TRIAL AND APPELLATE ADVOCACY
Adjunct Professor John S. Siffert
and Honorable Sonia Sotomayor

COURSE MATERIALS VOLUME 2

UNITED STATES v. ABASI BANDELE © 2006

For:

C-1 – Josephine Morse
C-2 – Andre Segura
D-1 – Megan Swiebel
D-2 – Andrew Warshaver
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No Classes on 1/16/06 (Martin Luther King Day), 2/20/06 (Presidents’ Day), 3/13/06 (Spring Recess)
COURSE MATERIALS FOR
TRIAL AND APPELLATE ADVOCACY
To be Taught By Hon. Sonia Sotomayor and
Adjunct Professor John S. Sifert

SUMMARY

Trial and Appellate Advocacy is designed to take eight third year law school students through the critical stages of a case from inception through appeal. Special emphasis will be placed on ethical considerations, preserving issues for appeal as well as trial and appellate strategy. The eight students will be teamed in four groups of two, with each team rotating as prosecutor/defense counsel, appellant/appellee and trial/appellate judge at the various stages of the proceeding. There are two fact patterns that will be followed from trial through appeal. One criminal case involves the use of a forged document and alleged perjury in a securities arbitration. The other criminal case involves the use of false documents to obtain federally subsidized housing.

The reading materials will consist of These Course Materials prepared by the Professors, as well as Thomas A. Mauet's Fundamentals of Trial Techniques (Little, Brown and Company) and Michael E. Tigar's Federal Appeals (Shepard's/McGraw-Hill, Inc.).

The thirteen class sessions will be organized as follows:

First Session: January 9

Assigned Reading Prior to First Session

Read pages I-1 to I-3 of Course Materials:

Classroom Topics

1. Overview of the course and its objectives.

2. Using the generic criminal fact pattern in Exercise for First Session (pp. I-1 to I-3), introduce themes of taking no steps as a prosecutor without first asking and answering the questions:

   What are you trying to accomplish?
   Is what you are doing/saying accomplishing your purpose?
   What are the risks of pursuing your purpose?
   What are the alternatives available for accomplishing your stated purpose?

4. Develop a Point of View: Repetitions/Sanford Meisner Tape

5. The Imprecision of Language: Peanut Butter and Jelly Sandwich/Imagine A Bear

**Second Session:** January 23

**Assigned Reading:** Read pages II-1 to II-4 and II-5 through II-34; and for A-1, A-2, B-1 and B-2 read IV-1 to IV-135 (United States v. Sweet) of Course Materials; for C-1, C-2, D-1 and D-2 read U.S. v. Bandele; Mauet: Chapters I & II

- Exercise for Second Session: pp. II-1 to II-4

**Classroom Assignments**

Using the materials contained in the Exercise to Second Session (pp. II-1 to II-4), explore the same themes developed in first session from defense point of view.

Discuss ethical considerations in criminal intakes:
- "Anatomy of a Murder" Video v. Book (pp. II-5 to II-13)
- Video on Witness Prep Issues

**Strategic Issues for United States v. Sweet and Lemon:**

1. Who to indict; what to charge?
   a. Why initially indict Sweet alone?
   b. Why supersede to add Lemon?
   c. Why have two counts?
   d. Generic considerations; what to say in indictment?

2. Why make a motion attacking indictment?
   a. Striking prejudicial matter
   b. Severing - standards
   c. Evidentiary concerns
   d. Tactical issues
   e. Risks of making motion
   f. Preservation of Appellate Issues
Strategic Issues for civil cases:

1. Who to sue/what allegations to make?
   A. Suing the company alone
   B. Suing individual employees
      - pro's
      - con's
      (i) issues of liability, damages, collectibility, amenability
   C. Why charge: Contract
      False Imprisonment
      Battery
      Tortious Interference

D. Pro's and Con's of Motion Practice:
   (i) to dismiss
   (ii) for summary judgment considerations: cost, timing, appellate concerns, strategy

OTHER TOPICS

At the Second Session, we also will discuss such pretrial issues as:

1. drafting requests to charge
2. interviewing/deposing adversarial witnesses
3. importance of developing a theme

We also will discuss such trial issues as:

1. Starting with Summation
2. Order of Proof
3. Whether to Call a Witness
4. Goals of Cross-examination
5. Calling a Defendant/Client

Third Session: January 30

Reading Assignment:

All students read pages III-1 to III-74 (Niesig v. Team I and Camden v. State of Maryland), and students A-1, A-2, B-1 and B-2 read United States v. Sweet. Students C-1, C-2, D-1 and D-2 read United States v. Bandele in Course Materials:
CLASSROOM TOPICS:

Witness Preparation

A. Non-Client Witness Interviews  
B. Client Intake Issues Continued  
C. Preparing Client for Deposition  
D. Preparing Client for Grand Jury  
E. Preparing Client for Trial Testimony  
F. Prosecutor Preparing Witness for Grand Jury  
G. Prosecutor Preparing Witness for Trial

CLASSROOM ASSIGNMENTS:

Students will introduce at least two Ethical Issues raised by the Disciplinary Rules, Ethical Considerations and ABA Rules and the cases cited above (pp. III-1 to III-75) in connection with the following role-playing exercises, and students will lead discussion about those issues.

A-1 will play the role of Charlotte Dubois. A-2 will play the role of her lawyer and prepare her to testify at the NASD. Then A-2 will play the role of Dubois and A-1 will play the role of the prosecutor and will prepare her to testify in the criminal case.

B-1 will play the role of Conan Sweet. B-2 will play the role of Trustum’s lawyer preparing him to testify at the NASD arbitration. Then B-1 will prepare B-2 to testify as Sweet on his own behalf at the criminal trial.

D-1 will play the role of Bandele. D-2 will interview D-1 as Bandele for purposes of being retained as counsel. Then D-1 will play the role of defense counsel and will prepare D-2 as Bandele to testify at trial.

C-1 will play the role of Sadiki. C-2 will play the role of Sadiki’s lawyer and meet with C-1 as Sadiki about whether Sadiki should plead guilty and cooperate. Then C-1 act as prosecutor and prepare C-2 for trial testimony as Sadiki.

EXAMPLE OF OPENING
Fourth Session: February 6

Assignments

1. Read:

   Mauet Chapters III & IX (opening statements, trial preparation and strategy)

   Course Materials, United States v. Sweet; and United States v. Bandele

Written Work:

2. Prepare: Trial Book for United States v. Sweet
   Trial Book for United States v. Bandele

Classroom Work:

Classroom Exercises:

A-1 and A-2 will give prosecution opening in United States v. Sweet and Lemon.

B-1 will give defense opening for Sweet in United States v. Sweet and Lemon.

B-2 will give defense opening for Lemon in United States v. Sweet and Lemon.

C-1 and D-2 will give prosecution opening in United States v. Bandele.

D-1 and C-2 will give opening for defendant in United States v. Bandele.

Fifth Session: February 13

Assignments

Read: Mauet: Chapters IV, V and VI (Direct and Cross)

United States v. Lemon and Sweet Drills:

For Direct:

1. Refresh Recollection
For Cross:

2. Prior Inconsistent Statement
   DuBois
   Sweet
   Marlow

Exhibits:

3. Award
5. Affidavit of DuBois on p. IV-58
6. Stipulation on pp. IV-60 to IV-63
7. Insurance Policy on IV-71
8. Cut and Paste examples on pp. IV-72 and IV-73
9. Diagram of Lemon's office and position of DeLong's and Burton's Desks

United States v. Bandele Drills:

1. Refresh Recollection
2. Prior Inconsistent Statement
   Sadiki
   Vigilente

Discuss Theories and Practice of Direct and Cross Examinations.

Show Video of Direct/Cross.

**Sixth Session:** February 27

**Classroom Assignment:**

D-1 will direct Vigilente.
D-2 will cross Vigilente.

C-1 will play Vigilente.

B-1 will direct Abner Pols for prosecution.

B-2 will cross Abner Pols for Lemon.

A-1 will play Pols.
A-1 will direct Sheila DeLong for Lemon.

A-2 will cross Sheila DeLong for prosecution.

B-1 will play DeLong.

C-1 will direct Sadiki.

C-2 will cross Sadiki.

D-1 will play Sadiki.

**Seventh Session:** March 6

**Classroom Assignment**

A-1 will cross Lemon.


B-2 will direct Conan Sweet for defense.

Play Lemon.

B-1 will cross Conan Sweet for prosecution.

C-2 will direct Bandele.

C-1 will cross Bandele.

D-2 will play Bandele.

D-2 will direct Sadiki.

D-1 will cross Sadiki.

C-2 will play Sadiki.

**Eighth Session:** March 20

**Classroom Work:**

Complete exercises from prior weeks.

Lecture/Discussion: Objections; Record Preservation; Issue
Camouflaging/Flagging; Record Supplementation; Reasons for Appeal; Grounds for Appeal; Strategy of Cross-Appeal; Logistics of Appeals

Discuss Theories and Practice of Summations. Demonstration.

**Ninth Session:** March 27

A-2 will sum up for **Sweet** in **United States v. Sweet** and **Lemon**.

A-1 will sum up for **Lemon**.

B-1 will sum up for prosecution.

B-2 will give rebuttal summation for prosecution.

D-1 and C-2 will sum up for prosecution in **United States v. Bandele**.

C-1 and D-2 will sum up for defense in **United States v. Bandele**.

**Tenth Session:** April 3

**Assignment**

Read: **Mauet:** Chapter VIII (Objections)

**Federal Appeals,** pp. 197-246; 247-299

A-1, A-2, B-1 and B-2 read: Abstracts from Motions to Dismiss, pp. X-1 to X-19; X-29 to X-34

**Written Work:**

Assume a conviction in **United States v. Sweet** and **Lemon**:

A-1 will serve appellants' Brief on Appeal in **United States v. Lemon** and **Sweet** on grounds that the mailings were not in furtherance of the fraud and were not foreseeable (See pp. X-1 to X-19).

B-1 will serve Brief on Appeal on behalf of Lemon on the grounds that motion for severance of Sweet should have been granted. (See pp. X-29 to X-34)

Assuming a conviction in **United States v. Bandele**, C-1 will serve brief on appeal on grounds that the district court improperly failed to order production of the **Brady** materials that were discovered after the conviction. C-2 will serve brief on
appeal on Miranda violation.

**Classroom Work:**

D-1 will give charge to jury in United States v. Bandele.

B-2 will give charge to jury in United States v. Sweet and Lemon.

**Lecture/Discussion** on how to appeal, standing, final judgment rule, interlocutory orders, appeals by United States, sentence appeals, habeas petitions, certifying questions to state court, *en banc* in 2d Circuit.

**Eleventh Session:** April 10

**Assignments**

Read: Federal Appeals, pp. 315-360 (Briefs)
      361-414 (Oral Argument)

**Written Work:**

B-2 serve Opposing Brief on Appeal on "mailing" issues in United States v. Lemon and Sweet; A-2 will serve government brief on severance.

D-1 will serve Opposing Brief on Brady and D-2 will serve opposing brief on Miranda in United States v. Bandele.

**Classroom Work:**

1. Make up on Trial Exercises
2. Lecture/Discussion continued on how to appeal, standing, final judgment rule, interlocutory orders, appeals by prosecution, sentence appeals, habeas petitions, certifying questions to state court, *en banc* in 2d Circuit.

**Twelfth Session:** April 17

**Classroom Work:**


D-2 and C-2 argue Miranda Appeal in United States v. Bandele.

Remainder preside as judges.
A-1 delivers opinion on Appeal re: severance.

C-1 delivers opinion in United States v. Bandele.

Lecture on how panels decide cases and continue lecture on appeals.

**Thirteenth Session:** April 24

Classroom Work:


C-1/D-1 argue Brady Appeal in United States v. Bandele.

B-1 assigned to delivers opinion on mailings in United States v. Sweet.

D-2 assigned to write opinion in Bandele.

Lecture/Discussion on appellate practice continued.

Lecture/Discussion on Ethics in Appellate Advocacy

- What are counsel's obligation for candor on appeal, and is it a limitation on advocacy?
- What can a lawyer do to defend attack of competence? (See pp. XII-1 to XII-7).
- Should a lawyer take appeal if he or she is directed by a client to do so regardless of the legal basis for an appeal?

**EXTRA TOPICS:**

**Assignment**

Read: Federal Appeals, pp. 415-432

Classroom Work:

Make up Arguments

Lecture/Discussion on

Deliberation Process
Impact of Oral Argument on Decision-making
Issuance of Mandate
Rehearing and Rehearing En Banc
Bail Pending Appeal
Bond Pending Appeal
Post Judgment Remedies
Collateral Review (habeas)

When to settle

Cost/Benefit Analysis

Likelihood of Success

- Weight of evidence
- Jury sympathy

Collateral issues in settling

- Publicity
- Collateral consequences
- Costs
- Family harmony
- Precedential risks

When to Plead Guilty

Likelihood of conviction
Sentencing considerations
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NYU – Trial Advocacy: HUD Fraud Exam Fact Pattern

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United States v. Abasi BANDELE
Chronology

1982  BANDELE emigrates to the United States from Liberia

6/94  BANDELE becomes a U.S. citizen

7/9/95  Ade Jackson born

10/9/99  SADIKI arrives in U.S from Liberia illegally using passport of a friend

6/00  BANDELE gives social security card and other identification to SADIKI

7/16/00  SADIKI obtains employment with Supersafe Security by using BANDELE’s identity and social security number

8/01  BANDELE closes World Goods and rents the store to a friend who opens TuTu Culture.

12/01  SADIKI applies for an apartment at Carter, using BANDELE’S identification documents

2/2/02  SADIKI applies for political asylum

4/02  Mr. and Mrs. BANDELE file for bankruptcy

8/02  SADIKI moves into apartment 4K, 160 Carter Ave. in the Bronx, New York, and begins receiving federal rent subsidies

8/7/02  Ladeen employment verification signed by BANDELE

2003  HUD Special Agent Vicki Vigilente begins investigation of Carter Apartments

2/03  SADIKI begins working at Continental Airlines under his own name, after receiving work authorization card

2/03  As part of Carter’s periodic recertification process, SADIKI tells the Carter Management that he works at World Goods.

2/19/03  The Carter Management sends an employment verification form to World Goods.

3/2/03  World Goods, Inc. employment verification stating that BANDELE is an employee is signed by “Ade Jackson” and sent to the Carter Management

4/30/03  Citibank Credit Card Application in the name of Ade Jackson is signed.

10/20/03  SADIKI’S asylum petition is denied

11/03  SADIKI appeals denial of asylum petition

1/04  BANDELE opens KBAB Financial Services, Inc.

2/04  Board of Immigration Appeals reverses denial of SADIKI’s asylum petition, and remands for further proceedings

5/21/04  BANDELE arrested at his home in Teaneck, NJ, and interviewed by HUD Agents

5/21/04  SADIKI interviewed by HUD agents at Carter Apts. Management office

5/22/04  SADIKI arrested

6/20/04  Vigilente Grand Jury Testimony

#63971
8/30/04  SADIKI signs cooperation agreement and agrees to plead guilty to one count of mail fraud.

9/04  SADIKI is granted political asylum

9/10/04  BANDELE arraigned in SDNY
Goodheart and Friendly P.C.
1420 Fifteenth Avenue
New York, New York 10099

November 22, 2004

Harry Winthrop, Esq.
Randolph, Mortimer, & Duke LLP
100 Easy Street
New York, New York 10000

Re: United States v. Abasi Bandele, a/k/a "Ade Jackson"

Dear Harry:

It was great to have lunch the other day at the Yachtsman’s Club and talk about Mr. Bandele’s case. I am so glad that you’ve agreed to take it on. Mr. Bandele is really a great guy and I think he has a strong case. Were it not for my big immigration fraud trial that is scheduled at the same time as Mr. Bandele’s trial, I would be looking forward to putting the government to the test!

Mr. Bandele is a United States citizen who emigrated from Ligeria about twenty years ago. As I explained to you over lunch, this case is about illegally obtaining rent subsidies pursuant to the U.S. Department of Housing and Urban Development’s ("HUD") Section 8 program. The case involves a rent-subsidized apartment in the Carter Apartments, located in the Bronx, New York. I have heard that HUD has been investigating Section 8 fraud at Carter for some time, and this is just one of many federal prosecutions that have resulted.

Obasi Sadiki, the brother of Mr. Bandele’s wife Ayo, applied for the apartment in 2001 using Mr. Bandele’s name and identification documents. Mr. Sadiki moved into the apartment in August 2002 and lived there until his arrest in May 2004. During that time, Mr. Sadiki received approximately $15,000 in federal rent subsidies under HUD’s Section 8 program. I have not seen any evidence that Mr. Bandele received any money and he told me that he did not. Mr. Bandele has been charged in a one-count indictment with participating in a conspiracy that had two objects: (1) to defraud the United States (to wit, HUD); and (2) to commit mail fraud.

#63910
Mr. Sadiki is a Ligerian who entered the United States illegally in October 1999. I think he has since been granted asylum. He has pleaded guilty to one count of mail fraud. He entered into a cooperation agreement and will serve as the government's primary witness at Mr. Bandele's trial. The government's discovery so far has not included any materials from Mr. Sadiki's asylum proceedings. You might want to see if you can obtain his immigration files; you never know what you might find in there.

From my interviews with Mr. Bandele and my review of the discovery that the government has provided so far, it appears that, in July 2000, Mr. Sadiki obtained employment as a security guard using Mr. Bandele's name and identification documents furnished by Mr. Bandele. When Mr. Sadiki received W-2 forms from his employers, he provided them to Mr. Bandele, who then filed the W-2s as part of his federal income tax returns. In December 2001, Mr. Sadiki applied for a rent-subsidized apartment at the Carter Apartments by using Mr. Bandele's name and identification documents. Mr. Sadiki told the government during a proffer session that he had returned the identification documents to Mr. Bandele after he obtained employment, and that Mr. Bandele provided him with identification documents on a subsequent occasion to enable him to obtain the Carter apartment. Mr. Bandele told me that he did not give the identification documents to Mr. Sadiki a second time.

To ensure that tenants continue to qualify for the subsidized apartments, the Carter management send verification forms to tenants' employers. In 2003, Mr. Sadiki - still using the name "Abasi Bandele" - reported to Carter that he changed jobs and now worked at a store called World Goods, in Newark, New Jersey.¹ Carter sent an employment verification form to the World Goods address in 2003. Mr. Bandele used to own World Goods but sold it to a friend before 2003. He still owns the building.

The 2003 World Goods employment verification form was signed by "Ade Jackson", who purported to be the World Goods manager. The government maintains that Mr. Bandele signed the name "Ade Jackson" and will put on a handwriting expert. Mr. Bandele told me that he did not sign the form. My handwriting

¹ In fact, by this time Mr. Sadiki had obtained work authorization and was working under his real name for Continental Airlines.

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expert said he thinks the government expert is wrong that there is a clear match, but he cannot rule out Mr. Bandele as the writer.

In my opinion, Mr. Bandele has a good defense that he did not knowingly and willfully enter into a conspiracy to defraud HUD or to obtain Section 8 rent subsidies. Moreover, the record contains no evidence that Mr. Bandele: (1) ever obtained any portion of the Section 8 rent subsidies or any other money as a result of his participation in the charged conspiracy; (2) ever lived at the Carter apartment rented by Mr. Sadiki; or (3) in any other way obtained any benefit as a result of his participation in the charged conspiracy.

Two notes of caution: First, I saw an application for a credit card in the name of "Ade Jackson" in the government discovery. The address listed is the Carter apartment where Mr. Sadiki lived. There is also an application for a replacement Social Security card for a young boy named "Ade Jackson." The Social Security number matches the number on the credit card application, and the address on the Social Security application is an apartment in Mr. Bandele’s building in Newark. Second, there is a similar HUD employment verification form, signed by Mr. Bandele, for a person named Tajawal Ladeen. I have not talked to Mr. Bandele about either of these issues.

Good luck and thank you again very much for taking Mr. Bandele’s case.

Yours sincerely,

Marvin P. Goodheart

Marvin P. Goodheart

Encl.
UNIVERSAL STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  

UNITED STATES OF AMERICA  

-against-  

ABASI BANDELE,  
also known as  
"Ade Jackson,"  

Defendant.  

THE GRAND JURY CHARGES:  

INTRODUCTION  

At all times relevant to this Indictment, unless otherwise indicated:  

1. The United States Department of Housing and Urban Development  
"HUD") administered a federal program (the "Section 8 Program") that provided rent subsidies to eligible, low-income tenants, who were annually certified as being qualified recipients for such benefits upon providing HUD with current information regarding each tenant's earnings, employment, assets and citizenship or registered alien status.  

2. The Carter Apartments ("Carter") was a multi-family housing development in the Bronx, New York in which the tenants registered for, and obtained, Section 8 Program benefits. Based upon a formula related to the income level of the tenant, HUD transferred each qualified tenant's rent subsidy to Carter, and the tenant paid Carter the non-subsidized balance of the rent.  

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CONSPIRACY

3. In or about and between December 2001 and May 2004, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant ABASI BANDELE, also known as "Ade Jackson," together with Obasi Sadiki, did knowingly and intentionally conspire to: (i) defraud an agency of the United States, to wit, HUD; and (ii) devise a scheme and artifice to defraud HUD and Carter and to obtain from HUD money and property by means of materially false and fraudulent pretenses, representations and promises, in violation of Section 1341 of Title 18 of the United States Code, and for the purpose of executing and attempting to execute such scheme and artifice, to cause to be delivered by the United States Postal Service mail matters and things to be sent and delivered according to the directions thereon.

4. It was a part of the conspiracy that, in approximately 2000, the defendant ABASI BANDELE gave his social security card and other identification documents to his brother-in-law, Sadiki, who had illegally entered the United States from Liberia, so that Sadiki could obtain employment by impersonating the defendant. Later in 2000, Sadiki obtained employment with Supersafe Security, Inc. ("Supersafe") by using the identity and social security number of the defendant ABASI BANDELE.

5. It was a further part of the conspiracy that, in or about and between December 2001 and August 2002, with the defendant ABASI BANDELE's permission, Sadiki used the defendant's identification documents and social security number to apply for an apartment at Carter.

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6. It was a further part of the conspiracy that, in or about and between August 2002 and May 2004, with the defendant ABASI BANDELE's permission, Sadiki leased Apartment 4K, 160 Carter Avenue, Bronx, New York ("the Carter apartment"), by using the name of the defendant ABASI BANDELE, and obtained Section 8 Program benefits in connection with that Carter tenancy by impersonating the defendant ABASI BANDELE.

7. It was further a part of the conspiracy that, in or about and between August 2002 and July 2004, in order to appear to qualify for rent subsidies under the Section 8 Program, Sadiki made false statements to Carter regarding Sadiki's true identity, employment and earnings.

8. It was a further part of the conspiracy that, between approximately August 2002 and July 2004, the defendant ABASI BANDELE did not reside in the Carter apartment, but rather, Sadiki resided in the Carter apartment.

9. It was a further part of the conspiracy that in February 2003, Sadiki, using the identity of the defendant ABASI BANDELE and as part of the periodic re-certification process for Section 8 Program benefits, informed Carter that he was employed by World Goods, 506 Main Street, Newark, New Jersey, as a "storekeeper," when, as Sadiki well knew and believed, he was never employed by World Goods.

10. It was a further part of the conspiracy that in or about and between 2003 and 2004, Sadiki failed to disclose to HUD and Carter that he was actually employed under his true name by Continental Airlines.

11. It was a further part of the conspiracy that the defendant ABASI BANDELE, together with others, assisted Sadiki in providing HUD and Carter with false
information regarding Sadiki's eligibility for Section 8 program benefits. In March 2003, as part of the periodic re-certification process for Section 8 Program benefits, Sadiki and the defendant ABASI BANDELE, together with others, caused a false employment verification to be mailed in the name of World Goods, a business owned by the defendant, to Carter claiming that Sadiki was employed by World Goods. The false March 2003 employment verification, mailed by Sadiki and the defendant ABASI BANDELE to Carter, was signed on behalf of World Goods by "Ade Jackson," which was an alias used by the defendant ABASI BANDELE, and falsely claimed that Sadiki had earnings from World Goods, when, as the defendant well knew and believed, Sadiki had never been employed by World Goods.

12. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of New York, the defendant ABASI BANDELE and his co-conspirators committed and caused to be committed the following:

OVERT ACTS

a. In or about 2000, the defendant ABASI BANDELE gave his social security number to Sadiki so that Sadiki could use that number to obtain employment and an apartment.

b. In or about December 2001, Sadiki applied for an apartment at Carter by using the name and social security number of the defendant ABASI BANDELE.

c. On or about March 2, 2003, the defendant ABASI BANDELE caused a fraudulent verification of Sadiki's employment, which falsely represented that Sadiki was employed by World Goods, 506 Main Street, Newark, New Jersey and which bore the name of
"Ade Jackson," to be delivered by the United States Postal Service to Carter Apartments, Inc., 240 Carter Avenue, Bronx, New York.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

A TRUE BILL

/s/
FOREPERSON

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

BY:      /s/
ACTING UNITED STATES ATTORNEY
PURSUANT TO 28 C.F.R. 0136

#63914

VI-11
No.

UNITED STATES DISTRICT COURT

Southern District of New York

Criminal Division

The United States of America

Vs.

Abasi Bandele,

Defendant

Indictment

(T. 18, U.S.C., §§ 371, and 3551 et seq.)

A true bill.

__________________________
Foreman

Filed in open court this __________ day.

of ______________ A.D. 20________

__________________________
Clerk

Bail, $__________________

AUSA Jack McCoy (212) 555-6157

#63914

VI-12
UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF NEW YORK
Regular Grand Jury

UNITED STATES OF AMERICA

- against -

Abasi Bandele,
Defendant.

Transcript of Hearing,
June 20, 2004

Appearances:

Jack McCoy, Esq.
Assistant United States Attorney

Witness:

Vicky Vigilente

[Excerpts]
Witness enters room

VICKY VIGILENTE, having first been duly sworn by the Foreperson of the Grand Jury, was examined and testified as follows:

BY MR. MCCOY:

Q. Please be seated and spell your name for the record.
A. I'm Vicky Vigilente. V - I - G - I - L - E - N - T - E.

Q. By whom are you employed?
A. I am employed by the Inspector General's Office of U.S. Department of Housing and Urban Development.

Q. What is your official title?
A. My official title is Special Agent.

Q. What are your duties and responsibilities as a Special Agent?
A. I investigate fraud, waste and abuse within HUD.

Q. How long have you been with HUD?
A. For four years.

Q. Have you been participating in an investigation of a location know as Carter Apartments? What generally is that investigation about?
A. Yes. The investigation, it's a multifamily building, which is also known as a project, a housing development, in the Bronx, Section 8 fraud.

Q. What type of apartment complex is it?
A. It's made up of six buildings, and the addresses run from 140 to 225 on Carter Avenue.

Q. The investigation began approximately what year?
A. In 2003.

Q. And have you investigated numerous apartments and individuals in that location?
A. Yes.

Q. And could you generally describe what Section 8 and the Section 8 program is under HUD's auspices.
A. The Section 8 program, basically it is to help people of low income to be able to help them pay their rent, so they receive a rent subsidy, and it's based on a percentage of
their gross income. They can receive up to 70 percent of their gross income. The rest is paid by HUD to the management company for the tenant.

Q. And to qualify, what is the process, particularly at Carter, to qualify for rent subsidies, what is the process that an applicant would go through?
A. The tenant would come to the management company, and state they would like to fill out an application. And this application is for the waiting list. Attached to the application would be proof of legal residency in this country, their W-2s, to show that they qualify, their wages to qualify for these Section 8 apartments, family compositions, any kind of marriage certificates, birth certificates, or any other assets to show that they would benefit from this program.

Q. Are resident aliens eligible for a Section 8 rent subsidy?
A. As long as they are legally in this country.

Q. So is it fair to say that the information requested to see if you qualify for Section 8 subsidy is information such as a tenant applicant’s earnings, employment, assets they may have and citizenship or resident alien status?
A. Yes.

Q. After the tenant furnishes the information, what happens next in the application process to become a tenant and recipient of Section 8 rent subsidies?
A. The tenant is placed on Carter’s waiting list. When his name comes up on the waiting list, he’s called in for an interview. They have to bring in all these documents again to prove their - - if they qualify for the Section 8 program. Carter then takes that application and places it on a computer software that is connected to HUD, and once that information is there, they sent it to HUD and HUD gives its approval for that apartment and then at that point if HUD approves it, then the money is wired for the tenant every month to the management company.

