a copy of their judgment and turn it over to the prison gangs. There is apparently no BOP policy precluding this. They are requiring cooperator members' families to obtain transcripts and judgments so that they can compare sentencing exposure with sentencing results, and such documents clearly reflect cooperation without expressly saying so. In this District, we are using all means at our disposal to refrain from disclosing cooperation, including sealed doc-

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	uments, sealed proceedings and attachments to the judgment, among others. However, those protocols are not eliminating the problem. There is also a developing trend in our Circuit jurisprudence that seems oblivious to the cooperation issue. We do not discuss cooperation in the context of a plea, but we fully recognize that the prospect of a cooperation departure is a prime motivating factor for the plea. The Circuit has issued some opinions that question the absence of such a conversation during the Rule 11 plea colloquy. This entire problem is national in scope, and would benefit from a national policy. However, if there continues to be a disconnect between BOP's national management and prison officials on the ground, I am not sure that any policy will alleviate the problem.
General comment about harm in prison/prison culture; general comment about the frequency of harm	There seems to be an organized effort in the BOP by some inmates to determine whether other inmates have/are cooperating. We have received an uptick in former clients wanting information to prove they didn't cooperate.
General comments about the sources to identify cooperator; procedures for protecting defendants	There were direct threats to me and my family that the Marshall addressed. If there are closed sentencing hearing it is presumed that it is to discuss cooperation. I don't mention the [cooperation] agreement on the record or close a sentencing hearing unless specifically requested by the parties. Attorneys regularly [practicing] before me understand this and it works well. There are always reasons for a variance regardless of cooperation. Newer attorneys want to discuss the cooperation agreement in detail and we have to close the hearing. It is no secret after that.
Nothing to report	There were none in 2013 or 2014
Takes issue with the survey; general comment about the frequency of harm; comments about refusal out of fear	These are not all-inclusive. Exact numbers can't be known. The "no snitching" culture is strong in [redacted]. We have not kept statistics on this, but many witnesses and defendants fear to cooperate without identifying their reasons.
Takes issue with the survey; comments about refusal out of fear	these cases are difficult to follow. The clients stop talking to us when they get really scared
General comments about the sources to identify cooperator; general comment about harm in prison/prison culture	They have access to PACER at the prisons and so prisoners and/or guards go through the dockets and tell people what the charges were and what the sentences were. This leads to being able to figure out if they cooperated.
Takes issue with the survey	This entire survey is a waste of time.
General comment about the frequency of harm; comments about refusal out of fear; procedures for protecting witnesses; procedures for protecting defendants	This is [redacted] and many defendants have links to DTOs. As such, defendants often have to balance the possibility of threats against the possibility of reduced sentences. Indeed, AUSAs in our district believed that the perceived or potential of threat or harm (without any actual threat made or harm inflicted) deters many defendants from cooperat-

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	ing and/or inhibits them from following through with the cooperation addendum. In addition, we were involved with several incidents in 2014 in which cooperators had to be relocated or placed in WITSEC due to threats. Finally, we also would note that, several years ago, our district court developed a docketing system, in consultation with USAO and FPD, to endeavor to better protect cooperators entering pleas. Called the Master Sealed Event calendar, it creates a docket skip early in every case, and then going forward a separate cooperation addendum gets appended, without a docket skip, to a special sealed calendar.
Policy comments; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; general comment about the frequency of harm	This is not a problem the judiciary can solve by sealing court records because inmates are required to "prove" they have not cooperated by producing their own paperwork. If the inmate has cooperated, which is often the case, he simply has no choice but to check himself into the Segregated Housing Unit because he knows the other inmates will access PACER and learn that he has cooperated. I have even had requests from defendants and attorneys to seal a defendant's entire court file so no member of the public could access it. Even then, however, the sealing of court documents related to sentencing raises a red flag as to whether a particular defendant has cooperated. This is a serious problem that needs to be promptly addressed by the DOJ. Defendants do not understand when they enter a plea and cooperation agreement that they are likely agreeing to serve their sentence in solitary confinement. Many of these inmates serve years in the SHU and if they are transferred to another institution the process simply starts over again and they enter the SHU for their own protection at the new institution. Although this is a DOJ/BOP problem, the judiciary has an interest in it because judges accept these pleas and they sentence defendants pursuant to the pleas. A sentence served in the SHU is a very different sentence than one served in general population. There is no programming. Any inmate serving a lengthy sentence in the SHU stands little if any chance at rehabilitation. The judiciary should insist the DOJ address this increasing problem.
Takes issue with the survey	This is useless when the relative of a defendant was murdered.
General comment about the frequency of harm; Takes issue with the survey	This issue is raised continually by defense counsel but I have no evidence of actual harm resulting. However, I lose track of cases after sentencing, so I am not the best person to ask.
Details of a specific incident	This response only represents one case.