Q. In the original application process, is the tenant asked to present payroll stubs or other proof of their earnings, like W-2s or payroll?
A. Yes. They are required to bring in whatever they have to prove that they make that amount of money.

Q. You also mentioned an employment verification process. Could you explain to the Grand Jurors what that verification process is.

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A. HUD requires the management company to send out third party verifications if the tenant switches jobs, and that is sending the letter out to the employer himself and saying can you fill out the form for the tenant. It must be mailed by the company itself. And the information requested is basically wages, titles, how long they have been working there, do they receive any kind of overtime, benefits, bonuses. This information has to be received from the third party.

Q. So if a tenant applies or is recertifying after they’ve been living there, do they furnish to the management company, Carter, the name and address of their current employer?

A. Yes.

Q. What does Carter do with that information? Do they send out a form?

A. They send out a form to the address that was supplied by the tenant.

Q. In the course of your investigation of the Section 8 program at Carter, have you investigated an individual of the true name and also a person using the name Abasi Bendele?

A. Yes.

* * *

Q. Is Mr. Sadiki an individual who has agreed to cooperate with the Government?

A. Yes.

Q. Has Mr. Sadiki entered a plea?

A. Yes.

Q. Has he pled guilty to a crime in connection with this investigation?

A. Yes.

Q. And in connection with this investigation, before his guilty plea, was he interviewed by you and your fellow agents?

A. Yes.

Q. And after Mr. Sadiki consulted with his attorney, did he sign, to your knowledge, a cooperation agreement with the Government in connection with his guilty plea?

A. Yes.

Q. Could you tell us how the investigation began or what you learned about that apartment and Bandele and Sadiki’s connections to that apartment?
A. Yes. My investigation started in 2003, and through a series of computer checks, Bandele’s name came up on a list which indicated that he owned several properties within New Jersey.

Q. So is it fair to say that you obtained a tenant list of tenants at Carter who were getting Section 8 rent subsidies?

A. Yes.

Q. Was Bandele’s name on that list as one of the tenant’s at Carter getting rent subsidies?

A. Yes.

Q. The name Bandele was a tenant under which Section 8 rent subsidies were allotted for Apartment 4K, correct?

A. Yes.

Q. Upon further investigation, what did you learn about the actual tenant in Apartment 4K at Carter?

A. I learned that Obasi Sadiki was living in 4K and is the brother-in-law of Bandele.

Q. And did you in the course of your investigation execute an arrest of Mr. Sadiki?

A. Yes, in May 2004.

Q. And did he agree to cooperate thereafter?

A. Yes.

Q. When he was first arrested, was he interviewed by fellow agents and yourself?

A. Prior to his arrest he was interviewed.

Q. Did you learn some of the information that Mr. Sadiki gave to your fellow agents in that May interview?

A. Yes. I had learned that Sadiki was living in that apartment from day one. He had applied for the Section 8 program, was accepted into that apartment and had lived there alone during the entire time, during his entire tenancy there.

Q. Was his tenancy in Carter under the name Abasi Bandele?

A. Yes.

Q. Approximately what year did he apply?

A. He applied in December of 2001 and received the apartment in August 2002.

Q. And he was a tenant up until approximately what time or what year?

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A. May 2004.

Q. So during this interview by Sadiki with your fellow agents, what did he tell them?

A. He stated he came to the United States from Liberia in October 1999, and when he first arrived here he wanted to work but he was - - he had come into the country illegally and so he could not apply for a Social Security card, and after some time he went to his brother-in-law and asked him for his identification documents so that he could work in this country.

Q. Asked for whose documents?

A. Sadiki asked for Bandele’s documents. Which was a Social Security card, a Naturalization Certificate. He took this information and applied for a job with Supersafe Security.

Q. And where did he first live when he first came to the United States, Sadiki?

A. When he first came to live in the U.S. he lived with his brother-in-law.

Q. And then how long before he left there?

A. A month or two, and then he moved in with a friend of his at Carter.

Q. Did Mr. Sadiki tell your fellow agents that he got identification-type documents of Bandele and used them to get employment at Supersafe Security, the company that provides security for the Carter complex?

A. Yes – a Social Security card and a certificate of naturalization.

Q. Did Sadiki apply for his own apartment at Carter Apartments?


Q. And when he applied for the apartment, what name did he use?

A. He used “Abasi Bandele”.

Q. And when he applied for an apartment at Carter Apartments, did he use a social security number?

A. Yes.

Q. And whose social security number did he use?

A. Bandele’s.

Q. After he applied for the apartment, did he eventually get the apartment?

A. Yes.

Q. And he became a tenant resident there?
A. Yes.
Q. Did he ever have to go through recertification processes?
A. Yes when he changed jobs in 2003.
Q. Did he have to sign documents?
A. Yes.
Q. And what name did he use?
A. He used Bandele.
Q. What Social Security number did he use?
A. Bandele's Social Security number.
Q. Did there come a time when he left his employment at Supersafe Security and started working at Continental Airlines?
A. Yes.
Q. And what did Sadiki tell you he told Carter about this?
A. He had to notify them that he changed jobs because they would notice that he no longer worked as a security guard at the apartment complex. Because he had applied for this apartment under Bandele's name, he had to continue using Bandele's name. When he got the Continental job, he had gotten it in his own name, Sadiki's name, so he could not use that information and bring - - he could not bring that information to the management company because he was still living under Bandele's name. So he stated that he went to his brother-in-law, Bandele, and told him his situation and they decided that they would put that Sadiki was working for World Goods, a store that Bandele owned at some point, and he furnished to the management company paystubs from World Goods.
Q. And when he originally applied for the apartment and employment, did Sadiki tell your fellow agents whether or not he, Sadiki, told Bandele that he was going to use Bandele's name and social security number for employment and for an apartment?
A. He did not tell us this at his first interview. He told us that later.
Q. And what he told you was that he told his brother-in-law that he was going to get a job and apartment using the name Bandele and Bandele's Social Security number?
A. Yes.
Q. And during his recertification process at Carter, did Sadiki ever tell Carter that he worked at Continental Airlines?
A. No.

Q. During the interview in May and in subsequent interviews with yourself, did Sadiki state whether or not he ever actually worked for World Goods?
A. Yes. He stated that he did not work for World Goods.

Q. And, therefore, were the paystubs information, earnings information that he gave to Carter true or false?
A. They were false.

Q. Did Sadiki ever say how he got the World Goods paystubs?
A. Yes. Bandele told Sadiki that he would help Sadiki receive paystubs from World Goods. So when Sadiki went for his 2003 recertification, he gave the address of World Goods to the Carter management company. The management company sent to 506 Main Street the third-party verification. It was signed on the bottom by someone named “Ade Jackson,” returned to Sadiki and then Sadiki filled out the form, basically claiming his wages and all that, and he mailed it the management company.

Q. And the actual paystubs or earnings information, how did Sadiki claim he got possession of those documents and who did he get them from?
A. Sadiki said he picked them up at Bandele’s home.

* * *

Q. During the course of your investigation, during the tenancy did you learn how much federal subsidies were paid under the name Bandele for Apartment 4K?
A. Yes.

Q. How much approximately?
A. $15,127.

Q. During the course of this, was HUD paying that money under the name of a tenant that was know to HUD as Abasi Bandele?
A. Yes.

Q. What is government Exhibit 5?
A. It is an employment verification that was sent February 19th 2003 to World Goods, 506 Main Street, Newark, New Jersey. The information provided on this
employment verification was that Bandele was employed since 2002 as a storekeeper making $7 and hour, an average of 32 hours a week. It is signed by Ade Jackson.

Q. Where does that name appear in connection with that?
A. It’s under the person supplying the information from World Goods, Inc.

Q. Is that the employment verification, the attached pages and envelope that you were describing in your previous, earlier testimony?
A. Yes.

Q. Do you know who did write Ade Jackson?
A. Our handwriting expert matched it to the handwriting of Abasi Bandele.

* * *

Q. Have you learned anything more in your investigation other than what you testified to about the name Ade Jackson and whether it is a true person?
A. Yes. I did find out that Ade Jackson is a true person.

Q. During the course of your interviewing of Sadiki, did you discuss with Sadiki in the presence of his lawyer whether he was getting any mail or credit card bank statements when he was a tenant at 4K at Carter?
A. Yes.

Q. What did he tell you?
A. He stated that while he was there he received mail from Citibank in the name of Ade Jackson. He decided to call his brother-in-law about this, and Bandele said that the envelope, “that is mine.” What Sadiki did was put it in another envelope and sent it to Bandele.

Q. And did he get any other letters like that in the name of Ade Jackson?
A. Yes.

Q. What did Sadiki do with them?
A. He sent them to Bandele.

Q. In the course of your investigation, did you also obtain through Grand Jury subpoenas the bank records marked Government Exhibit 8?
A. Yes.

Q. And those are credit card records?
A. Yes.
Q. For what address and Social?
A. The address for Ade Jackson is 160 Carter Avenue, Apartment 4K in the Bronx.
Q. And the Social again?
A. 131-31-3131.
Q. And in obtaining these records under the name Ade Jackson from Citibank, what were you trying to do?
A. What I was trying to do was prove if Sadiki was telling me the truth.
Q. And the records that you received under the name Ade Jackson from Citibank, can you determine what they are?
A. Yeah. It's - - from what I understand, it is a credit card that he received under - - a credit card with a balance on it, so his balance would be whatever he placed on the credit card itself. So if he gave $300, then he had a balance on $300 on his credit card.
Q. Did you also research or seek information about a social security card issued for an Ade Jackson?
A. Yes, I did.
Q. Let me show you Exhibit 9. What did you learn?
A. It was assigned to an Ade Jackson, date of birth, July 9, 1995. Place of birth was Newark City, New Jersey, and the first issuance was January 11, 1996. The second issuance, which was a replacement card issued on April 9, 1996 in the name of Ade Jackson.

* * *

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#63951
United States Department of Housing and Urban Development
Office of the Inspector General

Memorandum of Interview

Interview Date: May 21, 2004

Participants: OBASI SADIKI, Witness
              JENNIFER POND, Special Agent, HUD-OIG
              MICHAEL H. STALLWORTH, Special Agent, HUD-OIG

Subject: CARTER APARTMENTS INVESTIGATION

Memo prepared by S.A. Stallworth (6/11/04)
Affidavit of Sadiki attached

SADIKI was interviewed at the management office of the Carter Apartments at 240 Carter Avenue, Bronx, NY. SADIKI was advised of the identity of the interviewing agents and the purpose of the interview. SADIKI provided the following information.

SADIKI stated that he first arrived in the United States from Ligeria in 1999. When he first arrived, SADIKI used ABASI BANDELE’S name and documents so that he (SADIKI) could work in the United States. BANDELE is SADIKI’S brother-in-law. SADIKI produced his driver’s license and Social Security card for identification.

SADIKI stated that BANDELE “is the person who gave me everything.”

SADIKI stated that, in 2000, he signed his brother-in-law’s Social Security card, with BANDELE’s name and Social Security number. He said that he held onto them in case he might need them again. SADIKI stated that he used BANDELE’s identification documents again to apply for his apartment in 2001. SADIKI denied that he ever paid BANDELE for use of his documents.

SADIKI stated that he has worked for Continental Airlines, in customer service, since February 2003. He makes $10.95 per hour and works full time. SADIKI stated that he worked for a business called World Goods when he first came into the country in 1999, before he went to work for Continental. SADIKI stated that he still works at WORLD GOODS part time.

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SADIKI stated that WORLD GOODS is located in Newark, New Jersey. SADIKI explained that he drives to work at WORLD GOODS. SADIKI stated that he helps at the store. SADIKI stated that he works at WORLD GOODS and is paid under his brother-in-law’s name. SADIKI stated that his brother-in-law knows that he, SADIKI, is using his name for work.

SADIKI stated that he is not a US citizen. SADIKI explained that he is in the United States with an asylum privilege. SADIKI stated that he is married. His wife lives in Liberia. SADIKI sends his wife approximately $200 per month.

SADIKI stated that he did file a tax return last year and did receive a tax refund. SADIKI stated that he did not report the income from WORLD GOODS because the income was not in his name.

SADIKI stated that he worked 32 hours per week at WORLD GOODS in addition to his full time work at Continental, up until December 2003. SADIKI further stated that he now works at WORLD GOODS only once in a while when he is off work at Continental. SADIKI stated that he has worked approximately 16 hours per week since December 2003. SADIKI stated that he has not worked at WORLD GOODS at all since April 2004.

When asked, SADIKI admitted that he lied about his identity on the HUD paperwork for his apartment.

SADIKI was asked if WORLD GOODS is or was owned by his brother-in-law. SADIKI stated that he is not sure if his brother-in-law owned the business. SADIKI stated that his brother-in-law was always coming down to the store, but SADIKI is not sure if his brother-in-law owned the business or just worked there.

**SADIKI then was admonished by the Agents not to lie.**

SADIKI admitted that he never worked at WORLD GOODS. SADIKI admitted that BANDELE gave him the World Goods pay stubs that were in the tenant file. SADIKI said, “I never stole it. He (BANDELE) gave it to me. I never worked at WORLD GOODS before.”

SADIKI stated that he arrived in the United States on October 9, 1999. SADIKI lived with his brother-in-law for a short time and then lived with a friend. SADIKI explained that he came to the US on his own passport and applied for asylum. SADIKI stated that he was turned down for asylum and his appeal of that decision is pending.

SADIKI stated that he could not use his friend’s paperwork, because his friend was using his own paperwork to work. His friend suggested that SADIKI talk with his brother-in-law. SADIKI stated that he told his brother-in-law that he needed

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paperwork. His brother-in-law gave SADIKI his Social Security card and naturalization papers. BANDELE kept the documents.

SADIKI worked at SUPERSAFE SECURITY for approximately two and a half years, under BANDELE’s name. SADIKI then got his own papers and started working at Continental under his real name.

SADIKI recalled that BANDELE gave SADIKI the pay stubs for WORLD GOODS at BANDELE’s house. SADIKI stated that he had told BANDELE that he needed the pay stubs because he needed to submit some employment verification.

SADIKI then prepared a sworn affidavit, a copy of which is attached.
I Obasi Sadiki voluntarily made the following statements. I swear and affirm the statements are truthful to the best of my knowledge and ability.

I came into the U.S.A. on October 9, 1999, and I stayed with my brother-in-law who helped me out by giving me his Social Security card and certificate of citizenship so that I may get some work. I used it to get work at Supersafe Security and he gave it to me when I cannot secure any work authorization from immigration when I applied for it. I worked from 2000 - Dec. 2002, and when I got through from immigration process I was able to get my own papers and I stopped using it to work.

I kept the identification and used it to get an apartment at Carter. I did not know the implications of what I was doing. I thought he was helping me until when they told me what it means.

The name on that social security number was "Abasi Bandele" and the number is 666-66-6666 and he asked me to sign on it with his own name.

When I was to do the 2003 verification for Carter’s recertification requirement he got the World Goods pay stub to enable me to go through. Initially he gave me the address to use for the WORLD GOODS which is 506 Main St., Newark, NJ. I never worked with the company.

I was shown a letter in my Carter Apartments file by the agents. The letter was an employment verification form. The purpose of the letter was to show that

#63945
I worked at World Goods in 2002 and 2003. I filled out all of the handwritten information on the form, except for the signature of the manager. I do not know who signed that. Mr. Bandele got that signed for me and gave it to me. I mailed it in, with the envelope Carter provided for the employer.

I knew when I filled out this letter that the information was not true, because I never worked at World Goods. When the Special Agents first asked me today if I worked there, I lied. But then they told me I have to tell the truth so I did. I have read this affidavit before signing it. It is the truth.

Sworn and Subscribed to:

/s/
Obasi Sadiki

Witnesses:

/s/
Michael Stallworth
Special Agent, HUD-OIG
5/21/04

/s/
Jennifer Pond
Special Agent, HUD-OIG
5/21/04

Place statement was taken: Carter Management Office, 240 Carter Ave., Bronx, N.Y.
Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States Attorney's office for the Southern District of New York (the "Office") and Obasi Sadiki (the "defendant") agree to the following:

1. The defendant will plead guilty to Count One of the above-captioned indictment, charging a violation of 18 U.S.C. § 1341. The count carries the following statutory penalties:


   c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years without credit for pre-release imprisonment or time previously served on post-release supervision. (18 U.S.C. §§ 3583 (b), (e)).
d. Maximum fine: $250,000 or the greater of twice the gross gain or twice the gross loss resulting from the offense (18 U.S.C. § 3571).

e. Restitution: $25,127


g. Other penalties: Possible deportation

2. The defendant’s sentence is governed by the United States Sentencing Guidelines. The Office will advise the Court and the Probation Department of information relevant to sentencing, including all criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant’s sentence. Based on information known to it now, the Office will not oppose a downward adjustment of two levels for acceptance of responsibility under U.S.S.G. § 3E1.1.

3. The defendant will provide truthful, complete and accurate information and will cooperate fully with the Office. This cooperation will include, but is not limited to, the following:

   a. The defendant agrees to be fully debriefed and to attend all meetings at which his presence is requested, concerning his participation in and knowledge of all criminal activities.

   b. The defendant agrees to furnish to the Office all documents and other material that
may be relevant to the investigation and that are in the defendant’s possession or control and to participate in undercover activities pursuant to the specific instructions of law enforcement agents or this Office.

c. The defendant agrees not to reveal his cooperation, or any information derived therefrom, to any third party without prior consent of the Office.

d. The defendant agrees to testify at any proceeding in the Southern District of New York or elsewhere as requested by the Office.

e. The defendant consents to adjournments of his sentence as requested by the Office.

f. The defendant agrees to cooperate fully with the Internal Revenue Service in the ascertainment, computation and payment of his correct federal income tax liability for the years 1999 through 2004, and consents to the disclosure to the Internal Revenue Service of information relating to his financial affairs that is in the possession of third parties.

4. The Office agrees that:

a. Except as provided in paragraphs 1, 8, and 9, no criminal charges will be brought against the defendant for his heretofore disclosed participation in criminal activity involving a scheme to defraud the United States Department of Housing and Urban Development by providing false information as to his identity, social security number, earnings and employment in order to obtain rent subsidies under the Section 8 Program, all from the period December 2001 through June 2004, and, at the time of sentence, it will move to dismiss the remaining counts of the indictment with prejudice.
b. No statements made by the defendant during the course of this cooperation will be used against him except as provided in paragraphs 2, 8, and 9.

5. The defendant agrees that the Office may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel’s presence at such debriefings and meetings. Upon request of the defendant, the Office will endeavor to provide advance notice to counsel of the place and time of meetings and debriefings, it being understood that the Office’s ability to provide such notice will vary according to time constraints and other circumstances. The Office may accommodate requests to alter the time and place of such debriefings. It is understood, however, that any cancellations or reschedulings of debriefings or meetings requested by the defendant that hinder the Office’s ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant’s ability to provide substantial assistance. Matters occurring at any meeting or debriefing may be considered by the Office in determining whether the defendant has provided substantial assistance or otherwise complied with this agreement and may be considered by the Court in imposing sentence.
regardless of whether counsel was present at the meeting or debriefing.

6. If the Office determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion pursuant to U.S.S.G. § 5K1.1 and U.S.C. § 3553(e) with the sentencing Court setting forth the nature and extent of his cooperation. Such a motion will permit the Court, in its discretion, to impose a sentence below the applicable Sentencing Guidelines range and also below any applicable mandatory minimum sentence. In this connection, it is understood that a good faith determination by the Office as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, and the Office’s good faith assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon him. The defendant agrees that, in making this determination, the Office may consider facts known to it at this time. The Office will not recommend to the Court a specific sentence to be imposed. Further, the Office cannot and does not make a promise or representation as to what sentence will be imposed by the Court.

#63941
7. The defendant agrees that with respect to all charges referred to in paragraphs 1 and 4(a) he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law. The defendant waives any right to additional disclosure from the government in connection with the guilty plea. The defendant agrees to pay the special assessment by check payable to the Clerk of the Court at or before sentencing.

8. The defendant must at all times give complete, truthful, and accurate information and testimony, and must not commit, or attempt to commit, any further crimes. Should it be judged by the Office that the defendant has failed to cooperate fully, has intentionally given false, misleading or incomplete information or testimony, has committed or attempted to commit any further crimes, or has otherwise violated any provision of this agreement, the defendant will not be released from his plea of guilty but this Office will be released from its obligations under this agreement, including (a) not to oppose a downward adjustment of two levels for acceptance of responsibility described in paragraph 2 above, and (b) to file the motion described in paragraph 6 above. Moreover, this Office may withdraw the motion described in paragraph 6 above, if such #63941
motion has been filed prior to sentencing. The defendant will also be subject to prosecution for any federal criminal violation of which the Office has knowledge, including, but not limited to, the criminal activity described in paragraph 4 above, perjury and obstruction of justice.

9. Any prosecution resulting from the defendant's failure to comply with the terms of this agreement may be premised upon, among other things: (a) any statements made by the defendant to the Office or to other law enforcement agents on or after August 30, 2004; (b) any testimony given by him before any grand jury or other tribunal, whether before or after the date this agreement is signed by the defendant; and (c) any leads derived from such statements or testimony. Prosecutions that are not time-barred by the applicable statutes of limitation on the date this agreement is signed may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statutes of limitation between the signing of this agreement and the commencement of any such prosecutions. Furthermore, the defendant waives all claims under the United States Constitution, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal statute or #63941
rule, that statements made by him or after August 30, 2004, or any leads derived therefrom, should be suppressed.

10. This agreement does not bind any federal, state, or local prosecuting authority other than the Office, and does not prohibit the Office from initiating or prosecuting any civil or administrative proceedings directly or indirectly involving the defendant.

11. No promises, agreements or conditions have been entered into other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties. This agreement supersedes any prior promises, agreements or conditions between the parties. To become effective, this agreement must be signed by all signatories listed below.

Dated: New York, New York
August 30, 2004

United States Attorney
Southern District of New York

By: /s/ Jack McCoy
Assistant United States Attorney

Approved by:

/s/
Supervising Assistant U.S. Attorney

#63941

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I have read the entire agreement and discussed it with my attorney. I understand all of its terms and am entering into it knowingly and voluntarily.

/s/ __________________________
Defendant

Approved by:

/s/ __________________________
Counsel for Defendant
CASE ACTIVITY REPORT

CASE FILE NO: NY 01 000000 CASE TITLE: Carter Housing Developments
Obasi Sadiki/Abasi Bandele

SPECIAL AGENT: Vicky L. Vigilente DATE OF ACTIVITY: September 21, 2004
OFFICE: New York, NY

OTHER PARTICIPATING AGENCIES:
Attorney for Obasi Sadiki- Robert Lester, AUSA Jack McCoy- SDNY

OTHER PARTICIPATING OFFICERS:

DESCRIPTION OF ACTIVITY:

Proffer with Obasi Sadiki

DISTRICT: 2AGI
SUB OFFICE: New York, NY
DISTRIBUTION: Case File; U.S. Attorney’s Office

On the above date, Special Agent (SA) Vicky L. Vigilente of the Office of the Inspector General (OIG), Office of Investigations (OI), U.S. Department of Housing and Urban Development (HUD), and Jack McCoy from the Southern District of New York proffered Obasi Sadiki in the presence of his attorney Robert Lester. Lester and Sadiki were shown the proffer document, and it was signed by all parties in the room. McCoy explained all exceptions to the proffer and Sadiki provided the following information:

Sadiki was born on September 18, 1950, in Newtown, Liberia. His true U.S. Social Security number is 777-77-7777. He acknowledged that he has used the name Abasi Bandele. Bandele is the wife of Sadiki’s sister, Ayo.

On October 9, 1999, Sadiki illegally entered the U.S. at John F. Kennedy Airport. He has not traveled back to Liberia since that time. Prior to coming to the U.S. in October 1999, he worked for Liberian Airways as a pilot for nineteen years and also served as a flight attendant. He was an executive member of the Liberian Pilots’ and Flight Attendants’ Association. He held the title of Secretary of the union.

According to Sadiki, he left Liberia because of political turmoil. He explained that his union organized a strike to protest the military government in 1998. Sadiki was one of several union officers who were held in police custody for several days. During that time, he was tortured (including electric shock). He showed us scars on his legs. After he was released, he was instructed not to fly international routes any longer.
Sadiki next explained to us how he was able to enter the U.S. in October 1999. He obtained the passport of a Ghana Airways captain named Asad, approximately two days prior to leaving for the U.S. Sadiki said that Asad is no longer living. Sadiki thus entered the U.S. posing as an airline pilot. The passport had Asad’s picture but Sadiki said that he looks similar enough to Asad that he was not questioned by U.S. Customs agents upon his entry.

In 2002, Sadiki applied for political asylum. Sadiki’s petition initially was denied. He appealed and was granted political asylum earlier this month. In his asylum petition, Sadiki explained that his life would be in danger if he were to return to Liberia. Members of his union are still missing. He confirmed that neither the U.S. Attorney’s Office nor HUD’s Inspector General’s Office helped him to secure asylum. He also confirmed that he never made any false statements during the course of his asylum application, including during the hearing testimony.

Sadiki stated that once he entered the U.S., he went to stay at his sister’s home at 128 Square Driveway, Teaneck, N.J. for about two weeks. She lived with her husband Abasi Bandele and their three children. He then went to stay with his friend Dugi Odufumi, who lived in the Carter Apartments, at 280 Carter Ave., Apt. 1-H. At the time, Sadiki did not know that it was a federally-subsidized apartment.

Sadiki stated that he was unable to get a job because he was in the U.S. illegally. Dugi told Sadiki that he could not help Sadiki get work papers. Sadiki then telephoned his brother-in-law, Bandele, and told him that he needed to find work because he had to support his family back in Liberia. He told Bandele that there was a position available at Supersafe Security, the company that provided security for the Carter Apartments. Bandele told Sadiki that Bandele could use Bandele’s social security card and naturalization certificate. Sadiki then contacted a security guard school and attended the course under Bandele’s name. He then began to work for Supersafe Security in July 2000 under Bandele’s name. Sadiki stated that he presented to Supersafe Bandele’s Naturalization document with Bandele’s photo on it and Bandele’s social security card.

In late 2000, Bandele told Sadiki that he needed his documents back, so Sadiki returned them.

We showed Sadiki a 2000 W-2 from Supersafe with Bandele’s name on it. Sadiki stated that when the W-2s came in from Supersafe, he did not know what to do with them so he gave them to Bandele. Sadiki does not know if Bandele filed the Supersafe W-2s with his tax returns.

In late 2001, Sadiki decided to apply for his own apartment at Carter. He was still an illegal alien at that time and did not have the identification documents required by Carter. Sadiki again approached Bandele for help. Bandele told him that he would get Sadiki his own identification card in Bandele’s name so that Sadiki could apply for the
apartment in Bandele’s name. Sadiki stated that, at some point later, he went to visit Bandele and Bandele gave him a social security card in Bandele’s name. Sadiki signed Bandele’s name on the card in front of Bandele. Bandele also gave Sadiki the Naturalization Certificate again.

Sadiki stated that Dugi and Bandele’s wife were the only two people he told about using Bandele’s identification to work and later for the Carter apartment. Sadiki confirmed that he always consulted with Bandele before he did anything with Bandele’s identification.

We briefly reviewed the apartment application that Sadiki filled out and submitted to the Carter management. We asked Sadiki if he understood the significance of the statement, “preliminary application federally subsidized multi-family housing program”. Sadiki explained that this meant that the rent for the apartment for which he was applying was subsidized by the government.

Carter approved Sadiki’s application. He moved into 160 Carter Avenue, 4K, Bronx, N.Y. in August 2002.

In late 2002, INS gave Sadiki work authority and a social security card, pending the resolution of his appeal of the denial of his asylum petition. Sadiki then found employment with Continental Airlines in his own name. He began to work there as a porter in February 2003 and quit Supersafe Security. Sadiki is currently working under his real name as a porter for Continental Airlines.

After Sadiki began working for Continental under his own name, he had to create a job under Bandele’s name because Carter would learn that he no longer worked for Supersafe, and would require him to recertify (to demonstrate that he still qualified for the rent subsidy), which they did in 2003. Sadiki called Bandele and told him about his situation. Sadiki stated that Bandele runs his own store, called World Goods. The store sells African videos, telephones, and beepers. Sadiki asked Bandele if he could tell Carter that he worked at World Goods. Sadiki explained to Bandele that he would need Bandele to sign an employment verification form that the management at the Carter Apartments would send out and create a paystub that would demonstrate that Sadiki worked for World Goods.

Bandele agreed and said it would not be a problem because he had done this before for someone else. Sadiki did not know who it was that Bandele had helped. Sadiki told the Carter management that he worked at World Goods, and the management subsequently mailed the verification form to World Goods, at 506 Main Street, Newark, N.J. Bandele asked Sadiki what Sadiki’s title would be and how much Sadiki told the management at Carter he made as income.

Bandele received the verification form, signed it, and gave it to Bandele’s son, Fasi, to deliver to Sadiki. We showed Sadiki the form. Sadiki stated that he filled out the
entire verification form except for the signature of the World Goods manager, named “Ade Jackson.” Sadiki did not know who Jackson was and did not ask Bandele. Sadiki filled out the rest of the form, placed it in the self-addressed envelope, and mailed it to the Carter management office.

Sadiki also stated that Bandele created the World Goods paystubs that Sadiki submitted to Carter. He told Bandele that the paystubs should show that Sadiki earned no more than $7 per hour, so that his income would be low enough to qualify for the rent subsidy. Sadiki picked up those documents on a separate occasion at Bandele’s house, and then gave it to the Carter management when he went in for his re-certification interview.

Sadiki confirmed that he collected Section 8 subsidies each month that he lived in the apartment, and that he had discussed with Bandele that he was receiving rent subsidies.

Sadiki recalled that while he was living at 160 Carter Avenue, 4K, he had received by mail a Citibank envelope, addressed to "Ade Jackson", which appeared to contain a credit card. He sent this back to Citibank and wrote “no such person lives here” on the envelope. When he received a second letter addressed to Ade Jackson, Sadiki recalled that this was the name of the person who had signed the employment verification. He called Bandele and asked him if he knew Jackson. Bandele told him that the mail belonged to him and asked if Sadiki could forward the letter and the enclosed credit card to him. Sadiki stated that thereafter, whenever he received Citibank mail under Jackson’s name he forwarded the unopened mail to Bandele, per Bandele’s instructions. Sadiki did not know what Bandele did with the credit card.
On January 19, 2005, I received a call from Postal Inspector (PI) McFeely regarding an investigation his office is conducting into a major fraudulent documents operation that is being conducted in the Bronx, not far from the Carter Apartments. PI McFeely told me that he suspects the operation is just one aspect of a much larger criminal organization that is also engaged in large scale narcotics trafficking, loansharking, and murder-for-hire.

PI McFeely heard that I have been investigating Section 8 fraud in the Carter Apartments, and thought that we might be able to help each other out. He said that one of his confidential informants told him that until very recently a woman named “Anediji Hope” lived in the Carter Apartments and sometimes (for a finders fee) directed people looking for fraudulent documents to the operation. He also told me that Anediji Hope is Mr. Sadiki’s former girlfriend who broke up with him two months ago.

I then gave him some information about several individuals unrelated to the Sadiki/Bandele investigation. We agreed to keep each other informed about any new developments in our respective investigations.
I spoke with Fasi Bandele (FB) this morning by telephone for about twenty
minutes. This memorandum summarizes my conversation.

FB is the son of Abasi Bandele (AB) and the nephew of Obasi Sadiki (OS). He
currently lives in Rhode Island. He is 29 years old and works as an electrician. From
2001 (when he graduated technical school) to 2004, he lived in one of the apartments
above TuTu Culture (formerly “World Goods”) in the building owned by AB at 506
Main St., Newark, New Jersey. FB has a basic understanding of this case but does not
know any of the specifics. My overall impression is that he does not want to be caught in
the middle of a dispute between his father and his uncle.

FB explained that he was never very close to his father who always wanted him to
go to law school and was upset when he decided to become an electrician. He also does
not know too much about his uncle, OS. FB knew that OS was living in the Bronx but
did not know that OS was receiving federal rent subsidies. When I asked FB where his
uncle worked in Liberia, he told me that OS worked for Ligerian Airways as a “crew

#63995
man.” FB did not think OS ever flew planes and said that, even though he did not see his uncle much growing up, he most likely would have known if his uncle had been a pilot. FB recalls his uncle being politically active in Ligeria, but was not aware that his uncle was ever arrested or tortured by the government. FB added, however, that this was not something that his uncle would have shared with his family.

I asked FB if, while living at 506 Main St., he ever picked up mail for his uncle at TuTu Culture. He recalled that he did on one occasion. He was having dinner with his parents at their home when his uncle called. This was sometime in early 2003, around January or February. He is sure of the time frame because the family was having dinner to celebrate his new job. FB recalls that it sounded like his father was trying to calm OS down, saying things like, “I will help,” and “it will be fine.” FB did not learn what they were talking about, but later that night, AB told FB to keep his eye out at TuTu Culture for a letter addressed to AB’s old company, World Goods, from some company called “Carter Management.” AB told him to take the letter and bring it to his uncle in the Bronx (FB often visited the Bronx because his girlfriend lived there).

FB said that several days later he went to the store and saw the letter – the mail was always left on a shelf by the door – and brought it to his uncle. I asked FB if the letter was still sealed. He said that he thought it was – he certainly didn’t open it – but, if pressed, I don’t think he would be able to say for sure that it was sealed. FB did not ask his father or his uncle what the letter was about. He recalled vaguely that OS mentioned something about it having to do with OS’s apartment when FB dropped it off. FB was sure that OS never said anything about rent subsidies.

#63995
I asked FB if he knows any of his uncle’s friends. He has met a few of them. In general, they all seem to be good people, although he has some reservations about his uncle’s closest friend, Dupi Odufumi. FB described Odufumi as “shady” and had a reputation as the type of person who was always trying to take “shortcuts”.

#63995
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - X
: 04 Cr. No. 7734
UNITED STATES OF AMERICA :
: -against-
: :
ABASI BANDELE,
: also known as :
"Ade Jackson," :
: Defendant. :
:
- - - - - - - - - - - - - X

IT IS HEREBY STIPULATED AND AGREED by and among the
United States of America, by the United States Attorney for the
Southern District of New York, and the defendant Abasi Bandele,
that:

1. Government Exhibit 1 is a true and correct copy of
a W-2 form that was filed by Mr. Bandele as part of his 2000
federal tax return.

2. Government Exhibit 2 is a true and correct copy of
an application for a replacement Social Security card in the name
of "Ade Jackson."

3. Government Exhibit 3 is a true and correct copy of
a Citibank credit card application and account statement, both in
the name of "Ade Jackson."

4. The credit card was never used.

#63993

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5. If called as a witness, Janet Cliff would testify (a) that she is employed as an “occupancy specialist” by Carter Apartments, Inc.; (b) that she is one of the people responsible for handling prospective tenant applications and tenant recertification proceedings; (c) about how HUD’s Section 8 program works; (d) about the application process and the recertification process; (e) that Government Exhibits 4, 5, 7, 8, and 9 were part of the tenant file for 160 Carter Ave., Apt. 4-K; (f) that from August 2002 through May 2004, a person calling himself “Abasi Bandele” was the tenant who lived in 160 Carter Ave., Apt. 4-K; (g) that the defendant was not the person who applied for the apartment and came in to recertify; and (h) Obasi Sadiki received $15,127 in Section 8 subsidies.

6. If called to testify, a representative of Continental Airlines would testify that Government Exhibit 10 was from Obasi Sadiki’s employment file.

7. If called to testify, a U.S. Postal Inspection Service handwriting expert would testify that the signature “Ade Jackson” on Government Exhibit 5 matches exemplars provided by Mr. Bandele.

8. If called to testify, the defense’s handwriting expert would testify that he does not think a positive match can

#63993

VI-46
be made between the "Ade Jackson" signature on Government Exhibit 5 and Mr. Bandele's exemplars. He would further testify that he cannot rule out Mr. Bandele as the writer of that signature.

Dated: New York, New York
February 4, 2005

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK

BY: __________________________/s/____________________

ABASI BANDELE

BY: __________________________/s/____________________
Attorney for Abasi Bandele
**Government Exhibit 1 for id.**

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<th>Co. code</th>
<th>Corp. code</th>
<th>Department</th>
<th>File number</th>
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**a Employer’s identification number**

| 13-2222410 | 4980.75 | 15.45 | 1 Wages, tips, other compensation | 2 Federal income tax withheld |

**c Employer’s name, address, and ZIP code**

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| 7 Social security tips | 8 Allocated tips |

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<th>d Employee’s social security number</th>
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<th>10 Dependent care benefits</th>
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<th>e Employer’s name, address, and ZIP code</th>
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<th>12 Benefits included in box 1</th>
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<td>13 See Instr. For Form W-2</td>
<td>14 Other</td>
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| 13.80 NY SDI                           |                       |                               |

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<th>19 Locality name</th>
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Dept. of Treasury-Internal Revenue Service
For Paperwork Reduction Act Notice,
see separate instructions.

Form W-2 Wage and Tax Statement 2000
Copy D For Employer
Vigilante Grand Jury Exhibit 9 Id.

Government Exhibit 2 id.

UNITED STATES SOCIAL SECURITY ADMINISTRATION

CERTIFICATION

Pursuant to the provisions of Title 42, United States Code, § 3505, and the authority vested in me by 45 C.F.R. §§ 47245-46, I hereby certify that I have legal custody of certain records, documents, and other information established and maintained by the Social Security Administration, pursuant to Title 42, United States Code, § 405, and that the annexed is a true and complete copy of certain of such documents in my custody as aforesaid.

I also certify that the annexed computer printout showing the name, Social Security Number 131-31-3131 and the date the information was recorded is a true and complete copy of such document in my custody.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Social Security Administration to be affixed this 14 day of November, 2004.

Beryl Washington
Beryl Washington
File Supervisor
Security Records Center
Center for Material Resources
Office of Central Operations

#63946
APPLICATION FOR REPLACEMENT SOCIAL SECURITY NUMBER CARD

APPLICANT NAME: Ade Jackson
NAME TO BE SHOWN ON CARD: Ade Jackson
APPLICANT’S MAILING ADDRESS: 506 Main St., Apt. 1
NEWARK NJ 07103
SEX: M
BIRTH DATE: 7/9/1995
PLACE OF BIRTH: Newark City, NJ
MOTHER’S NAME AT HER BIRTH: Myrna Jackson
FATHER’S NAME: STATE WITHHELD
HAS THE APPLICANT OR ANYONE ACTING ON HIS BEHALF EVER FILED FOR OR RECEIVED A SOCIAL SECURITY NUMBER CARD BEFORE? YES
LAST SSN: 131-31-3131
CITIZENSHIP: U.S. CITIZEN

WARNING: DELIBERATELY FURNISHING (OR CAUSING TO BE FURNISHED) FALSE INFORMATION ON THIS APPLICATION IS A CRIME PUNISHABLE BY FINE OR IMPRISONMENT OR BOTH

SIGNATURE: Myrna Jackson DATE: 4/9/96

YOUR RELATIONSHIP TO APPLICANT: ( ) SELF (X) OTHER (SPECIFY) -- mother

WITNESS (IF SIGNED BY MARK X):

WITNESS (IF SIGNED BY MARK X):

DO NOT WRITE BELOW THIS LINE (FOR SSA USE ONLY)

DATE APPLICATION ENTED: 4/9/96 DOC: 188

SIGNATURE AND TITLE OF EMPLOYEE (S) REVIEWING EVIDENCE AND/OR CONDUCTING INTERVIEW:

/ls/ DATE: 4/9/96

IN-PERSON INTERVIEW CONDUCTED? YES

ACCEPTABLE EVIDENCE OF IDENTITY SUBMITTED

#63946
### ABOUT YOU

<table>
<thead>
<tr>
<th>PRINT FULL NAME AS YOU WISH IT TO APPEAR ON THE CARD</th>
<th>SOCIAL SECURITY NUMBER (IF ANY)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ade Jackson</td>
<td>131-31-3131</td>
</tr>
<tr>
<td>YOUR HOME ADDRESS NUMBER AND STREET (NO P.O. BOXES)</td>
<td></td>
</tr>
<tr>
<td>160 Carter Apartments, 4K</td>
<td></td>
</tr>
<tr>
<td>CITY OR TOWN</td>
<td>DATE OF BIRTH</td>
</tr>
<tr>
<td>Bronx</td>
<td>3/20/65</td>
</tr>
<tr>
<td>STATE</td>
<td>MOTHER'S MAIDEN NAME</td>
</tr>
<tr>
<td>NY</td>
<td>Thompson</td>
</tr>
<tr>
<td>ZIP CODE</td>
<td></td>
</tr>
<tr>
<td>10303</td>
<td></td>
</tr>
<tr>
<td>NAME PHONE IS LISTED UNDER</td>
<td>RESIDENCY/TAX STATUS (CHECK ONE)</td>
</tr>
<tr>
<td>Sadiki</td>
<td>U.S. CITIZEN/U.S. RESIDENT</td>
</tr>
<tr>
<td>PREVIOUS HOME ADDRESS NUMBER AND STREET (NO P.O. BOXES)</td>
<td>NON RESIDENT ALIEN INDIVIDUAL</td>
</tr>
<tr>
<td>506 Main Street</td>
<td></td>
</tr>
<tr>
<td>CITY OR TOWN</td>
<td></td>
</tr>
<tr>
<td>Newark</td>
<td></td>
</tr>
<tr>
<td>STATE</td>
<td></td>
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<td>NJ</td>
<td></td>
</tr>
<tr>
<td>ZIP CODE</td>
<td></td>
</tr>
<tr>
<td>07107</td>
<td></td>
</tr>
</tbody>
</table>

### ABOUT YOUR JOB...

<table>
<thead>
<tr>
<th>YOUR EMPLOYER (BUSINESS NAME)</th>
<th>CHECK HERE IF YOU ARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Danny Agency</td>
<td>EMPLOYED</td>
</tr>
<tr>
<td>YOUR CURRENT POSITION</td>
<td>SELF-EMPLOYED</td>
</tr>
<tr>
<td>Technician</td>
<td>RETIRED</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### SELECT YOUR CREDIT LINE...

- $300
- $500
- $800
- $1,000
- $1,500
- Other

FOR CITIBANK CUSTOMERS ONLY:
Automatically link your Citibank account with your Citibank MasterCard, please enter your complete CitiCard number as it appears on the front of your CitiCard.

### PLEASE SIGN THIS AUTHORIZATION...

Substitute W9 Certification for U.S. Taxpayers

I certify that I am at least 18 years old and that the information I have provided is accurate. I authorize my employer to release information to Citibank (South Dakota), N.A. ("CitiBank") and authorize Citibank to obtain and use credit reports about me in connection with this application. If I sign the application, I fully release Citibank from liability for all claims, defenses, or other reasons that may arise from my application. I understand that my application will not be approved if my bankruptcy or serious delinquency appears on my credit bureau report. If my income is less than $8,000 per year, or if my application is incomplete or not verifiable. By signing below, I am asking Citibank to establish a Certificate of Deposit (CD) in the amount of the enclosed check to be used as collateral to secure my credit card obligations with Citibank. I hereby grant and assign any security interest in Citibank in the insured CD and in all renewals. Additions and the proceeds thereof. The CD will have a term of 15 months and will not be renewed unless agreed upon by Citibank. In the event of an early withdrawal of the CD before maturity, the funds will be invested in a CD with a term equal to the remaining term of the original CD. The CD will not be renewed unless agreed upon by Citibank.

### Note:
Citibank prohibits any unauthorized use of this card. Citibank agrees to provide a copy of your credit report to you at your request. You may request a copy of your credit report by writing to the credit reporting agency that prepared the report. The credit reporting agency will provide you with a copy of your credit report at no cost. You may also request your credit report by calling the toll-free number listed below. If you are not satisfied with the accuracy of your credit report, you may dispute the information with the credit reporting agency and have an explanation included in your credit report. To obtain your credit report, you may contact the credit reporting agency at the following address:

### Citibank

CitiCard is issued by Equally to share with its affiliates any information about its transactions or experiences with you. If you do not want Citibank to share among its affiliates any other information you provide to us or that we get from third parties (for example, credit bureau), check here. You will still receive marketing offers by telephone and mail. If you choose not to receive these offers, please refer to the Terms and Conditions.

### Vigilante Grand Jury Exhibit 8 id.

#64080

Government Exhibit 3

VI-51
ADE JACKSON  
160 CARTER APARTMENTS, APT 4K  
BRONX, NY  
10304-4805

1-800-950-5114  
CITIBANK  
P.O. BOX 8116  
S HACKENSACK, NJ  
USA 07606-8116

For Customer Service call or write

Citibank MasterCard  
BOX 6500  
SIOUX FALLS, SD  
57117

Account Number  
131-31-3131

Payment must be received by 1:00 pm local time on 8/13/03

<table>
<thead>
<tr>
<th>Sale Dt</th>
<th>Post Dt</th>
<th>Reference</th>
<th>Activity Since Last Statement</th>
<th>Amount</th>
<th>T/C</th>
<th>Bin = or Mer =</th>
<th>RA</th>
<th>Sic</th>
</tr>
</thead>
<tbody>
<tr>
<td>07/26/03</td>
<td>$300</td>
<td>MEMBERSHIP FEE JAN 02-Dec 02</td>
<td>00</td>
<td>74</td>
<td>0000</td>
<td>0000000000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If you have not yet received your new card, please call the Customer Service number on this statement.

We will contact your prior to maturity with specific options regarding your CD.

Deposit Balance $301.05  
Interest Rate 4.000%  
Annual Percentage Yield 4.07%

Now you have the power to send and receive money by email! Introducing c2it (SM) service by Citibank. With c2it you can repay a friend for dinner, or pay for an online auction purchase, all through your email. Sign onto www.c2it.com/send24 to learn more!

#64080  
Vigilante Grand Jury Exhibit 8 id.
<table>
<thead>
<tr>
<th>Check Number</th>
<th>Period End</th>
<th>Name</th>
<th>Pay Date</th>
<th>Rate/Salary</th>
<th>Social Security Number</th>
<th>Deps</th>
<th>Res</th>
</tr>
</thead>
<tbody>
<tr>
<td>10157</td>
<td>12/04/02</td>
<td>BANDELE ABASI</td>
<td>12/11/02</td>
<td>7.000</td>
<td>666-66-6666</td>
<td>M2</td>
<td>Y</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>DESCRIPTION</th>
<th>HOURS</th>
<th>RATE</th>
<th>EARNINGS</th>
<th>OTHER DEDUCTIONS THIS PAY</th>
</tr>
</thead>
<tbody>
<tr>
<td>BI-WEEKLY REG.</td>
<td>64.00</td>
<td>7.000</td>
<td>480.00</td>
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</table>

**THIS PAY**

<table>
<thead>
<tr>
<th>GROSS</th>
<th>FEDERAL</th>
<th>STATE</th>
<th>FICA</th>
<th>MEDICARE</th>
<th>UNEMP-DIS</th>
<th>NET THIS PAY</th>
</tr>
</thead>
<tbody>
<tr>
<td>448.00</td>
<td>14.00</td>
<td>6.20</td>
<td>27.78</td>
<td>6.50</td>
<td>4.14</td>
<td>389.38</td>
</tr>
</tbody>
</table>

**YR TO DATE**

| 1344.00 | 42.00 | 18.60 | 18.33 | 19.49 | 12.42 |
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
ALTERNATE FORM OF VERIFICATION OF EMPLOYMENT

Housing Project: CARTER APARTMENTS, BRONX, N.Y.

NOTE TO HOUSING OWNERS: You may also use Appendix 6 to verify employment (HUD 6233/92004g, Request for Verification of Employment)

Date: February 19, 2003

To: Manager/Owner
World Goods
506 Main Street
Newark, New Jersey 07107

From: Janet Cliff
Occupancy Manager
240 Carter Avenue
Bronx, NY 10304

Subject: Verification of Information Supplied by an Applicant for Housing Assistance.
Name: Abasí Bandele
SSN: 666-66-6666
Address: Bldg: 60 Unit: 4K
160 Carter Avenue
Bronx, NY

This person has applied for housing assistance under a program of the U.S. Department of Housing and Urban Development (HUD). HUD requires the housing owner to verify all information that is used in determining this person’s eligibility or level of benefits. We ask your cooperation in providing the following information and returning it to the person listed at the top of the page. Your prompt return of this information will help to assure timely processing of the application for assistance. Enclosed is a self-addressed, stamped envelope for this purpose. The applicant/tenant has consented to this release of information as shown below.

INFORMATION BEING REQUESTED

1. Employed since 2002 Occupation: Storekeeper Salary: $ 7

2. BASE PAY RATE (check one)

#63959

VI-54
Per Hour \(\checkmark\) OR Per Week \(\quad\) OR Per Month \(\quad\)

Date present rate effective \(10-4-02\)

Average Hours per Week at Base Pay Rate:

Weeks \(32\) or Months \(\quad\) worked per year.

3. OVERTIME PAY RATE

PER Hour \(--\)

Expected average number of hours to be worked per week during next twelve months \(32\).

4. OTHER COMPENSATION NOT INCLUDED ABOVE (Specify for commissions, bonuses, tips, etc.)

FOR \(\quad\) -- $ \(\quad\) -- Per \(\quad\) --

5. Total Anticipated Base Pay Earnings
for the Next 12 calendar months: $ \(10,272\)

Total Anticipated Overtime Earnings
for the Next 12 calendar months: $ \(--\)

6. Medical Insurance Premium Deducted: \(1,258\)

7. Has Employment been Terminated? \(\text{No}\)
If Yes, Is Individual Eligible for Unemployment Benefits? \(\quad\)

---

Ade Jackson  
NAME AND TITLE OF PERSON

World Goods, Inc.  
FIRM/ORGANIZATION

SUPPLYING THE INFORMATION (PRINT)

---

Ade Jackson  
SIGNATURE

3/2/03  
DATE

#63959
YOU DO NOT HAVE TO SIGN THIS FORM IF EITHER THE REQUESTING
ORGANIZATION OR THE ORGANIZATION SUPPLYING THE INFORMATION IS LEFT
BLANK.

RELEASE: I hereby authorize the release of the requested information. Information obtained
under this consent is limited to information that is no older than 12 months. There are
circumstances which would require the owner to verify information that is up to 5 years old, which
would be authorized by me on a separate consent attached to a copy of this consent.

Abasi Bandele 2/18/03
SIGNATURE DATE

PENALTIES FOR MISUSING THIS CONSENT:

Title 18, Section 1001 of the U.S. Code states that a person is guilty of a felony for knowingly and
willingly making false or fraudulent statements to any department of the United States
Government. HUD, the PHA and any owner (or any employee of HUD, the PHA or the owner)
may be subject to penalties for unauthorized disclosures or improper uses of information collected
based on the consent form. Use of the information collected based on this verification form is
restricted to the purposes cited above. Any person who knowingly or willfully requests, obtains or
discloses any information under false pretenses concerning an applicant or participant may be
subject to a misdemeanor and fined not more than $5,000. Any applicant or participant affected
by negligent disclosure of information may bring civil action for damages, and seek other relief, as
may be appropriate, against the officer or employee of HUD, the PHA or the owner responsible
for the unauthorized disclosure or improper use. Penalty provisions for misusing the social
security number are contained in the Social Security Act at 42 U.S.C. 208(f)(g) and (h).
Violations of these provisions are cited as violations of 42 U.S.C. 408, f, g and h.

Carter does not discriminate on the basis of handicapped status in the admission or access to, or
treatment or employment in, its federally assisted programs and activities.

#63959
GOVERNMENT EXHIBIT 61D.

WORLD GOODS
MAILS, COMMUNICATIONS, BUSINESS SERVICES AND AFRICAN SUNDRIES
506 Main Street, Newark, New Jersey

Mr. Abasi Bandele
Owner and Manager

August 7th, 2002

To Whom It May Concern:

This is to confirm that Mr. Tajuwal Ladeen is one of our sales clerks since October 9th, 1998. Enclosed please find the prepared employment verification form. For further information contact the undersigned.

Sincerely,

Abasi Bandele

Abasi Bandele

Encl.

#63942
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
ALTERNATE FORM OF VERIFICATION OF EMPLOYMENT

Housing Project: Sunshine Houses

NOTE TO HOUSING OWNERS: You may also use Appendix 6 to verify employment (HUD 6233/92004g, Request for Verification of Employment)

Date: June 1, 2002

To: Manager/Owner
World Goods
506 Main Street
Newark, New Jersey 07107

From: Wilbur Martinez
Recertification Clerk
Sunshine Houses
1200 3rd Place
Pleasantown, New Jersey

Subject: Verification of Information Supplied by an Applicant for Housing Assistance:

Tajawal Ladeen

This person has applied for housing assistance under a program of the U.S. Department of Housing and Urban Development (HUD). HUD requires the housing owner to verify all information that is used in determining this person's eligibility or level of benefits. We ask your cooperation in providing the following information and returning it to the person listed at the top of the page. Your prompt return of this information will help to assure timely processing of the application for assistance. Enclosed is a self-addressed, stamped envelope for this purpose. The applicant/tenant has consented to this release of information as shown below.

INFORMATION BEING REQUESTED

1. Employed since 10/98 Occupation Clerk Salary: $500/wk

2. BASE PAY RATE (check one)

   Per Hour OR Per Week ✓ OR Per Month

   Date present rate effective 10/98

#63942

VI-58
Average Hours per Week at Base Pay Rate:

Weeks ___40__ or Months ____ worked per year.

3. **OVERTIME PAY RATE**

PER Hour ___N/A___

Expected average number of hours to be worked per week during next twelve months ___40__.

4. **OTHER COMPENSATION NOT INCLUDED ABOVE** (Specify for commissions, bonuses, tips, etc.)

FOR ___N/A___ $________________ Per________________

5. Medical Insurance Premium Deducted: $ ___N/A___

6. Has Employment been Terminated? ___No___

If Yes, Is Individual Eligible for Unemployment Benefits? ____

---

**Abasi Bandele**

NAME AND TITLE OF PERSON SUPPLYING THE INFORMATION (PRINT)

**World Goods**

FIRM/ORGANIZATION

---

**Abasi Bandele**

SIGNATURE

8/7/02

DATE

#63942

VI-59
YOU DO NOT HAVE TO SIGN THIS FORM IF EITHER THE REQUESTING ORGANIZATION OR THE ORGANIZATION SUPPLYING THE INFORMATION IS LEFT BLANK.

RELEASE: I hereby authorize the release of the requested information. Information obtained under this consent is limited to information that is no older than 12 months. There are circumstances which would require the owner to verify information that is up to 5 years old, which would be authorized by me on a separate consent attached to a copy of this consent.

Tajuwal Ladeen
SIGNATURE

May 30, 2002
DATE

PENALTIES FOR MISUSING THIS CONSENT:

Title 18, Section 1001 of the U.S. Code states that a person is guilty of a felony for knowingly and willingly making false or fraudulent statements to any department of the United States Government. HUD, the PHA and any owner (or any employee of HUD, the PHA or the owner) may be subject to penalties for unauthorized disclosures or improper uses of information collected based on the consent form. Use of the information collected based on this verification form is restricted to the purposes cited above. Any person who knowingly or willfully requests, obtains or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than $5,000. Any applicant or participant affected by negligent disclosure of information may bring civil action for damages, and seek other relief, as may be appropriate, against the officer or employee of HUD, the PHA or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the social security number are contained in the Social Security Act at 42 U.S.C. 208(f)(g) and (h). Violations of these provisions are cited as violations of 42 U.S.C. 408, f, g and h.

Sunshine Houses does not discriminate on the basis of handicapped status in the admission or access to, or treatment or employment in, its federally assisted programs and activities.

#63942
YOUR SOCIAL SECURITY CARD

Detach the card below and sign it in ink immediately.
Keep your card in a safe place to prevent loss or theft.
Do not laminate your card.

VI-61
Carter Apartments, Inc.  
240 Carter Avenue, Bronx, N.Y. 10304

NEW TENANT APPLICATION

Each application received will be recorded. Since so many families/elderly need housing, this Development will not be able to accommodate all who are eligible. As families can be reached, they will be called in for an interview.

NO PAYMENT OR FEE SHOULD BE GIVEN TO ANYONE IN CONNECTION WITH THE PREPARATION, FILING OR PROCESSING OF THIS APPLICATION FOR SUBSIDIZED HOUSING.

This information is to be filled out by the applicant:

NAME ___________________________ Abasi Bandele

PRESENT ADDRESS ___________ 49 Defort Pl. ___________ APT ______

CITY ________ Bronx ________ STATE ________ NY ________ ZIP ________

HOME PHONE NO. 718-555-2991 WORK PHONE NO. 718-555-6100

SOCIAL SECURITY NUMBER ___________ 666-66-6666 ___________ AGE: 41


FUNCTIONAL STATUS:

Are you or any member of your family who will live with you disabled? No

If "yes", enter name ____________________________

What is the disability? ____________________________

Are you or any member of your family who lives with you handicapped to the degree that you/they require a wheelchair, walker, crutches, metal braces, cane, or any type of mechanical aid to assist in walking? No
If YES, enter name ________________________________

Is your current residence designed for the handicapped? _____Yes  X No

What is your present monthly rent? $450.