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General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	Threats against actual or perceived cooperators are very common. There is hardly a drug case where the ones caught with the drugs (or their families) are not threatened by leaders of the drug trafficking organizations. Others in the jail suspect cooperators when they get pulled from the facility and brought for a debrief. The government often discloses to codefendants the cooperation of one in order to coerce guilty pleas. I have never had a case where cooperation was learned from the filing of any document or something said in the courtroom. A person's cooperation is usually discovered or suspected long before the govt files a 5K1.1 or Rule 35 motion.
General comments about the sources to identify cooperator	Threats have been made after release of [discovery] (particularly Jencks).
General comment about the frequency of harm; general comment about harm in prison/prison culture; details of a specific incident; procedures for protecting defendants; procedures for protecting witnesses	Threats lower because our caseload has dropped since US Atty doesn't bring many cases here (he prefers [redacted] with lesser penalties). At BOP, prisoners often demand to see PSR or dkt sheet to alert them to prior cooperation. It's dangerous to give up documents and dangerous not to. One of my trials was against killers of a witness. Cooperators often face disapproving and threatening family and former friends when they get up on the stand. It causes some to be very cautious and not especially good witnesses. Family estrangement is a strong motivator to keep silent. A number of my defendants or cooperators are in WitSec and/or protective BOP custody.
General comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; general comments about the sources to identify cooperator	Threats of harm and harm to inmates are not limited to cooperators. Sex offenders and clients who victimize children receive some of the worst threats and injuries. It is very common for inmates to request sentencing documents to prove they are not cooperators or sex offenders. When an inmate arrives on a housing unit in a BOP facility they are required to prove they are not a snitch or a sex offender. If they do not or cannot prove they have "clean paper" they have to request protective custody. Many of these clients end up serving their sentences in the most restrictive conditions with no access to treatment or other programs. They live in fear even in protective custody. The prisons are so understaffed that prison [authorities] rely on inmates to keep order. This system of social stratification is therefore tolerated if not condoned. While PACER and CM/ECF have conferred great benefits they also have made life much more difficult for many inmates. Many inmates have someone on the outside with access to PACER to verify the status of other inmates. It is not hard to spot a snitch or a sex offender if you have access to PACER.