How many persons are in your household? 1. How many bedrooms do you have? 1.

Present Landlord:  Anediyi Hope ______________________

Address:  49 Defor Pl. ________________________________

City:  Bronx State NY Zip ______

Telephone:  718-555-2786 ________________________________

( Check here) the utilities paid by you monthly and indicate the amount:

_____ Gas $_____;  _____ Electric $_____;  _____ Heat $_____;  _____ Water $_____.

List all persons who will live with you in this Section 8 Development:

<table>
<thead>
<tr>
<th>FULL NAME</th>
<th>RELATIONSHIP</th>
<th>BIRTH DATE</th>
<th>AGE</th>
<th>M/F</th>
<th>(Check if attending school)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) self</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Occupation_________________________ Social Security #_________________________

| (2)        |              |            |     |     |                            |

Occupation_________________________ Social Security #_________________________

| (3)        |              |            |     |     |                            |

Occupation_________________________ Social Security #_________________________

The Following Information is required for statistical purposes so that the Department of HUD may determine the degree to which its programs are utilized. This information must be completed. It will not affect the processing of this application.

RACIAL GROUP IDENTIFICATION (USED For Statistical purposes only).
Please check one group which identifies the head of household:
#63956

VI-63
White (Non Hispanic Origin) ____; Black (Non Hispanic Origin) __X__; Hispanic ____; American Indian or Alaska Native ____; Asian or Pacific Islander ____.

Carter does not discriminate on the basis of handicapped status in the admission or access to, or treatment or employment in, its federally assisted programs and activities.

THIS APPLICATION IS FOR AN APARTMENT THAT MAY BE ELIGIBLE FOR THE SECTION 8 RENT SUBSIDY PROGRAM AND IT WILL BE SUBMITTED TO THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.

PENALTIES FOR MISUSING THIS APPLICATION:

Title 18, Section 1001 of the U.S. Code states that a person is guilty of a felony for knowingly and willingly making false or fraudulent statements to any department of the United States Government. HUD, the PHA and any owner (or any employee of HUD, the PHA or the owner) may be subject to penalties for unauthorized disclosures or improper uses of information collected based on the consent form. Use of the information collected based on this verification form is restricted to the purposes cited above. Any person who knowingly or willfully requests, obtains or discloses any information under false pretenses concerning an applicant or participant may be subject to a misdemeanor and fined not more than $5,000. Any applicant or participant affected by negligent disclosure of information may bring civil action for damages, and seek other relief, as may be appropriate, against the officer or employee of HUD, the PHA or the owner responsible for the unauthorized disclosure or improper use. Penalty provisions for misusing the social security number are contained in the Social Security Act at 42 U.S.C. 208(f)(g) and (h). Violations of these provisions are cited as violations of 42 U.S.C. 408, f, g and h.

Applicant’s Name and Address

Abasi Bandele
49 DeFord Pl.
Bronx, NY

Abasi Bandele
(Applicant’s Name)
12/2/01
(Date)

#63956
CONTINENTAL AIRLINES, INC.

APPLICATION FOR EMPLOYMENT
An Equal Opportunity and Affirmative Action Employer

In order that we may better understand your qualifications and interest and to ensure that you receive the fullest consideration, please complete all of the items listed below. (PLEASE TYPE — DO NOT PRINT.)

<table>
<thead>
<tr>
<th>NAME (LAST, FIRST, MIDDLE)</th>
<th>SOCIAL SECURITY NUMBER (OPTIONAL)</th>
<th>DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sadiki Obasi</td>
<td>777-77-7777</td>
<td>12-01-02</td>
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<table>
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<tr>
<th>RESIDENCE STREET ADDRESS</th>
<th>PHONE NUMBER</th>
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<tr>
<td>160 Carter Apartments, FL</td>
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</table>

<table>
<thead>
<tr>
<th>CITY</th>
<th>STATE</th>
<th>ZIP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bronx</td>
<td>NY</td>
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<table>
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<tr>
<th>MAILING ADDRESS (IF DIFFERENT THAN ABOVE)</th>
<th>PHONE NUMBER</th>
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<table>
<thead>
<tr>
<th>CITY</th>
<th>STATE</th>
<th>ZIP</th>
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<th>POSITION OR AREA OF WORK IN WHICH YOU ARE INTERESTED</th>
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<th>SALARY EXPECTED</th>
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<td>8.50</td>
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<table>
<thead>
<tr>
<th>WHAT PROMPTED YOU TO APPLY FOR A POSITION WITH CONTINENTAL AIRLINES?</th>
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<tbody>
<tr>
<td>A friend told me.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>TYPE OF WORK DESIRED</th>
<th>ARE YOU AT LEAST 18 YEARS OF AGE?</th>
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<tbody>
<tr>
<td>(X) FULL TIME</td>
<td>(X) YES ( ) NO</td>
</tr>
<tr>
<td>( ) PART TIME</td>
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As a condition of employment, you will be required to submit proof of employment eligibility and identity in compliance with the Immigration Reform and Control Act of 1988.

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#63969
Please provide your complete employment history for the past TEN (10) YEARS, beginning with the most recent or present employer. Attach additional pages if necessary. IMPORTANT: State full details of all employment. If employing company is out of business, so state. If you have been self-employed, give names and addresses of at least two (2) clients whom we can contact, or supporting documentation.

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#63969
BACKGROUND VERIFICATION QUESTIONNAIRE AND RELEASE

DO NOT COMPLETE THIS APGE UNTIL INSTRUCTED TO DO SO

Continental Airlines Inc. requires that all employees undergo a thorough background investigation, which may include a criminal history check and/or driving record check, prior to starting work. If as a result of Continental's staffing and selection process, you receive an offer of employment, it will be contingent upon successful completion of this background investigation.

DO NOT COMPLETE THIS SECTION UNTIL YOU ARE INSTRUCTED TO DO SO

RELEASE AUTHORIZATION

I EXPRESSLY AUTHORIZE ANY PERSON ASSOCIATED WITH ANY EDUCATIONAL INSTITUTION, PAST OR PRESENT EMPLOYER, LAW ENFORCEMENT AGENCY (FEDERAL/STATE/LOCAL), CREDIT REPORTING ORGANIZATION, OR ANY PERSON WHO HAS KNOWLEDGE OF MY CHARACTER, WORK EXPERIENCE, CRIMINAL RECORDS, OR EDUCATION TO RELEASE INFORMATION TO CONTINENTAL AIRLINES, INC. INCLUDING ITS EMPLOYEES AND AGENTS, EITHER ORALLY OR IN WRITING. IN CONNECTION WITH ITS CONSIDERATION OF ME FOR EMPLOYMENT OR DURING MY EMPLOYMENT WITH CONTINENTAL. I HEREBY WAIVE ANY RIGHTS OR CLAIMS I MAY HAVE AGAINST CONTINENTAL OR ANY INFORMATION PROVIDER ARISING FROM THE DISCLOSURE OR USE OF SUCH INFORMATION. IN ADDITION, I GIVE CONTINENTAL PERMISSION TO RELEASE INFORMATION ABOUT MY EMPLOYMENT TO INDIVIDUALS OR CORPORATIONS AT ANY TIME IN THE FUTURE AND I AGREE TO HOLD CONTINENTAL AND ITS REPRESENTATIVES HARMLESS FROM ANY LIABILITY OR DAMAGES THAT MAY ARISE FROM THE RELEASE OF SUCH INFORMATION.

APPLICANT NAME
Obasi Sadiki

APPLICANT SIGNATURE
Obasi Sadiki

DATE
12/1/02

PERSONAL INFORMATION

DATE OF BIRTH
9/18/50

SOCIAL SECURITY NUMBER
777-77-7777

DRIVERS LICENSE NUMBER
ID 987-654-321

DATE OF ISSUE
06-14-00 NY

PLEASE GIVE ANY OTHER NAMES YOU HAVE USED, AND THE PERIOD OF TIME YOU HAVE USED THEM. FOR EXAMPLE, YOUR MAIDEN NAME, NAME(S) BY FORMER MARRIAGES, Former NAME(S), ALIAS(ES), OR NICKNAMES. IF THE OTHER NAME IS YOUR MAIDEN NAME, PUT "MAD" IN FRONT OF IT.

OTHER NAME

DATE USED FROM (MONTH/YEAR)

DATE USED TO (MONTH/YEAR)

Schools: Dates Attended

HIGH SCHOOL
ABC Grammar

COLLEGE

GRADUATE SCHOOL

TRADE SCHOOL/OTHER

Former residence addresses (Past 10 years)

FROM

TO

MO YR

MO YR

NUMBER AND STREET

CITY

STATE

ZIP CODE

10 99 present

160 Carter Ave.

Bronx

NY

3 83 10 97

39 Bancro St.

Newtown

Ligeria

HAVE YOU EVER BEEN CONVICTED OF A MISDEMEANOR OR FELONY (CIVIL OR MILITARY), OR RECEIVED DEFERRED ADJUDICATION, OR IS THERE NOW PENDING AGAINST YOU A CRIMINAL PROSECUTION? ( )Yes ( )No

IF YES, PLEASE EXPLAIN.

NOTE: A conviction does not automatically mean that you will not be offered a job. The crime of which you were convicted, circumstances surrounding the conviction, and how long ago the conviction occurred are important. Please provide complete information so that the company can make a informed decision.

#63969

VI-68
PLEASE READ CAREFULLY BEFORE SIGNING

I certify that the information I have provided on this application is true and complete to the best of my knowledge. I authorize Continental Airlines, Inc. ("Continental") to contact the previous employer(s), educational institution(s), and reference(s) I have listed above, and I authorize them to provide any information requested by Continental and waive any claims based on the provision of the information. I understand and agree that any misrepresentation, falsification, or omission on this application is sufficient cause to refuse me an offer of employment or to terminate my employment.

Applicant signature:

Obasi Sadiki

Date: 12/1/02

#63969
January 16, 2005

Re: United States v. Abasi Bandele, 04 CR 7734

Dear Sir:

In furtherance of the Government’s previous disclosure, and pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and to Rules 16 and 26.2 of the Federal Rules of Criminal Procedure and Title 18, United States Code, Sections 3500 et seq., the Government hereby provides the following additional disclosure to you as the attorney for Mr. Bandele. The Government reserves the right to supplement its disclosure.

Obasi Sadiki has informed the Government that, in approximately 1998, he was arrested by Ligerian state security authorities because of his association with an airline pilots’ union. Sadiki was an assistant secretary for the union. He was incarcerated for approximately two weeks. In 1999, he was temporarily detained by the authorities in his homeland, Liberia, because he was a member of the pilot’s union. He was released on bail. Rather than report to the authorities as he was required to do, Sadiki fled to the United States in October 1999 under an assumed name, using the passport and visa of a friend. Sadiki further informed the Government that he first applied for political asylum in the United States in 2002. He was originally denied asylum by the Immigration and Naturalization Service. Sadiki appealed the denial of asylum by the INS. Eventually, Sadiki won his appeal and was granted political asylum by the INS in approximately September 2004.

Very truly yours,

United States Attorney
Southern District of New York

By: /s/
Jack McCoy
Assistant U.S. Attorney
NOTE TO STUDENTS: THIS TRANSCRIPT IS ONLY AVAILABLE FOR THE APPEAL. THIS TRANSCRIPT WAS NOT PRODUCED BY THE GOVERNMENT UNTIL AFTER THE TRIAL IN THE CRIMINAL CASE.

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of

)  ) File No.: A 00-983-111

OBASI SADIKI,  ) IN REMOVAL PROCEEDINGS
Respondent  )

) Transcript of Hearing

Before ADAM EVENHAND, Immigration Judge

Date: September 2, 2003  Place: New York, New York

[Excerpts]

#63964

VI-71
JUDGE FOR THE RECORD

Good afternoon. We’re on the record in removal proceedings being conducted in New York, New York on Wednesday, September 2, 2003. This is Immigration Judge Adam Evenhand. This is the matter of Sadiki, Obasi, File A 00-983-111. This hearing is conducted in the English language. The case is now on for a merits hearing.

JUDGE TO MR. SADIKI

Q. Sir, could you please stand up and raise your right hand? Do you swear to tell the truth, the whole truth, and nothing but the truth?
A. I do.

* * *

Q. I have reviewed your petition for asylum, including the details of your ordeals in Liberia. Tell me about Captain Asad.
A. He’s a captain, my boss. I didn’t know he was killed. They only came to me that they want me in the office and then I went there. When I got there, they say you know anything about the death of this person. But I don’t know nothing about this death, that the last time I saw him was in prison, yes, when we were arrested and I left him there. They say he was killed tonight. It was like I was shocked. I said I don’t know what happened. They said I know about his killing.

Q. And how long were you held in prison?
A. Two, two weeks.

Q. Okay. And did you leave Liberia after this time?
A. Yes. In 1998, when they asked me to back to Liberian Airways. I applied for my vacation. So Liberian Airways give me vacation later.
A. Okay.

Q. So I go on vacation. So during that trip, I was planning whether I can come to U.S. or try to do something. So when they give me this vacation letter I went to American Embassy. So they give me a visa in December 1998, but I cannot leave the country because the security police has trailing me around. They’re watching me and it’s one of the (indiscernible), never try to leave the country. I wasn’t able to leave until October 1999.
A. What would happen, what did they say would happen if you did?
Q. If I leave the country, they definitely are going to (indiscernible) my family or if I come back, I would go back to prison and (indiscernible).
Q. So, Mr. Sadiki, so, I'm trying to figure out how to ask this. Why, why didn't you leave Ligeria right away, after you got the vacation letter in December 1998?
A. I don't leave Ligeria right away, because if I leave Ligeria, I'm putting my family, my wife and children, into danger. Because if I leave them without preparing for them, they will come there (indiscernible) start harassing them.
Q. Uh-huh.
A. So I don't want to leave them with that (indiscernible) my wife and children.
Q. Okay. And what happened after you returned to Ligeria from the United States?
A. When I returned from the, when I left here to Ligeria, I did not go through Immigration at the airport in Ligeria.
Q. Why?
A. Because I don't want my passport to be stamped that I come in.
Q. Why not?
A. Because if, this is one of the things the police always come to check, every (indiscernible) they have there. They go through the people who comes in, list of who comes in. If they see the, your name as one of them, they will come back to you. So what I did was that, when I go to Ligeria, on that flight, I just give my bag to a person to hold it for me. I put on my ID card and my (indiscernible) just somebody passing through, just walk in (indiscernible), that’s how I was able to walk out of the airport without going through the immigration.
Q. Uh-huh. And tell me again, why did you first go to the United States in October 1999?
A. I came to the United States to come and see my brother in Bronx to tell him about the problem I’m having. That I want to make arrangement whether I can be able to come to America, that maybe to (indiscernible) a living for my wife before I leave, so whether he can help me I can come down here. And I don’t just come and meet him without letting him know. ‘Cause he too, he has his own problem here. Just for me to stay with him to help me out, to make some other things.

#63964

VI-73
Q. Okay. And - - so after you came, after you came back to Ligeria in January 2000, what happened - - after you came back to Ligeria from the United States, you came to the airport, what happened after that?
A. Around November 2000, they came to my house, they arrested me. They say I should come, they say I should follow them to their office.
Q. Uh-huh.
A. And I follow them to the office, I was holding my key and I follow them to the special office, that is a long way from the Capital.
Q. What do you mean by special place?
A. This is a place where they lock you up and it's a torture place. They only take you there when they have a, when they don’t have a case and they want to get somebody guilty they took you there in that place. So when I got there, they ask me to sit down, just in a very big room. There was nobody when I got in there. It was only myself and I was just looking at the whole place. Nobody comes to answer me. So after about three or four hours, they came - - after about three or four hours, they came to me (indiscernible), then the man say I should release the key for him. I say I’m not give you my key. This when they use this like to cut my ankles so I can release the key for him. This when I got the first mark when I (indiscernible). And they ask me that, why do I travel to the U.S. without telling them. Then I told them I had traveled because I had, I’m sick and had a medical problem, the only way (indiscernible) treatment, that I don’t know that I have to tell them, I have to tell them before I travel.
Q. Uh-huh.
A. But I use the (indiscernible) because I was on vacation. That was the reason why I went to America for the treatment.
Q. Uh-huh.
A. (Indiscernible). They say I went for a meeting with the FBI and the CIA, that they saw my passport stamped by (indiscernible), and that’s (indiscernible) for me. Before that I had the meeting with the CIA and the FBI. I told them that I’m never, I was never a member of the CIA. I don’t even know CIA, I don’t know FBI. But if I’m a member CIA or FBI, you would not see me in this country. (Indiscernible.) They didn’t
forgive, they didn’t believe me, so I was (indiscernible) on the ground, so I was taken
back to the cell and (indiscernible) had to chain my hand - -

Q. Uh-huh.

A. And my two legs. They cannot chain this one because I have a wound here so the
place was bleeding, all through, so it was when I go to the cell, I had to use my - -

Q. All right, you can stand up.

A. These were the first ones they give to me. The first shock they give me and this is
the second one here they give me, just for me to confess what I gone to do in U.S.

JUDGE FOR THE RECORD

Okay. We’re going to go off the record for the respondent to compose himself.

* * *

Q. What happened when you left again in February 2001?

A. Not quite two weeks when I left the country, people were arrested for planning
the coup. I would have been one of them but because I ran out. I was lucky. Most of
them are dead, most of them are in prison now.

Q. And how were you able to come to the United States?

A. I had made arrangements with some of my friends in Ghana Airways, that’s the
other country from us, they always come to a place where (indiscernible), and I explain to
them my problem that the place for me is to get out of the country, this will be my
(indiscernible) get me killed.

Q. Uh-huh.

A. Or put me in prison for life. They, their president of opposition agree with me
that he will help me out. After some months, he called me back and say okay, he’s taking
a flight to JFK.

Q. Uh-huh.

A. On the 19th of February, that if I can join them at Accra airport, which is Ghana,
the capital of Ghana. So I make arrangements with an immigration man in Ligeria, Mr.
Nixon, which - -

Q. Uh-huh.

A. Which I don’t have no money to give him, but I have to give him my car,
(indiscernible) and I give it to him that he take my car, you can sell it. (Indiscernible).
So on the 19th of February, he walked, he took me to the, to the aircraft which I took form Newtown to Accra from Accra to JFK. So when I was coming, when I got to Ghana Airways to put my name on one of their general tickets. This is the one it's used for crew members only. So my name was in the ticket. That's what I used one of their tickets to arrange that.

Q. Okay. And then you arrived in the United States, is that correct?
A. Yes, Your Honor.

Q. When you were in the United States the first time in October 1999, you said you came to visit your brother, is that right?
A. Yes, sir.

Q. Now, while you were here --- well, how long were you in the United States when you came here that time to visit your brother?
A. I was here in October. I left here, I left here in January 2000.

Q. Did anything happen to your family while, while you were here in the States?
A. No, nothing happened to them.

Q. How do you support yourself now?
A. My brother is helping me. I don't have any job at all, nothing.

Q. So you were a pilot for Ligerian Airways?
A. Yes, sir.

Q. According to your testimony, you've been arrested a number of times, each time tortured —
A. Yes, sir, five, five times, sir.

Q. All right. And each time, they let you go. Each time, you signed a paper, each time they gave you the passport back.
A. Yes, sir.

Q. And it doesn't make any sense to me. Why would they do that? If they thought you were such a threat to their regime or threat to them, they would, one, kill you, or keep you in prison. Why, you know, it doesn't make sense to me that they would constantly release you and allow you to simply sign a piece of paper, give you your passport back, and let you travel back and forth to a number of countries for all these years.

JUDGE TO INS ATTORNEY:

#63964
Q. Any cross-examination?
A. Judge, just a few questions.

INS ATTORNEY TO MR. SADIKI:

Q. Sir, you’ve testified that you were a pilot, correct?
A. Yes. Ma’am.

Q. And, sir, your Ligerian Airways Ltd. States that you’re a senior cabin staff.
A. That was, that ID card was in 1979, when we came in. When you come in, before you can be a pilot, you must be a cabin attendant first.

Q. And it expires in 2000?
A. Yes, yes, Ma’am.

Q. And, sir, you also stated that you posed as member or crew member of Ghana Airways?
A. (Indiscernible) to get into the country.

Q. And, sir, this is in 2001?

Q. And, sir, do you, you went to pilot school?
A. I did.

Q. And do you have any school records or any kind of verification from your job at Ligerian Airways that you were a pilot?
A. No.

Q. Do you have any kind of school records or verification from your, from Ligerian Airways that you were a pilot there?
A. I cannot bring everything when I was coming, I ran away, so I couldn’t bring anything with me when I left the country, because I don’t want them to start searching and seeing anything. (Indiscernible) and when I (indiscernible), I only have, only, only one shirt and work clothes when I go there.

JUDGE TO MR. SADIKI

Q. Why didn’t you apply for asylum when you came in October 1999 to the U.S.?
A. The reason why I did not apply for it, Your Honor, is when I came in I never really plan for my wife or what to do when I came in 1999. (Indiscernible) so when I came, I (indiscernible), I don’t know whether my brother will accept me or not. That’s #63964
why I came to see him first before I went back to go on, to meet my family and make sure that (indiscernible) go back to the village and stay.

Q. Here’s a little problem. So when you came here again, why didn’t you bring your wife?

A. Because there’s no visa. You have to have visa to come to the country.

Q. Well, you didn’t use a visa to come here, so either.

A. (Indiscernible). I didn’t know (indiscernible) because my visa, the one they give me is only for one entry.

Q. I know, but you, you came to the United States - -

A. Through Ghana Airways.

Q. Through Ghana Airways - -

A. Yes. I cannot bring her. She’s (indiscernible). I don’t allow to bring her in through Ghana Airways, ‘cause she’s not working with Ghana Airways, only Ligerian Airways, so there’s nothing we can do to help her out. And we couldn’t leave my children for my old mother to take care of, so I ask her to stay with the kids, my children.

*   *   *

JUDGE FOR THE RECORD

I’m not convinced that he’s a pilot. If he’s not a pilot really, it destroys his credibility as to everything else that he’s said today. Also, I’d like to get back the results of that Forensics inquiry on the, the document that was sent out.

JUDGE TO MS. ACKERMAN (RESPONDENT’S ATTORNEY)

Q. I would also like to get, try to get, you can get more documentation to, to substantiate his claim that he is an airline pilot. All right. So therefore I couldn’t make a decision even if I wanted to today, but I want to get to the heart of this, I want to see if he’s an airline pilot. If he’s not an airline pilot, then it’ll be common sense, and then therefore he is, you know, it’s better if I could see his incredibility.

[PROCEEDINGS ARE ADJOURNED.]
NOTE TO STUDENTS: THIS TRANSCRIPT IS ONLY AVAILABLE FOR THE APPEAL. THIS TRANSCRIPT WAS NOT PRODUCED BY THE GOVERNMENT UNTIL AFTER THE TRIAL IN THE CRIMINAL CASE.

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of

OBASI SADIKI,

) IN REMOVAL PROCEEDINGS

Respondent

Transcript of Hearing

Before ADAM EVENHAND, Immigration Judge

Date: October 20, 2003

Place: New York, New York

[Excerpts]
JUDGE FOR THE RECORD

Okay. We're on the record in continued removal proceedings being conducted in New York, New York on October 20, 2003, before Immigration Judge Adam Evenhand. I see we're on today for, let's see, submission of additional documentation for the Court to consider and then the Court's decision. We have, among other things, a letter allegedly from the director of Personal Affairs with Ligerian Airways Ltd. Exhibit 9 is a pack of documents submitted by the Respondent Mr. Sadiki. It includes the letter from the Director of Personnel Affairs for Ligerian Airways Ltd. Exhibit 11 is the U.S. Consulate report submitted by the Government, relating to the Ligerian Airways letter that the respondent had previously submitted.

Now, a couple of things. One is the issue of well, is he or is he not a pilot? Was he or was he not a pilot for Ligerian Airways? And he had some documentation saying that he's not and other documentation saying that he was. The Government has submitted a, a letter that the respondent had submitted and a report came in that, that letter had fraudulent business letterhead and the person signing it did not work for Ligerian Airways. So the State Department suspected fraud. Then the respondent submitted in defense of that, I mean, saying that, that is not correct, that it was the material from the State Department showing his non-immigrant visa application which he filed in 1998, showing that he was in fact a pilot, that he did submit proof to the State Department showing that he in fact was a pilot. Then there is also more documentation showing that he was pilot for Ligerian Airways. Okay.

* * *

JUDGE TO MR. SADIKI:

Q. The letter that you submitted from that, from the Personnel Director. The, the current company, the current manager of Ligerian Airways, says that person never existed or didn't work for Ligerian Airways—

A. Yes, but that was—

Q. That, that letterhead was never used by that company, never used by the company. Why, what, how did you get that business letter?

A. The letter that was sent to you. I was not the person who sent it. I made a, I made a call to the airline. They sent it to my lawyer directly, not to me, sir.

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Q. Well, yes, I know, sir, but you—
A. So I don’t know anything about the changes or (indiscernible) if when I left, but I was working at Ligerian Airways.
Q. You want, I know, I know that before I had asked you to get more documentation ‘cause I was somewhat skeptical about your claim that you were a pilot but, so I know that you – who did you contact at the airline to –
A. I called, I called the personnel manager.
Q. The past manager?
A. Yes, the personnel officer there, the head of personnel, the secretary there.
Q. And you told them that you want a document.
A. Yes, a document showing that I working with Ligerian Airways, to send it to my lawyer, so I give them the address to my lawyer and they mailed it to my lawyer. I didn’t even know—
Q. So you don’t know what they did over there?
A. I don’t even know, sir. I was over here. The letter proves that I worked for Ligerian Airways. And first there’s all my ID card and passport, they all were there. They can do to – I’ll give them my ID card when I was with Ligerian Airways. They can go with that to the (indiscernible) over there. They can (indiscernible) whether I working there. You want my ID card (indiscernible) with them with the Immigration. They have everything there. They can go through it and they’ll see that I working there.
A. Well, sir, the State Department didn’t come out and say we checked their records and there is no person by this name, whoever worked as a pilot for them. Instead, it just said that this, the person who authored the letter didn’t work for them and the letterhead might be old, you know, screwy.

* * *

JUDGE TO MS. ACKERMAN (Counsel for Mr. Sadiki)
Q. You know, if he is a pilot, I would be honest with you, Ms. Ackerman, I don’t want to fly with him.
A. My client was never given the opportunity to present testimony as to his knowledge about whether or not he was a pilot because the conclusion was made that anything he, he, anything he said, he could simply have fabricated, so he was never given an opportunity

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to testify about his knowledge or skills of being a pilot, something he was prepared to do. The negative Consulate report regarding the letter that my client got saying that he was a pilot for Ligerian Airways. We’ve got a Consulate report saying that letter was fraudulent. The letter, the response that the, the, the Consulate got from Ligerian Airways is a letter that’s inconsistent on his face. It says that because this, the information is currently inaccurate, it must always have been inaccurate. So, it’s on its face inconsistent. It’s not dispositive and the confusion in the inconsistency on the letter is just, is reflective of the, the instability of Ligerian Airways overall, which I submitted, which is evidenced by the support, the (indiscernible) supporting documentation that I submitted to show that, that under the previous government, the company was mismanaged, that money was stolen, that airplanes were, that airplanes were the sole assets, and the company was, was liquidated, and the company condition of transition and deepened stability.

[Note to Students: Judge Evenhand denied Mr. Sadiki's application. That decision was overturned on appeal and Mr. Sadiki ultimately was granted asylum in September 2004.]
1st of October, 2003

Ms. Karin Ackerman
Charitable Migration Services
100 Apple St.
Bronx, New York USA

Dear Sir/Madam,

Your client Mr. Obasi Sadiki has asked us to release his personnel data to you for your onward transmission to United States immigration services.

Mr. Obasi Sadiki of 124, Kabula Blvd, Newtown, Ligeria, was employed on 23rd of March, 1979, as a pilot in training. He finished from State School of Aviation in 1978 as a Commercial Pilot. His Air-Transport Pilot License Number is AT949 of 28th Nov. 1978. He was posted to Ligerian Airways Operation Department as a flight-crew pending the time when there will be vacancy at the flying section of the airline.

In October 1981, he was posted to the flying line for the training on F27/F28 as First Officer. He flew various types of aircraft which the airline possess e.g. B737, B707, B747, DC10. In the year 1982, he was sent to S.A.S. Training School in Copenhagen as First-Officer on B747, which he came out in flying colours. Going through his flight log book, at the end of September 2000, he had 5,327 flying hours. Being a member of the Pilot’s Association, he involved himself in political activities in the country, by so doing, got into political trouble with the Federal Military Government, was arrested several times and released. The last time he came to work was September 2000. In December 2000, he was declared A.W.O.L. as at now he is under suspension and his salary stopped.

He is a fine Pilot, intelligent and well behaved gentleman, married with children. I recommend him for any future advancement. For further information please do not hesitate to contact the above address.

Yours Sincerely

Mohammad Lawal

Mohammad Lawal
Director of Personal Affairs

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NOTE TO STUDENTS: THIS FACSIMILE IS ONLY AVAILABLE FOR THE APPEAL. IT WAS NOT PRODUCED BY THE GOVERNMENT UNTIL AFTER THE TRIAL IN THE CRIMINAL CASE.

United States of America
Department of State

American Embassy – Liberia
Consular Anti Fraud Unit

FACSIMILE TRANSMISSION

To: Case Agent, INS
From: Consular Fraud Analyst
Fax: 212-555-6421
Date: 15 October 2003
Phone: 212-555-5916
Pages: 1 of 2
Re: Sadiki, Obasi

Your office has requested that we check the veracity of a Ligerian Airways letter dated 1 October 2003, regarding the employment of Obasi Sadiki.

Our office has been able to verify that the submitted letter purported to be from the "Director of Personnel" of Ligerian Airways is fraudulent. The current Managing Director/Chief Executive has looked at a copy of the letter (with the middle section content blacked out to protect Subject) and has written a letter declaring it to be a forgery. Our office received this letter directly from the Ligerian Airways office today. We enclose a copy.

Please contact our office if we may be of further assistance in this matter.
BY COURIER
The American Embassy
Consular Section
Newtown, Liberia

Dear Sir,

Your fax message on subject matter refers and would comment as follows:

1. There is no “Director of Personnel Affairs” in Ligerian Airways; instead the “Director of Administration” designation currently is in use in the airline.

2. The letterhead is forged. The one currently in use is as per this letter heading addressed to your good selves.

3. There is no Mr. Mohammad Lawal (the signatory to the forged letter) in the employment of Ligerian Airways Limited at present and as such could not have been “Director of Personnel Affairs”.

Please take note and be guided accordingly.

We thank you for your usual co-operation.

Yours faithfully,

/s/

M. BULA
DIRECTOR OF ADMINISTRATION
LIGERIAN AIRWAYS LIMITED

HEAD OFFICE: AIRWAYS HOUSE PLOT 000, AGBAMASA LANE, AREA 2
P.M.B. 3, NEWTOWN, LIBERIA TEL: 09-46224, FAX: 09-26220

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NOTE TO STUDENTS: THIS AFFIDAVIT IS ONLY AVAILABLE FOR THE APPEAL. IT WAS NOT PRODUCED BY THE GOVERNMENT UNTIL AFTER THE TRIAL IN THE CRIMINAL CASE.

United States Department Of Justice
Executive Office Of Immigration Review

______________________________
X

In the matter of

Obasi SADIKI
Applicant for Political Asylum

A 00-983-111

______________________________
X

AFFIDAVIT Of Obasi SADIKI in Support of his Application for Political Asylum

Obasi SADIKI, a native and citizen of Liberia, being duly sworn, deposes and says:

1. I am submitting this affidavit as a part of my Application for Asylum and for Withholding of Removal (Form I-589).

2. This is my first petition for asylum.

3. I am not filing this application more than one year after entering the U.S. I understand that if I waited for over a year to file this Application, I would have to provide an explanation for why the delay.


5. I am requesting political asylum because I have suffered persecution in Liberia due to my political activities. I have been followed, harassed, detained, interrogated and tortured by the State Security Service (SSS). They are a government-authorized covert police group which persecutes democratic activists, or anyone considered to threaten the military government. I am terrified of what will happen if I am forced to return to Liberia. I will be lucky if I am only jailed indefinitely. I am afraid that I will be killed.

6. The date of my last arrival into the U.S. was February 19, 2001.

7. I have never used another name.

8. I have resided in the U.S. for approximately eleven months.

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10. I am a commercial pilot with Ligerian Airways. I started flying with Ligerian Airlines in 1979. I have been flying to John F. Kennedy Airport in New York since 1980. I have made many trips to the United States in my capacity as a commercial pilot. I was a member of the Ligerian Airways Pilots/Flight Engineers Association since 1979. I was one of the officers of the Association.

11. In April 1993 there was a coup against President BOSEDA. It was called Major OKOCRA's coup because he led it. However, there was a counter-coup and President BOSEDA came back to power. After his return, I was selected for a special assignment to fly the President on his government plane.

12. I reported to duty on May 2, 1993. From this date until August I was in training for full-time flying. I began full-time flying in August 1993. I flew the President to France and then to England. I also flew him to the United States in 1995.

13. An election was held on June 12, 1995. There were no problems at first. Chief M.K.O. Akia was elected President. However, because Akia is from the South section of Nigeria, the Northern controlled military said they did not want him to rule and the election was annulled. They said that since he was Southern, his election would mean that Southerners would control the country. They do not want anyone from the South to rule. There were many riots and strikes during this period, starting in July when the election was annulled.

14. Shortly before the June 12, 1995 election, I joined the "Campaign for Freedom." The Ligerian Pilots Association chose Tunde Asad and me to represent the Association.

15. After the election was annulled in 1995, the Pilots Association went on strike. We grounded the aircraft and refused to fly. The SSS came to look for us. They found me at my house. They took me to the police station. They told me I had to go with them. I was scared because I never had been to a police station before in my life. They interrogated me about my position in the Pilots Association and my role in the strike. They asked me about my duties as an officer of the Pilots Association. I told them I was the coordinator. In this position, I was the liaison between Ligerian Pilots Association and other African pilots associations, such as the African Airline Association (AFFRA).

16. They demanded that I stop the strike. I told them that I did not have the authority to do so. They were trying to pressure me to stop the strike because they knew I was the international coordinator. After about four hours, they told me that I had to report back to the police station the next day. When I went the next day, I had to wait for their boss. I waited for 10 hours but he did not come. They told me to come back again the next day. I had to do this every day for a week. I had not choice but to go. They told me that if I did not, they would come and drag me to jail.
17. As a member of the Campaign for Freedom, I organized meetings to encourage people to support democracy. These meetings were held about once every two weeks. I had to be very careful because the SSS were watching all over the country.

18. In July 1995, President BOSEDA handed over power to an interim government led by Chief SONEKA. SONEKA said he was going to do something to protect democracy. After this, we went back to work. SONEKA was a civilian. In November 1993, ABARA, who was the Chief of the Army, overthrew the civilian government.

19. After the overthrow, our Pilots Association protested by going on strike again. We went on strike December 19, 1995. At this point, my problems became much worse. Once we went on strike, General ABARA said that civilian pilots like us should not fly government aircraft. He did not trust us to fly him because we had worked for the former President.

20. In February 1996, I was preparing to fly a plane to London, when the SSS came for me. I was actually sitting on the plane getting ready to fly, when they came to the plane and told me their boss wanted to see me in the office. They took me from the Airport to the SSS office about thirty-five miles away. They accused me of going to meet with the British Airways Pilots Association to convince them to stop coming to Liberia, because I opposed the ABARA government. I was not planning on doing this.

21. After my first arrest, I was kept at SSS headquarters for three days. They interrogated me. They asked me many questions: where did I take President BOSEDA, what happened to the aircraft while I was abroad. They accused me of helping to wire the airplanes for surveillance. I said I did not know anything about this; my only job was to fly the plane. They told me they did not believe me. I told them to ask my boss, Captain ASAD, who is the chief pilot on the fleet, about it. They then brought Capt. Asad to SSS headquarters. They interrogated us in separate rooms, but they kept us in the same cell at night.

22. On the fourth day, they told me to go home and come back the next day. They told me to sign a paper of release. I was released like I was on bail. I was on my own recognizance, but I had to report in every day. They took my passport and all my documents.

23. I was not allowed to fly again after this. I was required to report to SSS headquarters every day at 8 a.m. I did this for over six months. Then they asked me to stop coming. They did not give me any reason. But they still had my passport so I could not leave the country. They thought they could control me because I could not travel.

24. In March 1996, the government decided to disband all unions. So after this time, I was only able to be a member of the Campaign for Freedom.

25. In September 1996, I organized a Campaign for Freedom campaign. The purpose of the campaign was to get the poor people involved in democratic opposition to the military dictatorship. Since the unions had been banned, this was the only way for us to reach the masses. We held a meeting on September 12th, 1996. We were outside on a platform holding the meeting, and the police came in vans to arrest all of us. They had guns, horse

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whips and tear gas. The used tear gas to capture us. Otherwise, we might have been able to run away -- at least some of us. They were beating people with the whips. About two people died during this attack. I did not see it happen, because I was taken away, but I read about it in the papers later.

26. They handcuffed us and dragged us to the van. They had their guns pointed in our backs, yelling that if we said anything they would kill us. They took us to Prison. We were told that we would have to appear in court the next day, but we were never taken. We were held for two weeks. The conditions were terrible. There were about fifty people in the room. There was not enough room to lie down to sleep. I had to sleep sitting up. They never let me out. There was no water at all. There was no food either. They gave me some beans about once a day. They would only bring food if they were bribed. After two weeks, they told us we were being held under Proclamation 3, which is the government law for security risks. This meant they could detain us for as long as they wanted.

27. They did not release the President of the Campaign for Freedom and the Vice President. They were held until they were sentenced to prison in 1997. I am afraid of what will happen to me if I go back to Ligeria because I worked closely with both of these men in the Campaign for Freedom. The government knows this because we were all arrested together on September 12th, 1996, and the government was always monitoring the activities of Campaign for Freedom members.

28. I was released on the condition that I report to SSS headquarters every day. Several times, I noticed that I was being followed by SSS officers. Also, they came to my house several times. They would not say what they were looking for. They would just come to the house late at night, at 2 or 3 a.m. They would come to search the house. They said that if they found what they were looking for, they would arrest me. They did not find incriminating documents, such as my Campaign for Freedom card, because I hid them in my mattress.

29. In 1997, my boss at the airline, Captain Asad, was killed while he was driving. He was killed by unknown gunmen on the same day he was released from prison. I became very frightened because all the SSS knew that I worked closely with him. The day after he was killed, the SSS came to my house and told me to come to the police station. I knew I had no choice but to go. They interrogated me about his death. They asked me if I organized his killing. I said absolutely not, he was my friend, and I did not even know he was released. When they were interrogating me, other SSS officers went to my house to interrogate my wife, asking where I had been the previous day. They accused me of killing Asad. I did not kill my friend, but the SSS was trying to depict me as a subversive criminal. Actually, I believe that it was the SSS who killed him. I am afraid because they will use false charges against me to justify further imprisoning and torturing me for my political activities.

30. They detained me for two weeks. After two weeks, they told me to go back home. They made me sign a paper saying that I would no longer oppose the current government, and that I would support it. This was the condition of my release. I had to sign it because my family had no money and I needed to provide for them. They would not give me a copy of this release form. It is the government's property.
31. After that, they gave me my passport back. They told me to go back to my job as an airline pilot. They told me to behave, that I better not get involved in any politics, and that they would be watching my movements at all times. When I got out, my wife told me that she had sold the car to get $120,000 LIA (about $3500.00 U.S. dollars) to bribe them to release me. I think this is the only reason I was released. If my wife had not bribed them, I would still be in prison. When I got out, I went to my job. When I started working, I thought the best thing was for me to leave. Whenever it was time for me to fly, they would meet me at the airport. They refused to allow me to fly international flights. I went to the American Embassy in December 1998 to apply for a visa. I showed them my Ligerian Airlines identification and my vacation letter. I was given a visa, but I did not travel out of the country until October 1999. I knew I could not travel because they were still watching me. They were always following me and monitoring me. They would come to my house repeatedly to check to see that I was still around. I waited until they stopped watching me so intensely.

32. In October 1999, I was able to leave the country to come to the U.S. I had to come to the United States on my annual vacation to make arrangements with my brother in the Bronx, New York, in the event that I had to flee Liberia. I was in the United States from October 1999 to January 2000. In January I went to London. From London I went back to Liberia. I returned to Liberia on January 10, 2000.

33. On November 15, 2000, I was arrested again at my house. They did not ask me anything; they just locked me up. I was taken to a place called the "blood house." The conditions were absolutely terrifying. I was in a small room holding about ten people with a small window near the ceiling. All of us prisoners were all chained to the walls. Long chains extended from the ceiling for our arms, and shorter ones extended from the walls for our legs. Because of the chains, I could not lay down to sleep. I had to lower myself into a sitting position to sleep, with my arms extended above me. If I had to "use the bathroom," I would have to call an officer to bring a pail to put underneath me. Sometimes they would chain us together to take us to the latrine at one time. We were given ten minutes to perform bodily functions, in full view of guards who were pointing guns at us. I ate only once or twice daily, if I was lucky. For two weeks, I was only able to stand or sit in one place. I was detained for over two weeks. Never in my life have I seen anything so horrible, nor experienced so much physical and psychological pain.

34. Once a person is taken here, it is like they "disappeared." They killed people every day with batons. There were blood stains all over the walls. Whenever they called my name my heart was in my mouth, because I was afraid that I wouldn't be coming back. I knew that they used to take people out just to shoot at them for target practice. Three people in my room were taken and they did not come back. The SSS agents said they were released, but I think it was a lie. Sometimes they would say there was going to be an operation, which meant that they wanted to decongest the cell. They would call people by name, take them outside, remove their chains and tell them to run. Then they would shoot the people, claiming they were trying to escape. They did this just to reduce the prison population. I know this happened because I witnessed it from the window in my cell. Words fail to
describe the horror I felt at witnessing such barbarism and having to live in terror that next
time it would be my turn to die.

35. They constantly interrogated me about the CIA, FBI and the Campaign for Freedom. They
would take me to an interrogation room and chain me to the wall again. They would show
papers from the FBI or CIA which they claimed to have discovered in my house. They
never gave me a chance to see the documents. They would just wave them at me and
demand to know about my involvement with the CIA and FBI. They accused me of doing
work for the Campaign for Freedom in the United States. When I denied these things, they
would beat me with a horsewhip or cane and apply electrical shocks to my legs. I have scars
from electric shock all over my legs and scars from the chains on my wrists. After two
weeks they released me, again ordering me to go back to the police station daily. I was not
allowed to fly again.

36. At this point, I was afraid for my life. I knew that if these people were capable of such
torture, reason was impossible. They would do anything they wanted to me, anytime they
wanted, even though I was innocent of any crime. The only thing I had done to offend them
was to travel outside of the country and to participate in peaceful opposition to the
government.

37. One day an SSS agent told me to report to their office. I was terrified, but I had to go. They
made me sign a piece of paper. I was not allowed to read it. Then they gave me my
passport. They did not tell me why they did it and I knew better than to ask any questions.
They told me they were watching me and that I should be very careful about what I say and
who I talk to. They said that the next time they came for me, they would deal with me
severely. They told me that I would not like to see myself after they got done with me if
they had to pick me up again. I knew this meant that they would torture me so that I was
disfigured. They will use an iron rod to break people's backs so they can never walk again.

They agreed to help me to get out of the country. I had to bribe the Immigration officer in
Ligeria. I had to sell everything I had so I would be able to leave. I gave all the proceeds
from the sale of my belongings to Mr. Michael NIXON, who is senior officer at the
immigration post at the airport. I had to give him my car and $1500.00 in American dollars
in order to get his help.

39. I never planned to come to America. I sold everything to be smuggled out. The only reason
I was able to leave was because my friends at Ghana Airways were willing to help me. I left
Ligeria on February 19, 2001. I posed as a crew member on a Ghana Airways flight to New
York. My friends put my assumed name in their crew manifest for this flight. I had to
appear as one of their pilots and use his passport. When I came to the U.S., I returned the
passport. My passport was mailed to me afterwards.

40. My wife and children moved from our house in the capital. They are staying with my
mother in this country. I suffer from constant anxiety about their well-being. I did not have
enough money to get them out of the country.

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41. If I am forced to return to Liberia, I have no doubt that I will be tortured and killed. The last time I left Liberia for the United States, I was arrested and tortured when I returned. The military ministers are ruling the country. I am still considered an enemy, a suspected spy. My close colleagues are either dead or serving prison sentences. The government knows that I worked closely with them in the Liberian Pilots Association and the Campaign for Freedom. The government considers me an enemy and will kill me for my "betrayals."

42. For the foregoing reasons, I respectfully request that you approve my application for political asylum.

I certify, under penalty of perjury under the laws of the United States of America, that this application and the evidence submitted with it is all true and correct. Title 18, United States Code, Section 1546, provides in part: "Whoever knowingly makes under oath, or as permitted under penalty of perjury under Section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement or which fails to contain any reasonable basis in law or fact -- shall be fined in accordance with this title or imprisoned not more than five years, or both". I authorize the release of any information from my record which the immigration and Naturalization Service needs to determine eligibility for the benefit I am seeking.

Respectfully submitted,

Obasi Sadiki

Obasi SADIKI
160 Carter Avenue, Apt. 4K
Bronx, New York

************************************************************

Sworn to before me this 2nd day of February, 2002, at Charitable Migration Service, Bronx, New York

/s/
Notary Public of New York

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VI-92
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

ABASI BANDELE,
Also known as “Ade Jackson,”

Defendant.

DEFENDANT'S
REQUESTS TO CHARGE

The Defendant respectfully submits the following requests to charge. The Defendant reserves the right to supplement these requests and objections as the trial proceeds.
Request No. 1 – Membership in the Conspiracy

The Defendant requests the following additions and changes to be made to the Government’s proposed charge (which are indicated in blackline):

The second element which the Government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the defendant knowingly, willfully and voluntarily became a member of the conspiracy.

If you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether the defendant whom you are considering was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined the conspiracy. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or worker?

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have had a stake in the venture or its outcome. You are instructed that, while proof of a financial interest in the outcome of a scheme is not essential, if you find that the defendant had such an interest, that is a factor which you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the indictment.

As I mentioned a moment ago, before the defendant can be found to have been a conspirator, you must first find that he knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.

The Indictment charges that the objects of the conspiracy were (1) to defraud an agency of the United States, to wit, the U.S. Department of Housing and Urban Development; and (2) to obtain from HUD and Carter Apartments money and property, in the form of Section 8 rent subsidies, by means of materially false and fraudulent pretenses and representations, in violation of the federal mail fraud statute. I will explain each of these objectives in more detail shortly.

In order for the defendant to be found guilty, you must find that he knew that at least one of these two objectives was a purpose of the conspiracy, and that he intended and/or agreed to further one of these objectives. You cannot find that the defendant joined this conspiracy, if you find only that the defendant was aware that another criminal act, or some other unspecified wrongful behavior, was the object of a conspiracy that he knowingly and willfully joined.
This does not mean that the defendant has to have been aware of all of the details of the conspiracy. It does mean that the defendant must have joined the conspiracy with knowledge of the essential nature of the criminal plan as charged in the Indictment.

It is important for you to note that the defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators, and the reasonable inferences which may be drawn from them.

The defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need he have been apprised of all of their activities. Moreover, the defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on his part. Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives, but he must have knowingly and willfully joined the conspiracy charged in the Indictment with the knowledge of at least one of those unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

I want to caution you, however, that mere association with one or more members of the conspiracy does not automatically make the defendant a member. A person may know, or be friendly with, a criminal, without being a criminal himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends. Here, as I have explained to you, the Government charges that those objectives are (1) to defraud an agency of the United States, to wit, the U.S.
Department of Housing and Urban Development; and (2) to obtain from HUD and Carter Apartments money and property, in the form of Section 8 rent subsidies, by means of materially false and fraudulent pretenses and representations, in violation of the federal mail fraud statute.

In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement – that is to say, a conspirator.

Authority:

Sand et al., Modern Federal Jury Instructions (“MFJI”) (Instr. 19-6); United States v. Gallerani, 68 F.3d 611, 617-19 (2d Cir. 1995); United States v. Stavroulakis, 952 F.2d 686, 690-91 (2d Cir. 1992) (“Where ... the indictment charges a conspiracy under the ‘offense’ clause of the conspiracy statutes, the conspirators must have agreed to commit the same offense to satisfy the rule that they have agreed on the essential nature of the plan.”); United States v. Maldonado-Rivera, 922 F.2d 934, 960-61 (2d Cir. 1990) (“It is fundamental that in order to find a given defendant guilty of conspiracy, the jury must find that he was a member of the conspiracy that was charged in the indictment; membership only in some other conspiracy will not suffice.”); United States v. DeBiasi, 712 F.2d 785, 792-93 (2d Cir. 1983); United States v. Provenzano, 615 F.2d 37, 45 (2d Cir. 1980); United States v. Rosenblatt, 554 F.2d 36, 37-39, 40-42 (2d Cir. 1977); United States v. Gallishaw, 428 F.2d 760, 762-64 & n.1 (2d Cir. 1970).
Request No. 2 – Conspiracy to Defraud the United States

The Defendant requests the following additions and changes to be made to the Government’s proposed charge:

The charge of conspiracy to defraud the United States, to wit, the U.S. Department of Housing and Urban Development, does not mean that one of the illegal objects must be to cause the United States Department of Housing and Urban Development to suffer a loss of money or property as a consequence of the conspiracy. It would also be a conspiracy to defraud if one of the objects was to obstruct, interfere, impair, impede or defeat the legitimate functioning of the Government U.S. Department of Housing and Urban Development through fraudulent or dishonest means.

In order to find that the defendant was a member of the conspiracy to defraud the United States as charged in the Indictment, you must determine that the Government has proven beyond a reasonable doubt that the Defendant knowingly entered into an agreement that had as its objective defrauding the U.S. Department of Housing and Urban Development. You must ask whether the Defendant knew that HUD was the United States agency that was the intended victim of the conspiracy. In other words, you must find beyond a reasonable doubt that the defendant knew the essential nature of the criminal plan. If you find that the Defendant and a coconspirator agreed to defraud the United States Government in some capacity, but do not find beyond a reasonable doubt that the defendant agreed that HUD would be the target of the conspiracy, then the Government has failed to sustain its burden of proof.

Authority:

United States v. Rosenblatt, 554 F.2d 36, 40-42 (2d Cir. 1977); cf. United States v. Attanasio, 870 F.2d 809, 816-17 (2d Cir. 1989) (affirming conspiracy to defraud conviction where evidence established that defendants agreed to “essential nature of a single plan”, namely, to defraud IRS with respect to income taxes owed by two individuals).
Request No. 3 – Conspiracy to Commit Mail Fraud

The Defendant requests the following additions and changes to be made to the

Government’s proposed charge:

The second objective of this conspiracy that is charged in the Indictment is a conspiracy to commit mail fraud. In addition to the elements of conspiracy that I have described previously, in order for you to convict a defendant of conspiracy to commit mail fraud, the Government must prove each of the following elements beyond a reasonable doubt.

First, that there was a scheme or artifice to defraud or to obtain HUD and Carter Apartments of money or property, in the form of Section 8 rent subsidies, by materially false or fraudulent pretenses, representations or promises, as alleged in the Indictment; and

Second, that the defendant knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud; and

Third, that the execution or in furtherance of that scheme, the use of the mails occurred.

I will now explain each of these elements further, and I will give you some important definitions to apply as you deliberate on these charges.

The First Element: The first element the Government must prove beyond a reasonable doubt is the existence of a scheme or artifice to defraud or to obtain HUD and Carter Apartments of money or property in the form of Section 8 rent subsidies by means of false or fraudulent pretenses, representations or promises.¹

A “scheme or artifice” means a plan for the accomplishment of an objective. Here, the Government charges that the objective of the scheme was to obtain from HUD and Carter Apartments money and property, in the form of Section 8 benefits.

A scheme to defraud is any plan, device or course of action to obtain money or property by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.

“Fraud” is a general term which embraces all the various means by which human ingenuity can devise and which are resorted to by an individual to deprive

¹ See MFJ 1 (Instr. 44-4).
another person of money or property by false representations, suggestions or suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is merely a plan to deprive another of money or property by trick, deceit, deception or swindle. The scheme to defraud is alleged here to have been carried out by making false and fraudulent pretenses, representations, and promises.

A statement, representation, claim or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made.

A representation or statement is fraudulent if it was falsely made with the intent to deceive that it would cause some harm or injury to the victim. ²

A false or fraudulent representation may be made by statements of half-truths or the concealment of material facts, as well as by affirmative statements or acts, if you find that they were intended to deprive another person of money or property. The expression of an opinion not honestly entertained may also constitute false or fraudulent statements under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of the words or the circumstances in which they are used may convey the false and deceptive appearance. If there is deception, the manner in which it is accomplished is immaterial.

The false or fraudulent representation, statement, half-truth or concealment must relate to a material fact or matter, that is, a fact that would be of importance to a reasonable person in relying upon the representation or statement in making a decision. This means that if you find a particular statement to have been false, you must determine whether that statement was one that, in this case, a reasonable person at HUD or at Carter management might have considered important in making his or her decision to provide Section 8 rent subsidies. The same principle applies to fraudulent half-truths or omissions of material facts.

If you find that there was a fraudulent statement, representation or claim as to a material fact, it does not matter whether the victim was gullible or sophisticated, because the mail fraud statute protects the gullible and unsophisticated as well as experienced victims. Moreover, it does not matter whether the victim could have avoided a loss through greater diligence. Negligence by a victim is not a defense to a violation of the mail fraud statute.

² See United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999) ("Misrepresentations amounting only to deceit are insufficient, as the deceit must be coupled with a contemplated harm to the victim.") (internal quotations and citations omitted); United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987); see also United States v. Gabriel, 125 F.3d 89, 97 (2d Cir. 1997) ("to contemplate" in the context of mail fraud is synonymous with "to intend").
In addition to proving that a statement was false or fraudulent and related to a material fact, in order to establish a scheme to defraud, the Government must prove that the alleged scheme contemplated depriving another of money or property. Here, the Government charges that the scheme contemplated defrauding HUD and Carter Apartments into providing Section 8 rent subsidies.

However, the Government is not required to prove that a defendant himself or herself originated the scheme to defraud. Furthermore, it is not necessary that the Government prove that a defendant actually realized any gain from the scheme or that the intended victim actually suffered any loss.

A scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case.

It is not necessary that the Government prove each and every pretense, misrepresentation or promise alleged in the indictment. It is sufficient if the Government proves beyond a reasonable doubt that at least one pretense, misrepresentation or promise about a material fact was made in furtherance of the scheme to defraud that is charged in the Indictment. However, you may not find a defendant guilty unless you all agree that at least one particular pretense, misrepresentation or promise about a material fact was made or caused to be made by the defendant. That is, you cannot find the defendant guilty if some of you think that the defendant made only misrepresentation “A” and the rest of you think that the defendant made only misrepresentation “B”. There must be at least one specific pretense, misrepresentation or promise about a material fact that all of you believe the defendant made in order to convict the defendant.

If you find that the Government has sustained its burden of proof that a scheme to defraud, as charged, did exist, you should next consider the second element of the offense of mail fraud.

The Second Element: The second element the Government must prove beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully, and with specific intent to defraud.

To “participate” in a scheme to defraud means to associate oneself with it with a view and intent toward making it succeed. A mere onlooker is not a participant in a scheme to defraud. Even if you find that the Government has proved beyond a reasonable doubt that the defendant knew about the alleged criminal scheme and associated with others who were part of that scheme, you cannot find the defendant guilty unless the Government has also proven that the defendant took some action with the specific intent to defraud in furtherance of the goals of the alleged criminal scheme.3

3 See United States v. Pearlstein, 576 F.2d 531, 541-42 (3d Cir. 1978).

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“Knowingly” means to act voluntarily and deliberately, as opposed to mistakenly or inadvertently.

“Willfully” means to act knowingly and purposely, with an intent to do something the law forbids; that is to say with the purpose of either disobeying or disregarding the law.

To act with “intent to defraud” means to act knowingly and with the specific intent to deceive, for the purpose of causing some financial or property loss to another. Merely acting with the intent to deceive, without having the purpose of causing harm or injury, is not sufficient.4

In order to establish that the defendant acted with an intent to defraud, the Government must show that some actual harm or injury was contemplated by the defendant.