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General comment about the frequency of harm	Threats of harm are often recited to me from defendants during sentencing but rarely do I have any method of verifying their reliability. I do not doubt, however, that retribution for cooperation is a serious concern for many defendants faced with the Hobson's choice of cooperating or not receiving the most favorable plea agreement or the 5K or Rule 35 motion essential for avoiding the minimum mandatory sentence.
General comment about the frequency of harm; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture; procedures for protecting defendants	Threats of harm to cooperators are routine in our principal pretrial detention facility and at various BOP [institutions]. Cooperators are sometimes identified through discovery documents when the case goes to trial (or very close to trial). We have reports of defendants (whether they cooperated or not) being told to provide sentencing and/or plea transcripts to prove to others at a BOP facility that they did not cooperate. Cooperators sometimes also are identified (or believed to be identified) through J&C's that contain a sentence not seeming consistent with the charges. We limit access to some documents sent to the BOP by requiring that they be viewed in the Warden's Office (or some other restricted space).
General comment about the frequency of harm; procedures for protecting defendants	Threats of harm usually made to cooperators while they are in pretrial detention with co-defendants. A request is then made to transfer to another detention center or to a different area of the present detention center. These requests are almost always granted.
General comment about the frequency of harm; general comments about the sources to identify cooperator	Threats seem to occur more often when the Govt. lets co-defendants know that a cooperator will testify at trial. At sentencing, threats against cooperators [are] used to strengthen the Govt's 5K1 motion on behalf of the cooperator.
General comment about the frequency of harm	Threats that I am aware of were addressed either to me or to the prosecutor in a given case. I am unaware of any witness that has been threatened, and I have not received any reports from the Bureau of Prisons of harm done to a cooperating defendant/inmate.
General comment about the frequency of harm	Threats to co-defendants, witnesses and victims have occurred in assault, rape, child sexual abuse and drug conspiracy cases. Threats of harm are a particular problem in [redacted] cases.
General comment about the frequency of harm; policy comments	threats to cooperating co-defendants are reported fairly frequently but I do not know if they are real threats or just talk. It often appears to be just talk. It is hard to solve the problem, because the identity of the cooperating co-defendant or witness usually cannot be kept from the defendant, who is usually the perceived source of the threat.
General comment about the frequency of harm	Threats to victims, witnesses and cooperating defendants has been increasing each year.
Nothing to report	to my knowledge [there] have been no threats

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Details of a specific incident; general comments about the sources to identify cooperator	Two co-defendants were beaten in pre-trial detention when discovery/Jencks statements were given to defendants in jail and they learned of the co-defendants' cooperation. / An informant was killed when a gang learned he was informing to law enforcement.
Details of a specific incident; procedures for protecting defendants	Two multi-defendant [redacted] cases in parallel prosecutions in which each had one or more cooperators and one in each case had veiled or express threats of violence or physical harm to the [cooperating] defendant or his family members which resulted in permission for each of the threatened families to relocate to another state pending completion of the case. The case ultimately ended with each/all of the defendants entering pleas of guilty and the last of them was sentenced [redacted].
General comment about the frequency of harm	Uncertain of number, but there are a few cases that have been verbally threatened.
Procedures for protecting defendants	Usually the government and defense counsel have an agreed upon approach to these matters.
General comment about the frequency of harm; procedures for protecting defendants; general comment about harm in prison/prison culture; comments about refusal out of fear	Very few defendants ever tell me about threats or harm once they are sentenced. I have had a [few] (maybe 3-5) letters from prisons saying they are being threatened. In those situations we tell the AUSA or probation. Roughly half of the clients who could cooperate choose not to. A portion of these are concerned about their [safety].
Takes issue with the survey	Very hard to predict on a case [by] case basis.
General comment about the frequency of harm; general comment about harm in prison/prison culture	Virtually every defendant that we represent who ends up in BOP custody calls us to request proof that the defendant did not cooperate. Each inmate tells the same story -- he is confronted shortly after arrival at a BOP facility by an inmate or inmates saying that he has x number of days to prove he is not a cooperator or he will be beaten. Defendants routinely ask us to do things we cannot do -- i.e., provide a fake docket entry, fake statement of reasons for sentence, or to buy transcripts revealing the lack of cooperation.
Procedures for protecting defendants; policy comments; general comment about harm in prison/prison culture	We are not allowed to provide copies of discovery and pre sentence reports to defendants detained due to potential threats of harm. However, this prohibition limits the defendant's ability to thoroughly review the evidence against them. / Often, once the Defendant has been sentenced I have no further contact so I may not know if cooperation has [led] to threats of harm once in BOP custody.
Details of a specific incident	We can only recall one other case approximately 6 years ago where a cooperator was assaulted due to his cooperation while in pretrial detention.

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General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We constantly hear from clients about their desire to have documents to use in BOP to prove they are not cooperating. That number is in the hundreds. Media coverage of sentencings on TV leads to threats and violence against our clients. They are [savvy] enough to know that a sentence is too low following a guilty plea without cooperation.
Takes issue with the survey; nothing to report	We do not track this information so I cannot answer these questions with a specific number so I had to put 0.
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We do not track this information, so my numbers understate the occurrence. There has been a large increase in numbers of defendants calling or writing from BOP asking for their docket sheet. It is clear that most of the time it is because they are being pressured to produce this info to other prisoners. In one instance, another prisoner could be heard in the background telling my client what to ask for. / However, we don't track our defendants once they get to BOP, so we would not normally receive information about threats within BOP. Defendants who come back to us on Supervised Release Violations after release relate that this practice of checking docket sheets inside BOP is very common.
General comment about the frequency of harm; procedures for protecting witnesses	We experience this difficulty all the time, and constantly spend funds moving witnesses.
Details of a specific incident; procedures for protecting defendants	We found two cases that fit the criteria of the [survey]. The first case is outlined above. Basically, the defendant was on bond and while he was on bond, he was working as a confidential informant. While on bond, he reported receiving death threats and was relocated for a time. He was in protective custody by A.T.F. So while he was on pretrial release we know he received death threats. We found out that after the defendant was on supervision by the probation office he was shot to death at a local bar. The second case involved a defendant reported being intimidated but not threatened. He reported a truck would drive by his house and park there and watch him. He noted several individuals also approached him and asked him questions about his family.
Procedures for protecting defendants; general comments about the sources to identify cooperator; policy comments	We generally seal plea agreements with cooperation provisions, but it is an unsatisfactory approach. Inmates have become sophisticated in reading PACER, and many understand that a "sealed event" around the time of the plea is a strong indicator that the defendant is cooperating. This issue is of great concern to us, and we welcome the attention that is being paid to it.

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General comment about the frequency of harm; details of a specific incident; general comment about harm in prison/prison culture	We have a large number of gun and drug cases that arise in the inner cities and often with gang involvement. It is very common for witnesses in these communities to experience threats and intimidation. In several state prosecutions witnesses have been harmed and in some cases murdered. We have not had any witnesses murdered but it is not uncommon for a [witness] to report that fellow gang members have made threatening remarks to them. In one of the cases referenced earlier a witness was confronted at the door to her house by a man with a gun threatening her and her son because her son was a witness to a shooting and warning not to talk to the authorities. Threats and assaults in jail on cooperating defendants or those thought to be cooperating is not uncommon.
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; procedures for protecting defendants; procedures for protecting witnesses; details of a specific incident	We have a lot of anecdotal evidence from defense counsel that defendants are being confronted in BOP facilities based on cooperation (documents from PACER like 5K or Rule 35 motions, or even cooperation paragraphs in plea agreements), however, counsel have been reluctant to give us specifics about those threats. Many of our cases start out with the state, and defendants use documents from the state case, like complaints or search warrants, to find out who is cooperating and retaliate against them. Additional comments provided over phone: Respondent noted that his district sees a lot of harm to defendants and witnesses, but court documents, at least PACER documents, are rarely the source. Defenders know this to be an issue as well, and they were responding to the survey in the same way. Respondent then provided a brief description of how criminal cases work in his district. Even in purely federal cases, which he noted are quite rare for them, the prosecution is required early on to provide statements and plea agreements as part of discovery (within two weeks of the arraignment, by local rule). So these documents (5K, Rule 35, etc.) are given to the defense as part of discovery. The documents are sometimes the source of the information, but are RARELY obtained through PACER. Even if the name of the cooperator or witness is not included, the defendant often can figure out the name of the person based on the information (e.g., the sale of drugs on a specific day or at a specific place tells them who the buyer was). Respondent then relayed more information about the case he mentioned in his email contact. A multi-conviction drug dealer was under state investigation again. A search warrant was left as part of the investigation, so even before discovery, and from that information he was able to obtain the name of the cooperator, who he later lured onto the railroad tracks and shot. This is now a federal case. The only solution to preventing defendants from getting this kind of information is to seek a protective order, which the prosecutors almost never do be-