A defendant acted with specific intent to defraud if he engaged or participated in the fraudulent scheme with some realization of its fraudulent or deceptive character and with an intention to be involved in the scheme to defraud and to help it succeed with a purpose of causing some financial loss to the victim. Of course, as I instructed before, the Government need not prove that the intended victims were actually harmed. However, the Government must prove beyond a reasonable doubt that the defendant intended actual harm to the alleged victims.5 A mere realization that a scheme was fraudulent or deceptive, or a mere recognition of its capacity to cause harm, is insufficient.6 Equally insufficient is proof, without more, that the defendant intended to bring about some financial gain or benefit to himself. Only a showing of intended harm — i.e., proof that some actual injury was contemplated by the alleged schemer — will satisfy the element of fraudulent intent.7

Intent to harm, however, can be inferred from exposure to potential loss.

How someone acted — his or her state of mind — is a question for you to determine. Direct proof of knowledge and fraudulent intent is not always available, nor is it required. The ultimate facts of knowledge and criminal intent may be established by circumstantial evidence, which I explained to you earlier.

4 See United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999).


6 United States v. Gabriel, 125 F.3d 89, 96-97 (2d Cir. 1997).

7 United States v. Gabriel, 125 F.3d 89, 96-97 (2d Cir. 1997); United States v. D’Amato, 39 F.3d 1249, 1257 (2d Cir. 1994); United States v. Regent Office Supply, 421 F.2d 1174, 1180 (2d Cir. 1970).
Since an essential element of the offense is intent to defraud, it follows that
good faith on the part of a defendant is a complete defense to a charge of mail
fraud. A defendant, however, has no burden to establish a defense of good faith.
The burden is on the Government to prove fraudulent intent and the consequent
lack of good faith beyond a reasonable doubt.

Even false representations or statements, or omissions of material facts, do
not amount to a fraud unless done with fraudulent intent. However misleading or
deceptive a plan may be, it is not fraudulent if it was devised or carried out in
good faith. An honest belief in the truth of the representations made by a
defendant is a good defense, however inaccurate the statements may turn out to
be. One who expresses a belief honestly entertained is not chargeable with
fraudulent intent even though his/her opinion is erroneous or his/her belief is
mistaken, and evidence which establishes only that a person made a mistake in
judgment or was careless does not establish fraudulent intent.

I charge you, however, that it is not a defense that a defendant first made a
representation in good faith, if later at any time within the period covered by the
indictment he or she realized the representation was false and yet deliberately
continued to make that representation.

There is another consideration to bear in mind in deciding whether or not a
defendant acted in good faith. You are instructed that if the defendant
participated in the scheme to defraud, then a belief by the defendant, if such belief
existed, that ultimately everything would work out so that no one would lose any
money does not require a finding by you that the defendant acted in good faith. If
the defendant participated in the scheme for the purpose of causing some financial
or property loss to another, then no amount of honest belief on the part of the
defendant that the scheme would ultimately make a profit for the investors will
excuse fraudulent actions or false representations by the defendant.\(^8\)

As a practical matter, then, in order to sustain the charges against the
defendant, the Government must establish beyond a reasonable doubt that he
knew his conduct as a participant in the scheme was calculated to deceive and,
nonetheless, he associated himself with the alleged fraudulent scheme for the
purpose of causing some loss to another.

The Government can also meet its burden of showing that the defendant
had knowledge of the falsity of the statements if it establishes beyond a
reasonable doubt that he acted with deliberate disregard or whether the statements
were true or false, or with a conscious purpose to avoid learning the truth. If the
Government establishes that a defendant acted with deliberate disregard for the

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\(^{8}\text{ See United States v. Rossomando, 144 F.3d 197, 200-02 (2d Cir. 1998). But see U.S. v. Berkovich, 168
F.3d 64, 67 (2d Cir. 1999).} \)
truth, the knowledge requirement would be satisfied unless that defendant actually believed the statements to be true. This guilty knowledge, however, cannot be established by demonstrating that a defendant was merely negligent or foolish.

It is entirely up to you whether you find that a defendant deliberately closed his/her eyes and any inferences to be drawn from the evidence on this issue.

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme or that he lacked the specific intent to defraud, you should acquit him. On the other hand, if you find that the Government has established beyond a reasonable doubt not only the first element, namely the existence of a scheme to defraud, but also this second element, that the defendant was a knowing participant and acted with specific intent to defraud, and if the Government also establishes the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict the defendant.  

The Third Element: As to the mail fraud count you are considering, the third and final element that the Government must establish beyond a reasonable doubt is the use of the mails in furtherance of the scheme to defraud.

The use of the mails as I have used it here includes material sent through the United States Postal Service. The mailed matter need not contain a fraudulent representation or purpose or request for money. It must, however, further or assist in the carrying out of the scheme to defraud.

It is not necessary for a defendant to be directly or personally involved in the mailing, as long as the mailing was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the mailing by others. This does not mean that the defendant must specifically have authorized others to do the mailing. When one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen, even though not actually intended, then one causes the mails to be used.

The Government has offered proof of several mailings. It need only prove one mailing in furtherance of the scheme. You must all agree, however, as to what that mailing is. You cannot find a defendant guilty if some of you think he made or caused to be made only mailing “A” and the rest of you think a defendant made or caused to be made only mailing “B”. There must be at least one mailing that you all find was made or caused to be made in furtherance of the mail fraud scheme by the defendant in order to convict.

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9 MFJ1 (Instr. 44-5).
Respectfully submitted,

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cc: A.U.S.A. Jack McCoy
Witness Sheet – Ayo Bandele (defendant’s wife)

You are the wife of Abasi Bandele. You are 42 years old and work as a loan officer in a local bank in New Jersey. You are college-educated and very confident and comfortable on the stand. You feel very badly for your husband, who you are sure was only trying to help out your brother, Sadiki.

If called by the defense, you would testify to the following:

1. Abasi Bandele’s character: He is a very kind, good-natured person who is always helping friends and family. He is very smart and hard working, but his efforts at running his own businesses haven’t been very successful. He also can be a little naïve at times, but you have never known him to break the law or even to cut corners.

2. You recall that when your brother came to the U.S. in October 1999, he was not able to get a job because he was not here legally. Sadiki repeatedly asked Abasi for help. Abasi finally agreed to loan him his identification documents after Sadiki promised that he would use them to get a job at a place where they would not look too closely at the documents.

3. You did not know that your brother was receiving federal rent subsidies, and you did not know that he got the apartment by using your husband’s identity.

4. Your brother was never a pilot, and you never heard anything about him being arrested or tortured while in Liberia. You did not know how he obtained political asylum, but figured that he must have fabricated some story. You know that he has some unsavory friends, so you assumed that they helped him out.

5. Your brother is twelve years older than you, and is the oldest of your five siblings. It is part of your cultural tradition that both you and your husband treat him with great respect. In fact, he is almost like your father. Neither you nor your husband call him by his first name, but rather by “Brother Oba.” He, however, addresses both of you by your given names. If he asks you to do something, you generally do it, without asking too many questions, especially if it is a request for help of some sort. For this reason, neither you nor your husband thought much about helping him with the identification documents.

On cross you would admit the following:

1. From about late 2001 through early 2004, you and your husband went through a period of very difficult marital relations. You continued to live in the same house, but barely spoke. The problems were brought about in part because of your husband’s financial troubles. You also suspect that he may have been drinking too much.
2. You recall one time in early 2003 when your brother visited your house and met with your husband. You don’t know what they talked about.

3. From time to time, your brother’s friend Dupi would call the house to speak with your husband. You never liked Dupi, and did not like that your husband spoke with him. Because of the marital problems, you never talked to your husband about this.

4. You had no idea that your husband applied for a credit card using a fake name. You have no idea who “Ade Jackson” is.
Witness Sheet – Tajuwal Ladeen (defendant’s cousin)

The defense will try to prevent the government from calling this witness. The argument is that Mr. Bandele invoked his Fifth Amendment right to remain silent when he was arrested, but the HUD agents continued to barrage him with questions. (The government will argue that Bandele waived his right to remain silent.) During that time, Bandele told the HUD agents that Ladeen worked for him at World Goods. Bandele did this because he thought they might already know that Ladeen had received Section 8 subsidies, and Bandele wanted to “cover” for him. In fact, this was the first the agents had heard of Ladeen. Bandele will argue, therefore, that any information derived from statements he made during his arrest are inadmissible, and that the Ladeen evidence is fruit of the poisonous tree.

If this argument fails, Ladeen will testify as follows:

You are a cousin of Abasi Bandele. You grew up together in Liberia and have remained close ever since. You are forty years old and the single parent of an eight-year-old boy. Your wife died of cancer six years ago. She was the family’s primary earner. You have been struggling since she died, but you have a steady job as a handy man at the INS’s regional detention facility in Elizabeth, New Jersey.

You are called to the stand by the Government pursuant to an immunity agreement. As a result of this investigation, the Government learned that, for a very short period in 2002, you were living in a Section 8 apartment, even though you earned too much in your job to qualify for rent subsidies. You testify that, when your wife died, you no longer were able to pay the mortgage on your house. You went to your cousin, Bandele, for some advice, and he told you to look into Section 8 housing. You knew nothing about it, so he explained how it worked. (He told you that he knew all about it because he had just gotten a Section 8 tenant in his building.) When you found out that you made too much money to qualify for a subsidy, Bandele offered to say that you worked at his store and earned a salary low enough to qualify for the rental subsidies. Desperate, you agreed. After a few months, you decided that the apartment you were renting was not safe, so you and your daughter moved in with your new girlfriend.

On cross, you admit that you were very scared when the HUD agents showed up at your door. But, other than that, you don’t have any “secrets” to reveal on cross.
Witness Sheet – Postal Inspector McFeely

The defense wants to call you to testify about your conversation with your Confidential Informant, who told you that Anediji Hope was connected to a fraudulent document scheme. The Informant has since been murdered in an unrelated incident, and Hope will not testify (she would invoke her 5th Amendment rights). The government will object on hearsay grounds; the defense will argue that your testimony would fall under a hearsay exception because the Informant is no longer available. You can vouch for the Informant, who you have worked with for many years and who has helped obtain over ten convictions.

If the defense prevails and is permitted to call you to the stand, you will testify along the lines of Special Agent Vigilente's summary in her activity report.
Witness Sheet – Abasi Bandele (defendant)

[The defense will have to determine whether to put the defendant on the stand. His testimony may be the best way to persuade the jury that he did not intend to defraud HUD. On the other hand, the government will have an abundance of impeachment evidence.]

You are 44 years old. You were born in Newtown, Ligeria on June 28, 1960. In 1978, you met your future wife, Ayo, through a family friend in Liberia. She moved to the United States in 1986, four years after you did, and you were married in 1989. You have three children: an eighteen-year-old daughter who will be matriculating at Connecticut State University in the fall; a fifteen-year-old son who is in high school, and a twelve-year-old son who is in middle school.

In 1977, after graduating from high school in Liberia, you studied law at the State University. In 1982, you moved to the United States because you believed that the opportunities in Liberia were not as promising as were those in the United States. You became a U.S. citizen in October, 1994; it was one of the proudest days of your life.

In 1986, several years after you moved to the United States and after you earned enough money for tuition, you enrolled in the night program at Newark University. You graduated in 1989 with Bachelor of Science degrees in criminal justice and history. You made the Dean’s List and graduated with a grade point average of 3.9.

In 1996, you were accepted into the New Jersey College of Law. Due to financial hardships, you were unable to enroll at that time. You still hope to fulfill your dream of attending law school. Your daughter also hopes to become a lawyer, and you and she often talk of attending law school together one day.

When you first moved to the United States, you worked as a construction laborer and as a cab driver. For the next seven years, until 1989, you moved back and forth between these two jobs and occasionally held both concurrently while, beginning in 1986, also attending college.

After graduating from college, you became a caseworker for the City of Newark’s Child Protective Services Agency. In this position, you worked closely with foster children. You found this job to be deeply satisfying, and in hindsight you wish you had never left it.

In about early 1998, you decided to leave your job and start your own business. Scraping together your savings (and borrowing a lot more) you bought 506 Main Street. You began to rent out the four apartments and opened a store – World Goods – on the first floor. The store sold beepers, cell phones, African jewelry, and other items. With the money that you earned from the apartment rentals, you bought several more properties.

Neither venture proved to be very successful, and in August 2001, you stopped operating World Goods, rented out the store to a friend, who opened TuTu Culture, and sold some other real estate properties (at a small loss). Several years earlier, a friend in the insurance industry had encouraged you to try your hand at that business, so, in 2000, you acquired an insurance

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producers license. Between 2000 and 2002, you worked as an independent insurance agent, selling insurance plans and services to organizations and corporations. Despite your hard efforts – you often worked twelve hour days, six days a week at World Goods and selling insurance – your business was not successful and your financial problems continued.

In April 2002, you and your wife filed for Chapter 13 bankruptcy. Your decision to do so was motivated by the lack of success you were experiencing in your business ventures, together with marital problems that threatened the continuation of your marriage. The marital problems stemmed from your financial problems and a long-running dispute between your families in Nigeria. Although you and your wife never separated, you barely communicated for several years. It was only after your arrest that you and she began to reconcile.

Things began to pick up for you in 2003. A friend of a friend, who ran a small insurance and mortgage brokerage company, hired you. You soon acquired a mortgage broker’s license and decided to try once again to open your own business. In January 2004, you opened KBAB Financial Services, Inc., which provides clients with real estate and mortgage products. The business has been very promising, although since your arrest in May 2004, you have had difficulty focusing at times. Nonetheless, you still put in long hours and are optimistic about the future. If you are convicted, you will most likely lose your professional licenses. [The fact that your job requires you to read a lot of contracts, together with your background in the law, is something that the government will focus on during cross to rebut any claim that you did not read over the employment verification form when, according to the government, you signed it.]

You are a deeply religious person, and you attend weekly services at your Church, where you are involved in philanthropic and volunteer work.

You have a very cogent explanation for why you gave your identification documents to Sadiki after he came to the U.S. in 1999. First, you are the type of person who always lends a hand to people in need, especially family members. For example, you support both of your parents in Nigeria. Your mother is scheduled to have eye surgery this summer and you will have to pay a large portion of her medical expenses. Additionally, your cultural norms require both you and your wife to treat Sadiki – the eldest male among your wife’s siblings – with great respect. Both you and she address him as “Brother Oba” instead of by his first name. He, on the other hand, calls you Abasi. Accordingly, when he first came to you for help in getting a job so that (according to what he told you) he could send money to his wife and four children in Nigeria, you did not think twice about helping him.

You have a clear memory that Sadiki never returned your identification documents after he got the security job, nor did he ask you to borrow the documents a second time to apply for an apartment, but you cannot say for sure that you did not give him the documents again. You knew that he was living in an apartment in the Bronx but you never knew that he was renting the apartment in your name. You are sure that you did not know he was receiving Section 8 benefits. In fact, you testify on direct that you did not even learn about the Section 8 program until you were arrested. You state that you do not recall signing any papers for Sadiki. You insist that you never provided Sadiki with World Goods paystubs.

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In anticipation of cross, on direct you explain the “problem areas” as follows:

1. You never used the Citibank credit card. You applied for it using the name and Social Security number of Ade Jackson because, after your bankruptcy, you had no credit. You were in a state of desperation – your business ventures had been a disaster, your wife was not talking to you, and two of your children’s birthdays were right around the corner (and you were already far enough in the dog house with your children, based on all of your wife’s badmouthing, without skipping on presents). When, one day, Sadiki’s friend Dups Odumugi stopped by your office and said that he knew a way to get you a credit card, you took him up on the offer. Once the card came, however, you were so ashamed of what you had done that you cut it up and never used it.

2. [If Ldeen testifies] You are sure that you never told Ldeen about the Section 8 program. You did sign an employment verification form for him, but only because he could not afford his house after his wife died and wanted to move to a decent apartment in his community. The problem was that there were many illegal immigrants in his community, and landlords, not wanting to lose their business, might not want to rent an apartment to someone who worked for the INS. Ldeen told you that he was afraid that if he told the truth about working for the INS – even as a handyman – his application would be denied. You had no idea that he was applying for a rent subsidized apartment.
Witness Sheet – Obasi Sadiki (cooperator)

You are in your mid-50s. Throughout your testimony, you repeatedly say that you are just here to tell the truth, but you use that as an answer to so many questions that it sounds a little insincere.

[If the defense is able to obtain the asylum petition materials: On direct, the Government will be forced to ask you questions about the false statements you made in your petition for asylum and during the hearings before the Immigration Judge. Your explanation is that you were told by a friend who had just gone through the process, that you waited too long to apply for asylum (you had been in the U.S. for well over a year), and it would be best for you to lie about when you last came to the U.S. So, instead of saying that you last came in October 1999, you said that you came in February 2001, and that your trip in October 1999 was only temporary. You insist, however, that all the details of what happened to you in Nigeria are true; only the dates are wrong. You also insist that you were an airline pilot. When the Government asks if, during the proceedings, you ever submitted a fraudulent document purporting to state that you were a pilot, you say that you did not.]

Your testimony as to the HUD fraud is basically consistent with your proffer statements, although you go into much more detail about Bandele’s knowledge that he was helping you get rent subsidies, and not just a regular apartment or a job. You “recall” that, although you never gave Bandele any money in exchange for his help, he did ask you for a favor in return for signing the form. He was having financial difficulties, and he asked if you could put him in touch with your friend Dupi. You did, but you don’t know what they talked about, or whether Dupi ever “helped” Bandele. But, when you started getting the credit cards in the name of “Ade Jackson” mailed to your apartment, you assumed that it had something to do with Dupi.

During cross, you deny that you are trying to garner favor with the Government by embellishing your testimony about Bandele’s state of knowledge and his motives for helping you, even though you did not testify about either of these issues in the grand jury. You repeatedly say that you are not afraid of getting deported, and you have no idea whether the Government can revoke your asylum. You say only that you are here because you have decided to tell the truth.

You insist that Bandele provided you with the fraudulent World Goods pay stubs, and deny that you know how to create fake documents or know other people who do. You are also sure that, after you got the job at Supersafe Security, you gave Bandele’s documents back to him. You asked to borrow them a second time when you applied for the apartment.

#64021

VI-112
ISSUES ON APPEAL

Mr. Bandele was convicted after trial and was sentenced to a term of 10 months imprisonment. You are now considering an appeal based on the following two issues:

A. Your efforts to prevent Mr. Ladeen from testifying failed. You feel strongly that his testimony was crippling to the defense, because it undercut your argument that, even if Bandele did sign the employment verification form, he did not know that it was to be used for an apartment that was rent-subsidized.

You argued during a suppression hearing that Mr. Ladeen should not be permitted to testify (and his employment verification form should not be admitted) because the HUD agents learned about Mr. Ladeen only as a result of interrogating Mr. Bandele after he invoked his Miranda rights and asked to speak with his lawyer. See Edwards v. Arizona, 451 U.S. 477 (1981). Accordingly, you argued, any evidence pertaining to Mr. Ladeen is “fruit of the poisonous tree” and inadmissible. See United States v. Patane, 304 F.2d 1013 (10th Cir. 2002)*; cf. United States v. Faulkingham, 295 F.3d 85 (1st Cir. 2002). The trial judge ruled that he did not have to determine whether the HUD agents violated Mr. Bandele’s rights or whether, if they did so, evidence derived as a result of such a violation should be suppressed. The judge ruled that, in light of Mr. Sadiki’s grand jury testimony that Mr. Bandele told him that he had once before helped someone with a Section 8 apartment, the government would have learned about Ladeen even without Mr. Bandele’s statements. See Murray v. United States, 487 U.S. 533 (1988); United States v. Martinez-Gallegos, 807 F.2d 868 (9th Cir. 1987). You argued that the government never would have connected the name “Ladeen” to Mr. Sadiki’s grand jury testimony without the information provided by Mr. Bandele, but the trial judge rejected this argument.

B. Assume all of the information and evidence in these materials had been available to the defense except for the documents contained in Mr. Sadiki’s asylum file. Both the Department of Homeland Security (to which the INS was transferred) and the Department of Justice’s Executive Office for Immigration Review refused to turn over the file on the ground that petitions for asylum are confidential. See 8 C.F.R. § 208.6. Pre-trial, defense asked the Court to direct the INS to produce the files, and the Court directed the AUSA to obtain them from the INS.

Several days after the sentencing (in time to file a notice of appeal), you receive a call from Mr. Bandele’s wife (Mr. Sadiki’s sister). She tells you that she has just learned from another family member that her brother’s asylum application is riddled with lies, and that she thinks he also lied to the Immigration Judge during a hearing. At a post-trial hearing, the Assistant U.S. Attorney stated that he had the file but determined that he did not have to provide it to the defense on the grounds that (1) it is confidential; and (2) it is

* Note to Students: Patane was revised by the Supreme Court. See 2004 WL 1431768 (2004). For the purposes of the appeal, assume that the Supreme Court has not issued a decision in Patane yet.

#63943

IV-113
not exculpatory material required to be turned over to the defense pursuant to Brady v.
Maryland, 373 U.S. 83 (1963), and its progeny. You asked the Court to review the
materials in camera. After doing so, trial judge held that the failure to produce the
materials would not have changed the outcome; thereby, rendering the failure to produce
the materials harmless error. Meanwhile, you had asked your associate, B. Ray Neack, to
research the issue. Attached are his initial findings.

Your appeal brief should cover Points A and B.
MEMORANDUM

TO: Harry Winthrop; Bandele file
FROM: B. Ray Neack
RE: Abasi Bandele – Appeal

Enclosed are the cases you asked me to pull on the suppression issue.

B.R.N.

Enclosure
Briefs and Other Related Documents

Supreme Court of the United States

Robert EDWARDS, Petitioner,

v.

State of ARIZONA.

No. 79-5269.

Argued Nov. 5, 1980.
Decided May 18, 1981.
Rehearing Denied June 22, 1981.

See 452 U.S. 973, 101 S.Ct. 3128.

Defendant was convicted in an Arizona state court of robbery, burglary and first-degree murder, and he appealed. The Arizona Supreme Court, 122 Ariz. 206, 594 P.2d 72, affirmed and defendant petitioned for writ of certiorari. The United States Supreme Court, Justice White, held that: (1) state courts applied an erroneous standard for determining waiver of right to counsel by focusing on voluntariness of confession rather than on whether defendant understood his right to counsel and intelligently and knowingly relinquished it. U.S.C.A.Const. Amend. 5.

[2] Criminal Law — 517.2(2)
110k517.2(2) Most Cited Cases

State courts applied an erroneous standard for determining waiver of right to counsel by focusing on voluntariness of confession rather than on whether defendant understood his right to counsel and intelligently and knowingly relinquished it. U.S.C.A.Const. Amend. 5.

[3] Constitutional Law — 266.1(2)
92k266.1(2) Most Cited Cases

[3] Criminal Law — 517.2(2)
110k517.2(2) Most Cited Cases

Where defendant had invoked his right to have counsel present during custodial interrogation, valid waiver of that right could not be established by showing only that he responded to police-initiated interrogation after being again advised of his rights; thus, use of defendant's confession against him at his trial violated his rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. U.S.C.A.Const. Amends. 5, 14.

110k412.2(4) Most Cited Cases

Once an accused has expressed his desire to deal with police only through counsel, he is not to be subjected to further interrogation until counsel has been made available to him unless accused himself initiates further communications with police. U.S.C.A.Const. Amend. 5.

**1881 *477 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared.

After being arrested on a state criminal charge, and after being informed of his rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, petitioner was questioned by the police on January 19, 1976, until he said that he wanted an attorney. Questioning then ceased, but on January 20 police officers came to the jail and, after stating that they wanted to talk to him and again informing petitioner of his Miranda rights, obtained his confession when he said that he was willing to talk. The trial court ultimately denied petitioner’s motion to suppress his confession, finding the statement to be voluntary, and he was thereafter convicted. The Arizona Supreme Court held that during the January 20 meeting he waived his right to remain silent and his right to counsel when he voluntarily gave his statement after again being informed of his rights.

Held: The use of petitioner’s confession against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation, as declared in Miranda, supra. Having exercised his right on January 19 to have counsel present during interrogation, petitioner did not validly waive that right on the 20th. Pp. 1883-1886.

(a) A waiver of the right to counsel, once invoked, not only must be voluntary, but also must constitute a knowing and intelligent relinquishment of a known right or privilege. Here, however, the state courts applied an erroneous standard for determining waiver by focusing on the voluntariness of petitioner’s confession rather than on whether he understood his right to counsel and intelligently and knowingly relinquished it. Pp. 1883-1884.

(b) When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights. An accused, such as petitioner, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication, exchanges, or conversations with the police. Here, the interrogation of petitioner on January 20 was at the instance *478 of the authorities, and his confession, made without having had access to counsel did not amount to a valid waiver and hence was inadmissible. Pp. 1884-1886.

122 Ariz. 206, 594 P.2d 72, reversed.

Michael J. Meehan, Tucson, Ariz., for petitioner.


Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case, 446 U.S. 950, 100 S.Ct. 2915, 64 L.Ed.2d 807 (1980), limited to Q I presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation ...."

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder. [FN1] An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later **1882 that same day. At the police station, he was informed of his rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Petitioner stated that he understood his rights, and was willing to submit to questioning. After *479 being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the authority to negotiate a deal. The officer provided Edwards with the telephone number of a county attorney. Petitioner made the call, but hung up after a few moments. Edwards then said: "I want an attorney before making a deal." At that point, questioning ceased and Edwards was taken to county jail.

[FN1] The facts stated in text are for the most part taken from the opinion of the Supreme Court of Arizona.
At 9:15 the next morning, two detectives, colleagues of the officer who had interrogated Edwards the previous night, came to the jail and asked to see Edwards. When the detention officer informed Edwards that the detectives wished to speak with him, he replied that he did not want to talk to anyone. The guard told him that "he had" to talk and then took him to meet with the detectives. The officers identified themselves, stated they wanted to talk to him, and informed him of his Miranda rights. Edwards was willing to talk, but he first wanted to hear the taped statement of the alleged accomplice who had implicated him. [FN2] After listening to the tape for several minutes, petitioner said that he would make a statement so long as it was not tape-recorded. The detectives informed him that the recording was irrelevant since they could testify in court concerning whatever he said. Edwards replied: "I'll tell you anything you want to know, but I don't want it on tape." He thereupon implicated himself in the crime.

FN2. It appears from the record that the detectives had brought the tape-recording with them.

Prior to trial, Edwards moved to suppress his confession on the ground that his Miranda rights had been violated when the officers returned to question him after he had invoked his right to counsel. The trial court initially granted the motion to suppress, [FN3] but reversed its ruling when presented with a supposedly controlling decision of a higher Arizona court. [FN4] The court stated without explanation that it found Edwards' statement to be voluntary. Edwards was tried twice and convicted. [FN5] Evidence concerning his confession was admitted at both trials.

FN3. The trial judge emphasized that the detectives had met with Edwards on January 20, without being requested by Edwards to do so, and concluded that they had ignored his request for counsel made the previous evening. App. 91-93.


FN5. The jury in the first trial was unable to reach a verdict.

On appeal, the Arizona Supreme Court held that Edwards had invoked both his right to remain silent and his right to counsel during the interrogation conducted on the night of January 19. [FN6] The court then went on to determine, however, that Edwards had waived both rights during the January 20 meeting when he voluntarily gave his statement to the detectives after again being informed that he need not answer questions and that he need not answer without the advice of counsel: "The trial court's finding that the waiver and confession were voluntarily and knowingly made is upheld."

FN6. This issue was disputed by the State. The court, while finding that the question was arguable, held that Edwards' request for an attorney to assist him in negotiating a deal was "sufficiently clear" within the context of the interrogation that it "must be interpreted as a request for counsel and as a request to remain silent until counsel was present."