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	cause they are difficult to obtain. The district does try to protect cooperation information by entering 5K and Rule 35 information orally during a sentencing hearing (after notifying the court via email that such information will be entered), so there is no PACER docket entry for this. However, if someone went to the trouble of paying to obtain the transcript, they could learn it from there.
Procedures for protecting defendants	We have a procedure in place in the [redacted] to protect cooperating defendants. We have created a master sealed event in all criminal cases except immigration cases. This is where the attorneys can have docketed any matters relating to cooperation. It seems to work well.
General comments about the sources to identify cooperator	We have been informed of assumptions by outside individuals that anything sealed or any missing ECF docket numbers covers a sealed document that relates to cooperation.
General comment about the frequency of harm; general comments about the sources to identify cooperator; policy comments	We have experienced a distinct uptick in threatened and actual violence to witnesses and cooperator/targets in the last ten years. Drug traffickers are using their networks as well as [following] docket entries for sealed filings, transfer motions and waivers of pretrial motions. We believe a more secure system for filing sensitive pleading should be developed. There is also a "paralegal" who monitors some of the more significant drug cases. This [paralegal] is seen speaking with the defendants as well as the defense lawyers. Defense counsel do not welcome the input of the paralegal.
Details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	We have had a "certified complex" drug conspiracy case where a codefendant was afraid for his life for cooperating with agents. This case has not been sentenced yet. There was no plea agreement or 5K filed (yet), but there was a debrief with this codefendant who implicated other codefendants. This codefendant was assaulted for no reason while in custody pending sentence for the instant case and believes the leader/organizer of this conspiracy ordered the assault. / / In the past three years, we have reviewed about 3 PSRs where the material witnesses in alien smuggling cases were threatened harm if they talked to agents concerning the defendant. Names of material witnesses are disclosed in PSR's with their statement regarding the defendant and the instant offense. It is unknown if the defendant actually carried out the threat of harm as most or all of these material witnesses in these types of cases are deported before the defendant is sentenced. No additional information about these cases is known. /
General comment about the frequency of harm; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator	We have had multiple reports that defendants in BOP custody are routinely asked to "show papers," meaning J&C, PSR, transcripts of plea and sentencing hearings, etc., and that if they could not or did not they were targeted for violence. In the case of at least one facility, this was confirmed by a Correctional Officer.

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General comment about the frequency of harm	We have other cases where the defendant/offender has indicated they were threatened by others do to the cooperation but no evidence of the validity of the threat or how others became aware of his cooperation.
Nothing to report	We know of no harm or threats of harm in 2013 or 2014.
General comment about the frequency of harm; comments about refusal out of fear	We know that sometimes witnesses and cooperators refuse to cooperate due to threats or perceived threats, but that information is not always communicated to us. Also, the threats of harm or harm may not be the sole reason to refuse the cooperation.
General comment about the frequency of harm; procedures for protecting defendants	We prosecute a large number of cases in this district that depend on the cooperation of defendants and witnesses who have reason to fear retaliation or have been actually threatened. We do not track this information; therefore the numbers above are not reliable. There are merely a guess, but it is a substantial number each year. We are [redacted] and prosecute a large number of cartel and gang cases. This is a factor in every case. And, in almost every case, the fear of retaliation or the actual threats are made against cooperators or family members in [redacted], complicating matters substantially more than where the cooperators and/or their family members are entirely [redacted].
General comment about the frequency of harm; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	We receive frequent requests for sentencing transcripts from incarcerated defendants who have no appeal or habeas pending. These requests appear to be from defendants who are being pressured/threatened to demonstrate to other inmates that they did not cooperate with the government. Although I have no information of actual threats, I have a strong impression that this is a major problem for incarcerated inmates, whether or not they actually cooperated.
General comment about the frequency of harm; procedures for protecting defendants	We take extra precaution to try to prevent harm but it is sometimes inevitable.
Takes issue with the survey; general comment about harm in prison/prison culture; general comment about the frequency of harm; general comments about the sources to identify cooperator	You are asking the wrong person when you ask my office. We represent the LEAD defendant who is usually the person being snitched on, not the person doing the snitching. That said, we do regularly receive requests from defendants in the BOP for PSRs to prove they did not cooperate. We also occasionally receive requests to doctor documents to show cooperators did not cooperate.