Because the use of Edwards' confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments as construed in Miranda v. Arizona, **1883 supra, we reverse the judgment of the Arizona Supreme Court. [FN7]

FN7. We thus need not decide Edwards' claim that the State deprived him of his right to counsel under the Sixth and Fourteenth Amendments as construed and applied in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). In that case, the Court held that the Sixth Amendment right to counsel arises whenever an accused has been indicted or adversary criminal proceedings have otherwise begun and that this right is violated when admissions are subsequently elicited from the accused in the absence of counsel. While initially conceding in its opening brief on the merits that Edwards' right to counsel under Massiah attached immediately after he was formally charged, the State in its supplemental brief and during oral argument took the position that under Kirby v. Illinois, 406 U.S. 682, 689-690, 92...
S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972), and *Moore v. Illinois*, 434 U.S. 220, 226-227, 98 S.Ct. 458, 463-464, 54 L.Ed.2d 424 (1977), the filing of the formal complaint did not constitute the "adversary judicial criminal proceedings" necessary to trigger the Sixth Amendment right to counsel. Under the State Constitution, "no person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination." *Ariz.Const.*, Art. 2, § 30. The State contends that the Sixth Amendment right to counsel does not attach until either the constitutionally required indictment or information is filed or at least no earlier than the preliminary hearing to which a defendant is entitled if the matter proceeds by complaint. Under Arizona law, a felony prosecution may be commenced by way of a complaint, *Ariz. Rule of Criminal Procedure 2.2*. The complaint is a "written statement of the essential facts constituting a public offense, made upon oath before a magistrate," Rule 2.3, upon which the magistrate either issues an arrest warrant or dismisses the complaint. Rule 2.4. Once arrested, the accused must be taken before the magistrate for a hearing. Rule 4.1. At that hearing, the magistrate ascends the accused's true name and address, and informs him of the charges against him, his right to counsel, his right to remain silent, and his right to a preliminary hearing if charged via complaint. Rule 4.2. Unless waived, the preliminary hearing must take place no later than 10 days after the defendant is placed in custody. Rule 5.1. The purpose of the hearing is to determine whether probable cause exists to hold the defendant for trial. Rule 5.3. Against this background and in support of its position, the State relies on *Moore v. Illinois*, supra, where after recognizing that under Illinois law "[t]he prosecution in this case was commenced ... when the victim's complaint was filed in court," we noted that "adversary judicial criminal proceedings" were initiated when the ensuing preliminary hearing occurred. Moore, supra, at 228, 98 S.Ct., at 464. Cf. *United States v. Duvall*, 537 F.2d 15, 20-22 (CA2) (the filing of a complaint and the issuance of an arrest warrant does not trigger the right to counsel under the Sixth Amendment, that right accruing only upon further proceedings), cert. denied, 426 U.S. 950, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976). The Arizona Supreme Court did not address the Sixth Amendment question, nor do we.

*481 II*

In *Miranda v. Arizona*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be *482 preceded by advice to the putative defendant that he has the right to remain silent and also the right to the presence of an attorney. 384 U.S., at 479, 86 S.Ct., at 1630. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, "the interrogation must cease." If he requests counsel, "the interrogation must cease until an attorney is present." *Id.*, at 474, 86 S.Ct., at 1627.

*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

[1][2] First, the Arizona Supreme Court applied an erroneous standard for determining **1884 waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). See *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct.

Considering the proceedings in the state courts in the light of this standard, we note that in denying petitioner's motion to suppress, the trial court found the admission to have been "voluntary," App. 3, 95, without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel. The Arizona Supreme Court, in a section of its opinion entitled "Voluntariness of Waiver," stated that in Arizona, confessions are prima facie involuntary and that the State had the burden of showing by a preponderance of the evidence that the confession was freely and voluntarily made. The court stated that the issue of voluntariness should be determined based on the totality of the circumstances as it related to whether an accused's action was "knowing and intelligent and whether his will [was] overborne." 122 Ariz., at 212, 594 P.2d, at 78. Once the trial court determines that "the confession is voluntary, the finding will not be upset on appeal absent clear and manifest error." *Ibid.* The court then upheld the trial court's finding that the "waiver and confession were voluntarily and knowingly made." *Ibid.*

In referring to the necessity to find Edwards' confession knowing and intelligent, the State Supreme Court cited *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). Yet, it is clear that *Schneckloth* does not control the issue presented in this case. The issue in *Schneckloth* was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights. The Court declined to impose the "intentional relinquishment or abandonment of a known right or privilege" standard and required only that the consent be voluntary under the totality of the circumstances. The Court specifically noted that the right to counsel was a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard, *id.*, at 241, 93 S.Ct., at 2055, but held that "[t]he considerations *484 that informed the Court's holding in *Miranda* are simply inapplicable in the present case." *Id.*, at 246, 93 S.Ct., at 2057. *Schneckloth* itself thus emphasized that the voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries. Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.

Second, although we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina v. Butler*, supra, 441 U.S., at 372-376, 99 S.Ct., at 1757-1759, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial *1885 interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. *FN8* We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to *485* him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

*FN8* In *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 423 (1977), where, as in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information. In *Massiah* and *Brewer*, counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod v. Ohio*, 381 U.S. 356, 85 S.Ct. 1556, 14 L.Ed.2d 682 (1965), we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed.

*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once...
exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S., at 474, 86 S.Ct., at 1627. Our later cases have not abandoned that view. In Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), the Court noted that Miranda had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 423 U.S., at 104, n. 10, 96 S.Ct., at 326, n. 10; see also id., at 109-111, 96 S.Ct., at 329-330 (White, J., concurring). In Faretta v. Michael C., supra, 442 U.S., at 719, 99 S.Ct., at 2569, the Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his Miranda right to counsel, the Court again referred to the "undisputed right" under Miranda to remain silent and to be free of interrogation "until he had consulted with a lawyer." Rhode Island v. Innis, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980). We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to interrogate an accused in custody if he has clearly asserted his right to counsel.

In concluding that the fruits of the interrogation initiated by the police on January 20 could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right *486 identified in Miranda is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver. Rhode Island v. Innis, supra, makes this sufficiently clear. 446 U.S., at 298, n. 2, 100 S.Ct., at 1688, n. 2. [FN9]

FN9. If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

Various decisions of the Courts of Appeals are to the effect that a valid waiver of an accused's previously invoked Fifth Amendment right to counsel is possible. See, e.g., White v. Finkbeiner, 611 F.2d 186, 191 (CA7 1979) ("in certain instances, for various reasons, a person in custody who has previously requested counsel may knowingly and voluntarily decide that he no longer wishes to be represented by counsel"), cert. pending, No. 79-6601; Kennedy v. Fairman, 618 F.2d 1242 (CA7 1980); United States v. Rodriguez-Gastelum, 569 F.2d 482, 486 (CA9) (en banc) (stating that it makes no sense to hold that once an accused has requested counsel, "[he] may never, until he has actually talked with counsel, change his mind and deciding to speak with the police without an attorney being present"), cert. denied, 436 U.S. 919, 98 S.Ct. 2266, 56 L.Ed.2d 760 (1978). See generally Cobb v. Robinson, 528 F.2d 1331, 1342 (CA2 1975); United States v. Grant, 549 F.2d 942 (CA4 1977), vacated on other grounds sub nom. Whitehead v. United States, 435 U.S. 912, 98 S.Ct. 1463, 55 L.Ed.2d 502 (1978); United States v. Hart, 619 F.2d 325 (CA4 1980); United States v. Hauck, 586 F.2d 1296 (CA8 1978). The rule in the Fifth Circuit is that a knowing and intelligent waiver cannot be found once the Fifth Amendment right to counsel has been clearly invoked unless the accused initiates the renewed contact. See, e.g., United States v. Massey, 550 F.2d 300 (1977); United States v. Priest, 409 F.2d 491 (1969). Waiver is possible, however, when the request for counsel is equivocal. Nash v. Estelle, 597 F.2d 513 (CA5 1979) (en banc). See Thompson v. Wainwright, 601 F.2d 768 (CA5 1979).
show. Here, the officers conducting the interrogation on the evening of January *487 19 ceased interrogation when Edwards requested counsel as he had been advised he had the right to do. The Arizona Supreme Court was of the opinion that this was a sufficient invocation of his Miranda rights, and we are in accord. It is also clear that without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request. Indeed, Edwards informed the detention officer that he did not want to talk to anyone. At the meeting, the detectives told Edwards that they wanted to talk to him and again advised him of his Miranda rights. Edwards stated that he would talk, but what prompted this action does not appear. He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement, which was used against him at his trial. We think it is clear that Edwards was subjected to custodial interrogation on January 20 within the meaning of Rhode Island v. Innis, supra, and that this occurred at the instance of the authorities. His statement made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible. [FN10]

FN10. We need not decide whether there would have been a valid waiver of counsel had the events of January 20 been the first and only interrogation to which Edwards had been subjected. Cf. North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Accordingly, the holding of the Arizona Supreme Court that Edwards had waived his right to counsel was inerror, and the judgment of that court is reversed.

So ordered.

Chief Justice BURGER, concurring in the judgment.

I concur only in the judgment because I do not agree that either any constitutional standard or the holding of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)–as distinguished from its dicta–calls for a special rule as to how an accused in custody may waive the right to be free from interrogation. The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but *488 as with all "good" things they can be carried too far. The notion that any "prompting" of a person in custody is somehow evil per se has been rejected. Rhode Island v. Innis, 464 U.S. 391, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1979). For me, the inquiry in this setting is whether resumption of interrogation is a result of a voluntary waiver, and that inquiry should be resolved under the traditional standards established in Johnson v. Zerbst, 304 U.S. 518, 522, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938):

"*1887 "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Accord, e.g., Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). In this case, the Supreme Court of Arizona described the situation as follows:

"When the detention officer told Edwards that the detectives were there to see him, he told the officer that he did not wish to speak to anyone. The officer told him that he had to." 122 Ariz. 206, 209, 594 P.2d 72, 75 (1979) (emphasis added).

This is enough for me, and on this record the Supreme Court of Arizona erred in holding that the resumption of interrogation was the product of a voluntary waiver, such as I found to be the situation in both Innis, supra, 446 U.S., at 304, 100 S.Ct., at 1691 (concurring opinion), and Brewer v. Williams, 430 U.S. 387, 417-418, 97 S.Ct. 1232, 1248-1249, 51 L.Ed.2d 424 (1977) (dissenting opinion).

Justice POWELL, with whom Justice REHNQUIST joins, concurring in the result.

Although I agree that the judgment of the Arizona Supreme Court must be reversed, I do not join the Court's opinion because I am not sure what it means.

*489 I can agree with much of the opinion. It states the settled rule:

"It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.' Johnson v.
But few cases will be as clear as this one. Communications between police and a suspect in custody are common-place. It is useful to contrast the circumstances of this case with typical, and permissible, custodial communications between police and a suspect who has asked for counsel. For example, police do not impermissibly "initiate" renewed interrogation by engaging in routine conversations with suspects about unrelated matters. And police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney. E. g., State v. Turner, 32 Or.App. 61, 65, 573 P.2d 326, 327 (1978); see State v. Crisler, 285 N.W.2d 679, 682 (Minn.1979); State v. Marcum, 24 Wash.App. 441, 445-446, 601 P.2d 975, 978 (1979). It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk. Nothing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision. As Justice WHITE has observed, this Court consistently has "rejected any paternalistic *491 rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case." Michigan v. Mosley, 423 U.S. 96, 109, 96 S.Ct. 321, 329, 46 L.Ed.2d 313 (1975) (WHITE, J., concurring in result).[FN1]

FN1. Justice WHITE noted in Michigan v. Mosley:
"Although a recently arrested individual may have indicated an initial desire not to answer questions, he would nonetheless want to know immediately—if it were true—that his ability to explain a particular incriminating fact or to supply an alibi for a particular time period would result in his immediate release. Similarly, he might wish to know—if it were true—that (1) the case against him was unusually strong and that (2) his immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property would redound to his benefit in the form of a reduced charge." 423 U.S. at 109, n. 1, 96 S.Ct. at 329, n. 1 (WHITE, J., concurring in result).

But the Court has generally held that where police have no "right" to possess the suspect's presence, "initiation" of further communications is not appreciably different from "routine" custodial interrogations. Michigan v. Mosley, 423 U.S. 96, 99-100, 96 S.Ct. 321, 329, 46 L.Ed.2d 313 (1975).
facts of Mosley differ somewhat from the present case because here petitioner had requested counsel. It is nonetheless true in both cases that "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." Id., at 102, 96 S.Ct., at 326 (opinion of STEWART, J.).

In sum, once warnings have been given and the right to counsel has been invoked, the relevant inquiry—whether the suspect now desires to talk to police without counsel—is a question of fact to be determined in light of all of the circumstances. Who "initiated" a conversation may be relevant to the question of waiver, but it is not the sine qua non to the inquiry. The ultimate question is whether there was a free and knowing waiver of counsel before interrogation commenced.

If the Court's opinion does nothing more than restate these principles, I am in agreement with it. I hesitate to join the opinion only because of what appears to be an undue and undefined, emphasis on a single element: "initiation." As Justice WHITE has noted, the Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution. Id., at 326, 86 S.Ct., at 1654 (WHITE, J., dissenting); see **Michigan v. Tucker**, 417 U.S. 433, 443-444, 94 S.Ct. 2357, 2363, 41 L.Ed.2d 182 (1974). Miranda itself recognized, moreover, that counsel's assistance can be waived. 384 U.S., at 475, 86 S.Ct., at 1628 (opinion of Warren, C. J.). Waiver always has been evaluated under the general formulation of the Zerbst standard quoted above. My concern is that the Court's opinion today may be read as "constitutionalizing" not the generalized Zerbst standard but a single element of fact among the various facts that may be relevant to determining whether there has been a valid waiver. [FN2]

FN2. Such a step should be taken only if it is demonstrably clear that the traditional waiver standard is ineffective. There is no indication, in the multitude of cases that come to us each Term, that Zerbst and its progeny have failed to protect constitutional rights.

END OF DOCUMENT
Defendants were convicted in the United States District Court for the District of Massachusetts, Walter Jay Skinner, J., on charges arising out of conspiracy to possess and distribute illegal drugs, and they appealed. The Court of Appeals, for the First Circuit, 771 F.2d 589, affirmed. The Supreme Court, 476 U.S. 1138, 106 S.Ct. 2241, 90 L.Ed.2d 688, vacated and remanded for reconsideration, and upon remand, the Court of Appeal, 803 F.2d 20, affirmed, and defendants' petitions for certiorari were granted and consolidated. The Supreme Court, Justice Scalia, held that to determine whether marijuana observed in plain view at time of unlawful entry and later seized during subsequent search pursuant to warrant was admissible under independent source doctrine, remand was required to determine whether government agents would have sought warrant if they had not earlier entered warehouse.

Vacated and remanded.

Justice Marshall filed dissenting opinion in which Justice Steven and Justice O'Connor joined.

Justice Stevens filed dissenting opinion.

Justice Brennan and Justice Kennedy took no part in consideration or decision of cases.

West Headnotes

[1] Criminal Law 394.1(3)
110k394.1(3) Most Cited Cases

Police officers' illegal entry upon private premises does not require suppression of evidence subsequently discovered at such premises when executing search warrant obtained on basis of information wholly unconnected with initial entry. U.S.C.A. Const.Amend. 4.

110k394.1(3) Most Cited Cases

"Exclusionary rule" prohibits introduction into evidence of tangible and testimonial evidence acquired during unlawful search, as well as derivative evidence, both tangible and testimonial, that is product of primary evidence or is otherwise acquired as indirect result of unlawful search, up to point at which connection with unlawful search becomes so attenuated as to dissipate the taint. U.S.C.A. Const.Amend. 4.

[3] Criminal Law 394.1(3)
110k394.1(3) Most Cited Cases

Fourth Amendment does not require suppression of evidence initially discovered during police officers' illegal entry of private premises and rediscovered during later search pursuant to valid warrant that is wholly independent of initial illegal entry. U.S.C.A. Const.Amend. 4.

110k394.1(3) Most Cited Cases

"Independent source" doctrine permits introduction of evidence initially discovered during, or as consequence of, unlawful search, but later obtained independently from lawful activities untainted by initial illegality. U.S.C.A. Const.Amend. 4.

110k394.1(3) Most Cited Cases

Although federal agents' knowledge that marijuana was in warehouse was acquired at time of original unlawful entry, such knowledge was reacquired at time of subsequent entry pursuant to warrant and thus, upon showing that later acquisition was not...
result of earlier unlawful entry, independent source doctrine would allow admission of testimony as to that knowledge. U.S.C.A. Const. Amend. 4.

[6] Criminal Law \(\cong\) 394.1(3)
110k394.1(3) Most Cited Cases

In determining whether bales of marijuana first observed at time of unlawful entry into warehouse and again observed at time of subsequent entry pursuant to warrant were admissible, ultimate question was whether search pursuant to warrant was in fact genuinely independent source of information and tangible evidence at issue; evidence would not be admissible under independent source doctrine if agents' decision to seek warrant was prompted by what they had seen during initial unlawful entry or if information obtained during such entry was presented to magistrate and affected magistrate's decision to issue search warrant. U.S.C.A. Const. Amend. 4.

[7] Criminal Law \(\cong\) 1158(4)
110k1158(4) Most Cited Cases


[8] Federal Courts \(\cong\) 462
170Bk462 Most Cited Cases

Remand was required to determine whether independent source doctrine permitted introduction of tangible evidence first observed in plain view during unlawful entry into warehouse and again observed during subsequent search pursuant to warrant, even though district court found that government agents did not reveal prior warrantless entry to magistrate and had not included any recitation of their original observations in application for warrant; explicit finding was required as to whether agents would have sought warrant if they had not earlier entered warehouse. U.S.C.A. Const. Amend. 4.

**2531 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*533 While surveilling petitioner Murray and others suspected of illegal drug activities, federal agents observed both petitioners driving vehicles into, and later out of, a warehouse, and, upon petitioners' exit, saw that the warehouse contained a tractor-trailer rig bearing a long container. Petitioners later turned over their vehicles to other drivers, who were in turn followed and ultimately arrested, and the vehicles were lawfully seized and found to contain marijuana. After receiving this information, several agents forced their way into the warehouse and observed in plain view numerous burlap-wrapped bales. The agents left without disturbing the bales and did not return until they had obtained a warrant to search the warehouse. In applying for the warrant, they did not mention the prior entry or include any recitation of their observations made during that entry. Upon issuance of the warrant, they reentered the warehouse and seized 270 bales of marijuana and other evidence of crime. The District Court denied petitioners' pretrial motion to suppress the evidence, rejecting their arguments that the warrant was invalid because the agents did not inform the Magistrate about their prior warrantless entry, and that the warrant was tainted by that entry. Petitioners were subsequently convicted of conspiracy to possess and distribute illegal drugs. The Court of Appeals affirmed, assuming for purposes of its decision on the suppression question that the first entry into the warehouse was unlawful.

Held: The Fourth Amendment does not require the suppression of evidence initially discovered during police officers' illegal entry of private premises, if that evidence is also discovered during a later search pursuant to a valid warrant that is wholly independent of the initial illegal entry. Pp. 2532-2536.

(a) The "independent source" doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319. There is no merit to petitioners' contention that allowing the *534 doctrine to apply to evidence initially discovered during an illegal search, rather than limiting it to evidence first obtained during a later lawful search, will encourage police routinely to enter premises without a warrant. Pp. 2532-2535.

(b) Although the federal agents' knowledge that marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry, it was also acquired at the time of entry pursuant to the warrant,
and if that later acquisition was not the result of the earlier entry, the independent source doctrine allows the admission of testimony as to that knowledge. This same analysis applies to the tangible evidence, the bales of marijuana. *United States v. Silvestri*, 787 F.2d 736 (CA1, 1986), is unpersuasive insofar as it distinguishes between tainted intangible and tangible evidence. The ultimate question is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. Because the District Court did not explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse, the cases are remanded for a determination whether the warrant-authorized search of the warehouse was an independent source in the sense herein described. Pp. 2535–2536.

**2532** 803 F.2d 20 (CA1, 1986), vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE and BLACKMUN, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which STEVENS and O'CONNOR, JJ., joined, post, p. ——. STEVENS, J., filed a dissenting opinion, post, p. ——. BRENNAN and KENNEDY, JJ., took no part in the consideration or decision of the cases.

A. Raymond Randolph argued the cause for petitioners in both cases. With him on the briefs was Susan L. Lauber.

Roy T. Engler, Jr., argued the cause for the United States. With him on the briefs were Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, and Patty Merkamp Stemler.†

† Larry W. Yackle, John A. Powell, David B. Goldstein, and John Reinstein filed a brief for the American Civil Liberties Union et al. as *amicus curiae* urging reversal in No. 86-995.

*535* Justice SCALIA delivered the opinion of the Court.

[1] In *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3388, 82 L.Ed.2d 599 (1984), we held that police officers' illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry. In these consolidated cases we are faced with the question whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed.

Both cases arise out of the conviction of petitioner Michael F. Murray, petitioner James D. Carter, and others for conspiracy to possess and distribute illegal drugs. Insofar as relevant for our purposes, the facts are as follows: Based on information received from informants, federal law enforcement agents had been surveilling petitioner Murray and several of his co-conspirators. At about 1:45 p.m. on April 6, 1983, they observed Murray drive a truck and Carter drive a green camper, into a warehouse in South Boston. When the petitioners drove the vehicles out about 20 minutes later, the surveilling agents saw within the warehouse two individuals and a tractor-trailer rig bearing a long, dark container. Murray and Carter later turned over the truck and camper to other drivers, who were in turn followed and ultimately arrested, and the vehicles lawfully seized. Both vehicles were found to contain marijuana.

After receiving this information, several of the agents converged on the South Boston warehouse and forced entry. They found the warehouse unoccupied, but observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana. They left without disturbing the bales, kept the warehouse under surveillance, and did not reenter it until they had a search warrant. In applying for *536* the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry. When the warrant was issued—that is, 10:40 p.m., approximately eight hours after the initial entry— the agents immediately reentered the warehouse and seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined.

Before trial, petitioners moved to suppress the evidence found in the warehouse. The District Court denied the motion, rejecting petitioners' arguments
that the warrant was invalid because the agents did not inform the Magistrate about their prior warrantless entry, and that the warrant was tainted by that entry. \textit{United States v. Carter}, No. 83-102-S (Mass., Dec. 23, 1983), App. to Pet. for Cert. 44a-45a. The First Circuit affirmed, assuming for purposes of its decision that the first entry into the warehouse was unlawful. \textit{United States v. Moscatello}, 771 F.2d 589 (1985). Murray and Carter then separately filed petitions for certiorari, which we granted, \textsuperscript{[FN1]} **2533 480 U.S. 916, 107 S.Ct. 1368, 94 L.Ed.2d 685 (1987), and have consolidated here.

\textsuperscript{FN1} The original petitions raised both the present Fourth Amendment claim and a Speedy Trial Act claim. We granted the petitions, vacated the judgment below, and remanded for reconsideration of the Speedy Trial Act issue in light of \textit{Henderson v. United States}, 476 U.S. 321, 106 S.Ct. 1871, 90 L.Ed.2d 299 (1986). \textit{Carter v. United States and Murray v. United States}, 476 U.S. 1138, 106 S.Ct. 2241, 90 L.Ed.2d 688 (1986). On remand, the Court of Appeals again rejected the Speedy Trial Act claim and did not reexamine its prior ruling on the Fourth Amendment question. 803 F.2d 20 (1986). Petitioners again sought writs of certiorari, which we granted limited to the Fourth Amendment question.

II


[3][4] Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the "independent source" doctrine. See \textit{Silverthorne Lumber Co. v. United States}, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). That doctrine, which has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations, has recently been described as follows:

"[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." \textit{Nix v. Williams}, 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984)

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Our cases have used the concept of "independent source" in a more general and a more specific sense. The more general sense identifies all evidence acquired in a fashion untainted \textit{538} by the illegal evidence-gathering activity. Thus, where an unlawful entry has given investigators knowledge of facts \(x\) and \(y\), but fact \(z\) has been learned by other means, fact \(z\) can be said to be admissible because derived from an "independent source." This is how we used the term in \textit{Segura v. United States}, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984). In that case, agents unlawfully entered the defendant's apartment and remained there until a search warrant was obtained. The admissibility of what they discovered while waiting in the apartment was not before us, \textit{id.}, at 802-803, n. 4, 104 S.Ct., at 384, n. 4, but we held that the evidence found for the first time during the execution of the valid and untainted search warrant was admissible because it was discovered pursuant to an "independent source," \textit{id.}, at 813-814, 104 S.Ct., at 3389-90. See also \textit{United States v. Wade}, 388 U.S. 218, 240-242, 87 S.Ct. 1926, 1939-
through an independent source, it should be admissible if it inevitably would have been discovered.

Petitioners' asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. Brief for Petitioners *540 42. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. See Part III, infra. Nor would the officer without sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he **2535 finds cannot be used to establish probable cause before a magistrate. [FN2]

FN2. Justice MARSHALL argues, in effect, that where the police cannot point to some historically verifiable fact demonstrating that the subsequent search pursuant to a warrant was wholly unaffected by the prior illegal search—e.g., that they had already sought the warrant before entering the premises—we should adopt a per se rule of inadmissibility. See post, at 2539-2540. We do not believe that such a prophylactic exception to the independent source rule is necessary. To say that a district court must be satisfied that a warrant would have been sought without the illegal entry is not to give dispositive effect to police officers' assurances on the point. Where the facts render those assurances implausible, the independent source doctrine will not apply.
We might note that there is no basis for pointing to the present cases as an example of a "search first, warrant later" mentality. The District Court found that the agents entered the warehouse "in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence." United States v. Carter, No. 83-102-S (Mass., Dec. 23, 1983), App. to Pet. for Cert. 42a. While they may have misjudged the existence of sufficient exigent circumstances to justify the warrantless entry (the Court of Appeals did not reach that issue and neither do we), there is nothing to suggest that they went in merely to see if there was anything worth getting a warrant for.

It is possible to read petitioners' briefs as asserting the more narrow position that the "independent source" doctrine does apply to independent acquisition of evidence previously derived indirectly from the unlawful search, but does not apply to what they call "primary evidence," that is, evidence acquired during the course of the search itself. In addition to finding no support in our precedent, see Silverthorne Lumber, 251 U.S., at 392, 40 S.Ct., at 182 (referring specifically to evidence seized during an unlawful search), this strange distinction would produce results bearing no relation to the policies of the exclusionary rule. It would mean, for example, that the government's knowledge of the existence and condition of a dead body, knowledge lawfully acquired through independent sources, would have to be excluded if government agents had previously observed the body during an unlawful search of the defendant's apartment; but not if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse.

III

To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a worse one. See Nix v. Williams, 467 U.S., at 443, 104 S.Ct., at 2508.

We think this is also true with respect to the tangible evidence, the bales of marijuana. It would make no more sense to exclude that than it would to exclude tangible evidence found upon the corpse in Nix, if the search in that case had not been abandoned and had in fact come upon the body. The First Circuit has discerned a difference between tangible and intangible evidence that has been tainted, in that objects "once seized cannot be cleanly reseized without returning the objects to private control."

*542 United States v. Silvestri, 787 F.2d, at 739. It seems to us, however, that reseizure of tangible evidence already seized is no more impossible than rediscovery of intangible evidence already discovered. The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the independent source doctrine should not apply.

**2536 [7][8] The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry...[FN3] or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant. On this point the Court of Appeals said the following:

FN3. Justice MARSHALL argues that "the relevant question [is] whether, even if the initial entry uncovered no evidence, the officers would return immediately with a warrant to conduct a second search." Post, at 2538, n. 2; see post, at 2539, n. 4. We do not see how this is "relevant" at all. To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred--not whether it would have been sought if something else had happened. That is to say, what counts is whether the actual illegal
search had any effect in producing the warrant, not whether some hypothetical illegal search would have aborted the warrant. Only that much is needed to assure that what comes before the court is not the product of illegality; to go further than that would be to expand our existing exclusionary rule.

"[W]e can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant or to the discovery of the evidence *543 during the lawful search that occurred pursuant to the warrant.

***

"This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued. As there was no causal link whatever between the illegal entry and the discovery of the challenged evidence, we find no error in the court's refusal to suppress."

United States v. Moscatiello, 771 F.2d at 603, 604.

Although these statements can be read to provide emphatic support for the Government's position, it is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings. The District Court found that the agents did not reveal their warrantless entry to the Magistrate, App. to Pet. for Cert. 43a, and that they did not include in their application for a warrant any recitation of their observations in the warehouse, id., at 44a-45a. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse.

The Government concedes this in its brief. Brief for United States 17, n. 5. To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," App. to Pet. for Cert. 42a, and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Accordingly, we vacate the judgment and remand these cases to the Court of Appeals with instructions that it remand to the District Court for determination whether the *544 warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described.

It is so ordered.

Justice BRENNAN and Justice KENNEDY took no part in the consideration or decision of these cases.

Justice MARSHALL, with whom Justice STEVENS and Justice O'CONNOR join, dissenting.