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Procedures for protecting defendants; general comment about harm in prison/prison culture; general comments about the sources to identify cooperator; policy comments; general comment about the frequency of harm	We used to have mandatory plea agreement supplements that were sealed and filed in every case in an attempt to make it more difficult to tell which defendants were cooperating. Defense counsel reported that this was putting all defendants in jeopardy (including the people who did not cooperate) because the sealed docket entry suggested to fellow inmates that the defendant had cooperated. Accordingly, we stopped the practice of mandatory plea agreement supplements. Presently, motions for downward departure and cooperation agreements are automatically sealed documents. The docket entries are not visible to the public, but the docket will reflect a skipped number, which we are told is a signal to those who might wish to harm a cooperating defendant. Sealed cooperation-related documents are sealed for the duration of a defendant's term of incarceration. Counsel may move to seal things like sentencing memos which contain references to cooperation. On an adequate showing, those motions to seal are routinely granted. Our court has spent significant amount of time discussing this issue, and we have decided to await national guidance on the best way to balance the important interests at stake.
General comment about the frequency of harm	When defendants request reductions of their sentences under Rule 35, they and their lawyers generally contend that the defendants have been threatened, but I have no documented cases of such threats.
General comment about the frequency of harm; procedures for protecting defendants	While defendants at times ask for entire plea agreements to be sealed or not even docketed because of a perceived threat, I have never had any defendant or defense counsel or government attorney provide any details to support the perception.
General comment about the frequency of harm; details of a specific incident; general comments about the sources to identify cooperator; general comment about harm in prison/prison culture	While I don't have additional information about actual harm or actual threats of harm, I am frequently reminded of the dangers for offenders of being associated with the Government. In one recent large, multi-defendant heroin distribution case in which some defendants had gang affiliations, virtually every defendant [redacted] requested a copy of the transcript of his sentencing. This was not done for appeal purposes - because in each case the appeal period had run when the request was made. My court reporter told me that, in several cases, she was advised by the person requesting (and paying for) the transcript that the transcript was needed so that the defendant could show to other inmates that he was not a "snitch."

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General comment about the frequency of harm; Takes issue with the survey	While not many AUSAs in the district advised that they experienced defendants or witnesses experiencing harm or threats in the last three years, the AUSA who serves as the district's Professional Responsibility Officer (PRO) and Appellate Chief advised that he has heard of plenty of instances surrounding these issues in his capacity as PRO and Appellate Chief. Therefore, we submit that even though AUSAs may not be quantifying these situations in their daily casework, the issues do arise and the PRO and/or appellate division may be another good source for information. / / Note, that we entered 0 to the questions above because the approximate numbers, if any, are unknown.
General comment about the frequency of harm	While we have had a few [defendants] over the past three years express fears for their safety after cooperating with the government, these fears were based on the nature of the cooperation and no direct or indirect threats were made.
General comment about the frequency of harm; general comments about the sources to identify cooperator; comments about refusal out of fear	Within the District, there is a general perception that cooperators will be harmed, even if there is no specific credible threat of harm known. Even use of the safety valve provision is generally rejected by defendants in narcotics cases given their understanding that said provision could lead to the label of cooperator and the perceived risks that entails. Many defendants do not even consider cooperation or even the safety valve as a result.
Policy comments; general comments about the sources to identify cooperator; procedures for protecting defendants	Additional comments provided over email: If the survey is like other FJC surveys, I expect there will be opportunity for open-ended comments. That will be important to me. I have very strong feelings about what the Judiciary should and should not be willing to do in this arena. We are obviously all concerned about threats, intimidation and actual harm inflicted on a defendant who chooses to cooperate. We should get real, hard data on how extensive the problem is. Right now, I hear lots of anecdotes, but have very little real, hard information. This will be a good first step. But even if the survey develops hard data of a genuine and significant problem, I think the Judiciary must be very cautious about compromising the transparency and accuracy of Court records to address the problem. I don't have any problem with Courts doing what we have always done: namely, make case specific decision on whether and what to file under seal. But the recent proposals I've heard go way beyond that and would, if adopted, involve scrubbing the docket entirely of all references to the filing of Rule 35 or 5K motions (not just sealing content in appropriate cases), and in some instances even filing a public version of a plea agreement that appears to be complete but really isn't because there is a private, undisclosed rider that covers cooperation and substantial assistance.

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	In my view, adoption of proposals like these last two go way beyond sealing records in appropriate cases, and actually strike at the core of the transparency and accountability that is so essential to the integrity and operation of the Court. Court records should, in my view, fairly reflect what actually happened in a case. If there was a Rule 35 or 5K departure motion filed, the record needs to reflect that, even if the content of the motions is sealed for good cause. Otherwise, the Court is publishing a docket that distorts the reality of what occurred in a case. Similarly, if there is a Plea Agreement with a cooperation provision, and that is actually part of the plea deal, the record should not falsely suggest that there is Plea Agreement without such a cooperation provision. The proposal I've heard to file a public version of a Plea Agreement that does not include the cooperation provision, when everyone involved realizes the real deal actually does include cooperation, would in my view put the Judiciary in the position of creating a false and misleading record of what is actually occurring. And obviously I don't think the Judiciary should countenance that sort of thing. Making individualized decisions to seal some or all of the content of a document is perfectly proper and well-established judicial practice in my view. It does result in some compromise of the normal, presumptive right of public access to Court records. But the compromise is appropriate when a judicial officer determines there is good cause for the sealed filing. But the proposals that go beyond this, and that would distort the judicial record of what is actually happening in a case are totally different in my view. At least in my District, I'm hearing the US Attorney's Office--often with support from the Defender Service--push for the more extreme record scrubbing that would, in my view distort the reality of what is happening in a case. I understand and applaud the desire to protect people who choose to cooperate. But I don't think that protection can or should come at the expense of the integrity of the Court record.
Details of a specific incident; general comments about the sources to identify cooperator; procedures for protecting defendants; Procedures for protecting witnesses; Takes issue with the survey	Additional comments provided over email: I have the following information to report regarding threats or harm to offenders due to their cooperation: 1) [redacted] - was prosecuted for threatening a material witness [redacted]- see below. 2) [redacted] - was threatened by [redacted] regarding her testimony against [redacted]. [redacted] threatened with physical harm to herself and her family. No actual harm was done. [redacted] was on pretrial release at the time of the threat. No information to indicate she requested protective custody or that she received same. No information to indicate that court documents were used to identify the defendant as a cooperator.

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	3) [redacted] is being prosecuted for witness tampering. He made a series of phone calls to people to attempt to dissuade them from testifying in the sentencing of [redacted]. No information to indicate there were actual threats made. Defendant was in custody for TSR revocation at the time. Witnesses were in the community and no information is available about the witnesses requesting protection. No threat of physical or financial harm was reported and none actually occurred. Discovery material (statements) was disseminated amongst several people in this case. 4) [redacted] has received various threats of physical harm to him and his family due to his cooperation against other defendants. Some co-defendants distributed discovery material which included statements provided by [redacted]. [redacted] was on bond at the time of the treats and it has continued to his time on probation. No harm has actually occurred to date. 5) [redacted] is a [redacted] who cooperated with the Government against other [redacted]. He has been detained and awaiting sentencing since [redacted]. He is trying to enter the BOP Witness Security Program. We have no specific threat information, but there is a sincere concern for his safety. Please let me know if you have any questions or require additional information. I took the request to mean that we had to compile one response for the entire district so I did not complete the form itself.
Takes issue with the survey; general comment about the frequency of harm; details of a specific incident; general comment about harm in prison/prison culture; procedures for protecting defendants; general comments about the sources to identify cooperator	Additional comments provided over email: I have been attempting to complete the survey "Cooperators – Federal defenders and CJA Panel representatives" I am [redacted]. [redacted]. I truly appreciate your efforts in gathering information useful to the courts for this very real problem. I have attempted to complete the survey as constructed which has a number difficulties in getting useful information for the courts. I understand researchers like check box surveys because they can be more easily "scored" than interviews or open ended questions. However the issues are much more complex than what will be revealed by the structure of the questions asked. Despite that I dutifully went through the series of questions but got an error message "you cannot continue until you enter a valid number." This came with the following series of questions: 1. "In the past three years, how many defendants, because of actual or threatened harm, requested case information (CM/ECF docket, pre-sentence report, etc.) to prove they were not a cooperator?" 2. "In the past three years, how many defendants, because of actual or threatened harm, requested all or part of their CM/ECF docket be sealed?"

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	3. "In the past three years, how many defendants withdrew offers of cooperation because of actual or threatened harm?" The answer to #1 — There was a large space to answer (as there was in the other two) so I thought I could type in an explanation. My answer was: "This happens so routinely I cannot give a number. Most defendants are shaken down for case information upon arrival at BOP institution. This is 100% of defendants who are assigned to a USP and some that go to a medium." This has been the case for nearly my entire career. I do not have a number and would have to pull case files to get a number. The form wants a number. I put it at 75%. It would not take 75% This error warning (as the other two error warnings) did not come until I had completed all three of the questions. The answer to #2 was "None that I can recall. I have suggested this and been told it will not help and will actually raise a red flag and cause everyone to believe defendant was cooperator if items are sealed." The form wants a number so I put "0" (i.e. zero.) Form wouldn't take it. The answer to #3 was "This averages about 30%." This percentage is the defendants who are, no matter what, going to a USP versus a medium or lower. Form would not take answer or 30%. The last questions about the number of defendants/or witnesses harmed or threatened due to perceived or actual cooperation with the government higher or lower in 2014 vs 2013. I would answer lower because I have been told by defendants that they have learned that it does not get them anywhere and actually can make it worse if they complain. As for additional information (an open ended question) I can state the following: In addition to criminal defense work I do civil rights cases and FTCA cases. I frequently receive requests from inmates to represent them in cases where they have been seriously assaulted (usually with homemade knives) by fellow inmates. Due to the technical legal difficulties with §1983 cases and FTCA cases, and the expense and time necessary to take on such a case, I and other lawyers routinely turn down these requests for representation. I am currently in [redacted] on one such case that I did take regarding an individual who was assaulted so badly (because he was believed to be a snitch) that he had to have a kidney surgically removed, had heart repair surgery and is missing part of a lung. [redacted] because even without discovery the courts have so far held that "discretionary function" exception bars the suit. Some institutions are better run than others and can protect prisoners better than others. The perpetrators of this vicious assault received very minor sentences attached to their current sentences. There is no deterrence

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	of perpetrators of assaults nor any real threat of any ramifications for prison officials who fail to adequately protect prisoners at risk. As for district judges and protecting cooperators and others the situation is this: Every plea agreement in [redacted] for years has the following three required paragraphs that must be agreed to by the defendant: [redacted] These paragraphs are not in every district. Ironically the "debrief" required is often not bothered with or is cursory and does not provide any new information. However the paragraphs create obvious problems for the defendant when incarcerated. I hope this helps with your research. I hope that interviews of CJA district representatives, and FPDs and AFPDs are being contemplated in the future. In addition to criminal defense counsel who have represented defendants and witnesses who have been assaulted, civil rights attorneys who have represented similar victims are being contemplated.
General comment about the frequency of harm; general comment about harm in prison/prison culture; procedures for protecting defendants; policy comments; general comments about the sources to identify cooperators; details of a specific incident	Additional comments provided over email: Some weeks ago I returned your committee's survey on threats or harm to witnesses. At the time, I was personally familiar with only one or two cases. By coincidence the issue came up in connection with a request to unseal plea agreements that would indicate who had cooperated. The United States Attorney [redacted] presented three witnesses, with national and local experience, who effectively described the range of problems that occur when a cooperating witness is identified. The witnesses gave numerous examples of retaliation against cooperating witnesses, those merely suspected of cooperating, and even those who spoke to prison officials to give exculpatory information about a suspect. [Redacted]
Details of a specific incident; general comment about harm in prison/prison culture	[Case transcript provided over email]

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