The Court today holds that the "independent source" exception to the exclusionary rule may justify admitting evidence discovered during an illegal warrantless search that is later "rediscovered" by the same team of investigators during a search pursuant to a warrant obtained immediately **2537 after the illegal search. I believe the Court's decision, by failing to provide sufficient guarantees that the subsequent search was, in fact, independent of the illegal search, emasculates the Warrant Clause and underlines the deterrence function of the exclusionary rule. I therefore dissent.

This Court has stated frequently that the exclusionary rule is principally designed to deter violations of the Fourth Amendment. See, e.g., United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3411, 82 L.Ed.2d 677 (1984); Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). By excluding evidence discovered in violation of the Fourth Amendment, the rule "compel[s] respect for the constitutional guaranty in the only effectively available way, by removing the incentive to disregard it." Id., at 217, 80 S.Ct., at 1444. The Court has crafted exceptions to the exclusionary rule when the purposes of the rule are not furthered by the exclusion. As the Court today recognizes, the independent source exception to the exclusionary rule "allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." Nix v. Williams, 467 U.S. 431, 443, 104 S.Ct. 2501, 2508, 81 L.Ed.2d 377 (1984); see Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920). The independent source exception, like the inevitable discovery exception, is primarily *545 based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial. See Nix v. Williams, supra, 467 U.S., at 444-446, 104
S.Ct., at 2509-10; cf. United States v. Leon, supra, 468 U.S., 906-909, 104 S.Ct., at 3411-12. When the seizure of the evidence at issue is "wholly independent of" the constitutional violation, then exclusion arguably will have no effect on a law enforcement officer's incentive to commit an unlawful search. [FN1]

FN1. The clearest case for the application of the independent source exception is when a wholly separate line of investigation, shielded from information gathered in an illegal search, turns up the same evidence through a separate, lawful search. Under these circumstances, there is little doubt that the lawful search was not connected to the constitutional violation. The exclusion of such evidence would not significantly add to the deterrence facing the law enforcement officers conducting the illegal search, because they would have little reason to anticipate the separate investigation leading to the same evidence.

Given the underlying justification for the independent source exception, any inquiry into the exception's application must keep sight of the practical effect admission will have on the incentives facing law enforcement officers to engage in unlawful conduct. The proper scope of the independent source exception, and guidelines for its application, cannot be divined in a factual vacuum; instead, they must be informed by the nature of the constitutional violation and the deterrent effect of exclusion in particular circumstances. In holding that the independent source exception may apply to the facts of these cases, I believe the Court loses sight of the practical moorings of the independent source exception and creates an affirmative incentive for unconstitutional searches. This holding can find no justification in the purposes underlying both the exclusionary rule and the independent source exception.

The factual setting of the instant case is straightforward. Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA) agents stopped two vehicles after they *546 left a warehouse and discovered bales of marijuana. DEA Supervisor Garibotto and an assistant United States attorney then returned to the warehouse, which had been under surveillance for several hours. After demands that the warehouse door be opened went unanswered, Supervisor Garibotto forced open the door with a tire iron. A number of agents entered the warehouse. No persons were found inside, but the agents saw numerous bales of marijuana in plain view. Supervisor Garibotto then ordered everyone out of the warehouse. Agents did not reenter the warehouse until a warrant was obtained some eight hours later. The warehouse was kept under surveillance during the interim.

It is undisputed that the agents made no effort to obtain a warrant prior to the initial entry. The agents had not begun to prepare a warrant affidavit, and according to FBI Agent Cleary, who supervised the FBI's involvement, they had not even engaged in any discussions of obtaining a warrant. App. 52. The affidavit in support of the warrant obtained after the initial search was prepared by DEA Agent Keane, who had tactical control over the DEA agents, and who had participated in the initial search of the warehouse. The affidavit did not mention the warrantless search of the warehouse, nor did it cite information obtained from that search. In determining that the challenged evidence was admissible, the Court of Appeals assumed that the initial warrantless entry was not justified by exigent circumstances and that the search therefore violated the Warrant Clause of the Fourth Amendment.

Under the circumstances of these cases, the admission of the evidence "reseized" during the second search severely undermines the deterrence function of the exclusionary rule. Indeed, admission in these cases affirmatively encourages illegal searches. The incentives for such illegal conduct are clear. Obtaining a warrant is inconvenient and time consuming. Even when officers have probable cause to support a warrant application, therefore, they have an incentive first *547 to determine whether it is worthwhile to obtain a warrant. Probable cause is much less than certainty, and many "confirmatory" searches will result in the discovery that no evidence is present, thus saving the police the time and trouble of getting a warrant. If contraband is discovered, however, the officers may later seek a warrant to shield the evidence from the taint of the illegal search. The police thus know in advance that they have little to lose and much to gain by forgoing the bother of obtaining a warrant and undertaking an illegal search.

The Court, however, "see[s] the incentives differently." Ante, at 2534. Under the Court's view, today's decision does not provide an incentive for unlawful searches, because the officer undertaking
the search would know that "his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." *Ibid.* The Court, however, provides no hint of why this risk would actually seem significant to the officers. Under the circumstances of these cases, the officers committing the illegal search have both knowledge and control of the factors central to the trial court's determination. First, it is a simple matter, as was done in these cases, to exclude from the warrant application any information gained from the initial entry so that the magistrate's determination of probable cause is not influenced by the prior illegal search. Second, today's decision makes the application of the independent source exception turn entirely on an evaluation of the officers' intent. It normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search. [FN2] The testimony of the officers *548* *2539* conducting the illegal search is the only direct evidence of intent, and the defendant will be relegated simply to arguing that the officers should not be believed. Under these circumstances, the litigation risk described by the Court seems hardly a risk at all; it does not significantly dampen the incentive to conduct the initial illegal search. [FN3]

FN2. Such an intent-based rule is of dubious value for other reasons as well. First, the intent of the officers prior to the illegal entry often will be of little significance to the relevant question: whether, even if the initial entry uncovered no evidence, the officers would return immediately with a warrant to conduct a second search. Officers who have probable cause to believe contraband is present genuinely might intend later to obtain a warrant, but after the illegal search uncovers no such contraband, those same officers might decide their time is better spent than to return with a warrant. In addition, such an intent rule will be difficult to apply. The Court fails to describe how a trial court will properly evaluate whether the law enforcement officers fully intended to obtain a warrant regardless of what they discovered during the illegal search. The obvious question is whose intent is relevant? Intentions clearly may differ both among supervisory officers and among officers who initiate the illegal search.

FN3. The litigation risk facing these law enforcement officers may be contrasted with the risk faced by the officer in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). *Nix* involved an application of the inevitable discovery exception to the exclusionary rule. In that case, the Court stressed that an officer "who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered." *Id.* at 445, 104 S.Ct., at 2510. Unlike the officer in *Nix*, who had no way of knowing about the progress of a wholly separate line of investigation that already had begun at the time of his unconstitutional conduct, the officers in the instant cases, at least under the Court's analysis, have complete knowledge and control over the factors relevant to the determination of "independence."

The strong Fourth Amendment interest in eliminating these incentives for illegal entry should cause this Court to scrutinize closely the application of the independent source exception to evidence obtained under the circumstances of the instant cases; respect for the constitutional guarantee requires a rule that does not undermine the deterrence function of the exclusionary rule. When, as here, the same team of investigators is involved in both the first and second search, there is a significant danger that the "independence" of the *549* source will in fact be illusory, and that the initial search will have affected the decision to obtain a warrant notwithstanding the officers' subsequent assertions to the contrary. It is therefore crucial that the factual premise of the exception—complete independence—be clearly established before the exception can justify admission of the evidence. I believe the Court's reliance on the intent of the law enforcement officers who conducted the warrantless search provides insufficient guarantees that the subsequent legal search was unaffected by the prior illegal search.

To ensure that the source of the evidence is genuinely independent, the basis for a finding that a
search was untainted by a prior illegal search must focus, as with the inevitable discovery doctrine, on "demonstrated historical facts capable of ready verification or impeachment." Nix v. Williams, 467 U.S., at 445, n. 5, 104 S.Ct., at 2509, n. 5. In the instant cases, there are no "demonstrated historical facts" capable of supporting a finding that the subsequent warrant search was wholly unaffected by the prior illegal search. The same team of investigators was involved in both searches. The warrant was obtained immediately after the illegal search, and no effort was made to obtain a warrant prior to the discovery of the marijuana during the illegal search. The only evidence available that the warrant search was wholly independent is the testimony of the agents who conducted the illegal search. Under these circumstances, the threat that the subsequent search was tainted by the illegal search is too great to allow for the application of the independent source exception. [FN4] The Court's *550 contrary holding lends itself to easy abuse, and offers an incentive to bypass the constitutional requirement that probable cause be assessed by a neutral and detached magistrate before **2540 the police invade an individual's privacy. [FN5]

FN4. To conclude that the initial search had no effect on the decision to obtain a warrant, and thus that the warrant search was an "independent source" of the challenged evidence, one would have to assume that even if the officers entered the premises and discovered no contraband, they nonetheless would have gone to the Magistrate, sworn that they had probable cause to believe that contraband was in the building, and then returned to conduct another search. Although such a scenario is possible, I believe it is more plausible to believe that the officers would not have chosen to return immediately to the premises with a warrant to search for evidence had they not discovered evidence during the initial search.

FN5. Given that the law enforcement officers in these cases made no movement to obtain a warrant prior to the illegal search, these cases do not present the more difficult issue whether, in light of the strong interest in deterring illegal warrantless searches, the evidence discovered during an illegal search ever may be admitted under the independent source exception when the second legal search is conducted by the same investigative team pursuing the same line of investigation.

The decision in Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), is not to the contrary. In Segura, the Court expressly distinguished between evidence discovered during an initial warrantless entry and evidence that was not discovered until a subsequent legal search. The Court held that under those circumstances, when no information from an illegal search was used in a subsequent warrant application, the warrant provided an independent source for the evidence first uncovered in the second, lawful search.

Segura is readily distinguished from the present cases. The admission of evidence first discovered during a legal search does not significantly lessen the deterrence facing the law enforcement officers contemplating an illegal entry so long as the evidence that is seen is excluded. This was clearly the view of Chief Justice BURGER, joined by Justice O'CONNOR, when he stated that the Court's ruling would not significantly detract from the deterrent effects of the exclusionary rule because "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." Id., at 812, 104 S.Ct., at 3389. As I argue above, extending Segura to cover evidence discovered during an initial illegal search will eradicate this remaining deterrence to illegal entry. Moreover, there is less reason to believe that *551 an initial illegal entry was prompted by a desire to determine whether to bother to get a warrant in the first place, and thus was not wholly independent of the second search, if officers understand that evidence they discover during the illegal search will be excluded even if they subsequently return with a warrant.

In sum, under circumstances as are presented in these cases, when the very law enforcement officers who participate in an illegal search immediately thereafter obtain a warrant to search the same premises, I believe the evidence discovered during the initial illegal entry must be suppressed. Any other result emasculates the Warrant Clause and provides an intolerable incentive for warrantless searches. I respectfully dissent.
Justice STEVENS, dissenting.

While I join Justice MARSHALL's opinion explaining why the majority's extension of the Court's holding in Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), "emasculates the Warrant Clause and provides an intolerable incentive for warrantless searches," ante, at 2540, I remain convinced that the Segura decision itself was unacceptable because, even then, it was obvious that it would "provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home," 468 U.S., at 817, 104 S.Ct., at 3392 (dissenting opinion). I fear that the Court has taken another unfortunate step down the path to a system of "law enforcement unfettered by process concerns." Patterson v. Illinois, 487 U.S. 285, 305, 108 S.Ct. 2389, 2402, 101 L.Ed.2d 261 (STEVENS, J., dissenting). In due course, I trust it will pause long enough to remember that "the efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." Weeks v. United States, 232 U.S. 383, 393-394, 34 S.Ct. 341, 344, 58 L.Ed. 652 (1914).
The requirement that a confession must be voluntary in order to be admitted into evidence rests on two constitutional bases: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law $\supseteq 266.1(1)$
92k266.1(1) Most Cited Cases

[3] Criminal Law $\supseteq 519(1)$
110k519(1) Most Cited Cases

Defendant's statements after his arrest were not obtained in violation of the Due Process Clause of the Fourteenth Amendment, where defendant expressed a willingness to cooperate with law enforcement officers, and gave voluntary statements about his drug supplier, and the location of narcotics, without being formally questioned by officers. U.S.C.A. Const.Amend. 14.

[4] Criminal Law $\supseteq 412.2(4)$
110k412.2(4) Most Cited Cases

Defendant's statements to law enforcement officers after his arrest, concerning his drug supplier, and the location of narcotics, were obtained in violation of the Fifth Amendment, warranting their suppression, where defendant was not given Miranda warnings prior to making statements. U.S.C.A. Const.Amend. 5.

[5] Criminal Law $\supseteq 517(7)$
110k517(7) Most Cited Cases

There are at least three categories of evidence that may be derivative fruits of an un-warned confession: physical evidence, statements by a witness who is not the unwarned defendant, and later statements by the defendant himself after an initial un-warned statement. U.S.C.A. Const.Amend. 5.

[6] Criminal Law $\supseteq 412.2(4)$
110k412.2(4) Most Cited Cases

[6] Criminal Law $\supseteq 412.2(5)$
110k412.2(5) Most Cited Cases

The Massiah doctrine guarantees the defendant's
right to counsel once a criminal proceeding has been initiated, and forbids the government from deliberately eliciting statements from the defendant, in the absence of counsel and without a proper waiver. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ☐ 412.2(3)
110k412.2(3) Most Cited Cases

Once the unwarned inculpatory statements of the defendant are themselves suppressed, the role of deterrence under the Fifth Amendment becomes less primary. U.S.C.A. Const.Amend. 5.

[8] Criminal Law ☐ 412(4)
110k412(4) Most Cited Cases

Suppression of derivative evidence obtained as result of unwarned custodial statements by defendant to law enforcement officers, including statements of co-conspirator and narcotics seized from co-conspirator's residence, was not warranted, in prosecution for possession with intent to distribute and conspiracy to distribute heroin; although defendant's statements were properly suppressed, defendant's statements were voluntary and uncoerced by officers, and officers' failure to give Miranda warnings, was due to negligence, rather than any intent by officers to mislead or manipulate defendant. U.S.C.A. Const.Amends. 4, 5.

*86 F. Mark Terison, Senior Litigation Counsel, with whom Paula D. Silsby, United States Attorney, was on brief for appellant.

Kevin Lawrence Barron, with whom Denner-Sayeg, LLP was on brief for appellee.

Before BOUDIN, Chief Judge, LYNCH and LIPEZ, Circuit Judges.

LYNCH, Circuit Judge.

David Faulkingham is charged with possession with intent to distribute and conspiracy to distribute heroin. On the day of his arrest he made inculpatory statements to agents of the Maine Drug Enforcement Agency (MDEA). The agents did not give the required warning under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before Faulkingham made the statements. Faulkingham's own statements were thus ordered suppressed under Miranda. His statements, however, also led to the discovery of derivative evidence that was important to the government's case against him. That derivative evidence was testimony by a coconspirator and the drugs themselves, and it is the subject of this appeal.

Faulkingham argued, and the district court agreed, that the "fruit of the poisonous tree" doctrine, common to Fourth Amendment jurisprudence, should also apply to the derivative evidence, given the facts of this particular Miranda violation under the Fifth Amendment. United States v. Faulkingham, 156 F.Supp.2d 60 (D.Me.2001). In the end, the court granted the motion to suppress, believing that "suppression of the derivative evidence ... will serve to remind law enforcement that even in the excitement of the moment law enforcement retains an important duty to inform an individual taken into custody of his constitutional rights." Id. at 72.

*87 Individuals in custody should, of course, be informed of their rights. But we disagree that in this case the concerns that animate the Fifth Amendment require the suppression of the derivative evidence, as opposed to the suppression of Faulkingham's own unwarned statements.

I.

We outline the facts in this case as found by the magistrate judge and adopted by the district judge, and supplemented from the record. On July 28, 2000, Mark Leonard, an agent of the MDEA, received information from a confidential informant that Faulkingham was a drug dealer who lived on Route 102 in Tremont, Maine, and drove a tan Lincoln Town Car. The confidential informant also told Leonard that Faulkingham's driver's license was suspended, a fact that Leonard confirmed later that day.

On August 1, Leonard and another MDEA agent, Robert Hutchings, set off for Tremont to follow up on the information Leonard received from the confidential informant. On their way, the agents obtained a 1996 jail photograph of Faulkingham from the Hancock County Sheriff's Department.

When the agents reached the residence, they observed it from their car, which was parked in a driveway not far away. At approximately 3:15 p.m., the agents saw a tan Lincoln Town Car leaving the driveway of the residence. They followed the Town Car, until it slowed down to a stop. Leonard and Hutchings thought the driver of the Town Car matched the person in the photograph of Faulkingham.
Leonard and Hutchings searched Faulkingham's car, but found no other significant evidence. While they were searching the car, Faulkingham's wife, who happened to drive by the scene, stopped in her red pickup truck. She was dismayed when Hutchings told her of Faulkingham's arrest and said Faulkingham had recently completed a drug rehabilitation program. Hutchings gave Faulkingham's wife permission to speak with him. Faulkingham apologized to her, and asked her to get some bail money and to call his attorney.

As the agents were finishing up their search of Faulkingham's car, Faulkingham got the agents' attention, and when they walked up to their car, he told them that if he was going to cooperate and be helpful to them, he would have to be on the phone with his supplier by 3:30 p.m. Hutchings and Leonard both realized that it was already 3:28 p.m. Leonard called the agents' supervisor, Peter Arno, to get instructions on how to proceed. Arno gave the agents permission to have Faulkingham contact his supplier and record the phone call.

Faulkingham asked the agents to leave the roadside so that he would not be seen. After releasing Faulkingham from the handcuffs, Hutchings drove the agents' car, with Faulkingham in it, to a marina about a mile away. Leonard followed them in the Town Car. At the marina, Faulkingham made a few attempts to contact his supplier, but he failed because of bad reception. Faulkingham also suspected that his supplier did not answer the phone because he did not recognize the caller ID number, or because the supplier's roommate had already informed the supplier of Faulkingham's arrest. The agents asked Faulkingham how he was feeling to be sure he was not yet sick. Faulkingham continued to appear normal.

Because Faulkingham could not reach his supplier from the marina, he persuaded the agents to go to his house and make the phone call from there. When they arrived at Faulkingham's house, he did make contact with Mark Power, who he said was his supplier. [FN1] Faulkingham told Power that he had been stopped by the police just for "a driving thing," and had been released by the police. He also told Power that he should come over to the Faulkingham residence in order to hide it because MDEA agents were in the area. Eventually, Power arrived at the residence. After being confronted by the agents, Power also agreed to cooperate, and drugs were seized from Power's residence.
FN1. Power, who later cooperated with the government and became a witness against Faulkingham, denied this and claimed that Faulkingham himself was the supplier. In deciding the motion to suppress, the district court had no need to resolve this conflict, and neither do we.

Throughout the agents' contact with Faulkingham, they did not administer the Miranda warning to him. At the suppression hearing, they conceded that they should have but had not done so. They explained that lack of time and the rapid pace of the events on the day of the arrest were the reasons for their omission.

*89 II.


Faulkingham filed a motion to suppress the statements he made to the MDEA agents while in their custody, Mark Power's testimony, and the heroin to which Power's statements led the agents. The magistrate judge's decision recommended the motion as to Faulkingham's statements be granted because the agents did not give him the Miranda warning, but that the motion as to Power's statements and the physical evidence be denied, because the "fruit of the poisonous tree" doctrine does not apply to the Miranda exclusionary rule. Faulkingham, 2001 WL 586667, at *5-7.

The district court modified the magistrate judge's recommended decision by applying the "fruit of the poisonous tree" doctrine to this Miranda violation, and suppressing not only Faulkingham's custodial statements, but the derivative evidence of Power's statements and the drugs. Faulkingham, 156 F.Supp.2d 60. The district court appropriately rejected any per se application of the "fruits" doctrine to the Miranda violation, and made case-specific factual findings. Id. at 70. It found that the Miranda violation was not a technical one, and that it followed from that violation that Faulkingham did not knowingly and intelligently understand that he was waiving his privilege against compulsory self-incrimination. Id. at 70-71. The court found that all the derivative evidence at issue was obtained through Faulkingham's unwarned statements, and that the derivative evidence would not otherwise have been inevitably discovered. Id. at 71. The district court agreed with the magistrate judge's factual findings that there were no coercive official tactics by the police and that Faulkingham's statements were voluntary. Id. at 67-68. The court did not find that the agents had deliberately violated Faulkingham's Miranda rights. Id. at 66. It stated, however, that their failure to give the warning was "negligent, at best." Id. It then reasoned that "Faulkingham's statements were coerced by the lack of a Miranda warning." Id. at 67. It concluded that the deterrence rationale for Miranda dictated the suppression of both Faulkingham's statements and the derivative evidence. Id. at 71-72.

The government now appeals from the suppression order. It argues that the "fruit of the poisonous tree" doctrine does not apply to Miranda violations. The government also argues that this court's opinion in United States v. Byram, 145 F.3d 405 (1st Cir.1998), on which the district court based its decision, does not apply to this case, and that even if the factors considered by the court in Byram were to be used here, [FN2] the derivative evidence should not be suppressed.

FN2. The district court in this case misapprehended Byram as setting down a hard and fast test that fruits evidence must be suppressed when "[f]irst the Miranda violation [is] 'not merely technical.' Second, there [is] 'a substantial nexus between the violation and the second statement.' Third ... 'the second statement is not itself preceded by an adequate Miranda warning.' " Faulkingham, 156 F.Supp.2d at 69, (quoting Byram, 145 F.3d at 410). This language from Byram is appropriately read as an attempt to identify and evaluate the competing interests presented in the specific facts of that case, and not as creating a rigid test.

III.

[1] On an appeal of a disposition of a motion to suppress, "we accept the district *90 court's findings of fact unless clearly erroneous and evaluate its legal conclusions de novo." United States v. Chhien, 266 F.3d 1, 5 (1st Cir.2001). Thus, we must determine anew whether the evidence obtained as a result of Faulkingham's unwarned statements should be suppressed under the fruit of the poisonous tree doctrine.
circuits adopted a flat rule that a Miranda violation may never lead to suppression of derivative evidence. See, e.g., United States v. Sterling, 283 F.3d 216, 218-19 (4th Cir. 2002); United States v. DeSumma, 272 F.3d 176, 179-81 (3d Cir. 2001); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1047-48 (9th Cir. 1990); United States v. Sangineto-Miranda, 859 F.2d 1501, 1517-18 (6th Cir. 1988).

By contrast, this court has expressed the tentative view, in the absence of further guidance from the Supreme Court, that Elstad "does not wholly bar the door to excluding evidence derived from a Miranda violation--at least where the Miranda violation is not merely technical, where there is a substantial nexus between the violation and the fruits evidence, and where the fruits evidence, in Byram a second statement made in open court[,] is not itself preceded by an adequate Miranda warning." Byram, 145 F.3d at 409-10.

[5] There are at least three categories of evidence that may be derivative fruits of an un-Mirandized confession: physical evidence, statements by a witness who is not the unwarned defendant, and later statements by the defendant himself after an initial unwarned statement. Our decision in Byram and the Supreme Court's decision in Elstad involved the third category--further statements by the defendant. This case involves, instead, only the first two categories--physical evidence and statements of another witness.

It is entirely plausible to think that the admissibility of these three different categories of evidence derived from un-Mirandized custodial statements should be analyzed in different ways. [FN3] Nonetheless, the Supreme Court thus far has not differentiated in its analysis between the three categories of derivative evidence and, to the contrary, has used broad language, discouraging the use of the fruits doctrine following a Miranda violation, whatever the nature of the derivative evidence. Elstad, 470 U.S. at 307, 105 S.Ct. 1285 ("[T]he Miranda presumption ... does not require that the statements and their fruits be discarded as inherently tainted."). In deciding that the fruits doctrine did not apply to the Miranda violations on the facts of Elstad, the Court had to distinguish a violation of the Miranda rule from violations of different clauses of the Constitution to which the fruits doctrine does apply.

FN3. For example, it is arguable that further statements by a defendant himself should be most easily suppressed as the deterrence value of suppression is then high compared
to the other two categories, and even later statements by a defendant may involve trustworthiness concerns. (But there is a counter-argument that there is an intermediating opportunity for a later statement to be voluntary. Cf. Elstad, 470 U.S. at 347 & n. 29, 105 S.Ct. 1285 (Brennan, J., dissenting). The limited role played by the distinction between the categories of evidence here is to underline the lack of deterrence value and absence of trustworthiness concerns about physical evidence and statements of a third party, which are the subject of the suppression order here.

[6] The most common application of the fruit of the poisonous tree doctrine is as a remedy for violations of the Fourth Amendment, which protects against unlawful arrests and searches. The Supreme Court first articulated the fruits doctrine in a case where the defendant's Fourth Amendment rights were violated. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); see also Taylor v. Alabama, 457 U.S. 687, 689-93, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); Dunaway v. New York, 442 U.S. 200, 216-19, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The Court has also applied the doctrine to some violations of the Fifth Amendment, Nix v. Williams, 467 U.S. 431, 442 & n. 3, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (citing Murphy v. Waterfront Comm'n, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), which stated that the doctrine applied to the fruits of compelled in-court testimony), and to violations of the Sixth Amendment under the Massiah doctrine. [FN4] id. at 442, 104 S.Ct. 2501 (citing *12 United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), which applied the fruits doctrine to courtroom identifications resulting from pretrial identifications at which no defense counsel was present, id. at 239-42, 87 S.Ct. 1926). Perhaps for that reason, Elstad discussed the particular Fifth Amendment concerns protected by the Miranda rule.

FN5. In fact, the requirement that a Miranda warning be administered by the police is often seen as a safe (though not impregnable) harbor for the police, benefitting the police, perhaps more than the defendant. R.A. Leo, Questioning the Relevance of Miranda in the Twenty-First Century, 99 Mich. L.Rev. 1000, 1021-22 (2001) ("By creating the opportunity for police to read suspects their constitutional rights and by allowing police to obtain a signed waiver form that signifies consensual and non-coercive interrogation, Miranda has helped the police shield themselves from evidentiary challenges ... "); see also Dickerson, 530 U.S. at 444, 120 S.Ct. 2326 (noting that the Miranda rule is beneficial to

[7][8] Elstad drew a distinction between Fourth Amendment rights and Fifth Amendment rights, the latter being those that implicate Miranda warnings, and said that "a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment." Elstad, 470 U.S. at 306, 105 S.Ct. 1285. Elstad stated that the purpose of the exclusionary rule under the Fourth Amendment is "to deter unreasonable searches, no matter how probative their fruits." Id. The Fourth Amendment is specifically concerned with an individual's privacy and security and so with the methodology that law enforcement officers use in their searches. Bustamonte, 412 U.S. at 242, 93 S.Ct. 2041. By contrast, Elstad reasoned that the Fifth Amendment, by its terms, "is not concerned with non-testimonial evidence. Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion." 470 U.S. at 304-05, 105 S.Ct. 1285 (citations omitted). Instead, the Fifth Amendment is meant to safeguard the trustworthiness of testimony at trial and the fairness of the trial. Id. at 308, 105 S.Ct. 1285. Bustamonte, 412 U.S. at 242, 93 S.Ct. 2041. Once the un-Mirandized inculpatory statements of the defendant are themselves suppressed, the role of deterrence under the Fifth Amendment becomes less primary. As the Court stated in Bustamonte, "[t]he guarantees of the Fourth Amendment stand as a protection of quite different constitutional values" from those protected by the Fifth Amendment. 412 U.S. at 242, 93 S.Ct. 2041 (quoting Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966)). [FN5]
law enforcement officers because it is relatively easy "to apply in a consistent manner"). As Dickerson notes, "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." 530 U.S. at 443, 120 S.Ct. 2326.

Faulkingham argues that Elstad's continuing vitality has been called into question by Dickerson, which reaffirmed the status of Miranda's warning requirement as a constitutional rule binding on the federal and state governments. Dickerson, 530 U.S. at 438-41, 120 S.Ct. 2326. It is one thing, Faulkingham says, to decline to suppress evidence that is the fruit of a Miranda violation when there was a doubt as to whether Miranda was a constitutionally grounded rule or was merely a prophylactic procedure, as it was described in Elstad, 470 U.S. at 306, 105 S.Ct. 1285, and Michigan v. Tucker, 417 U.S. 433, 444, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974). It is another, he argues, to fail to use the fruits doctrine now that we know from Dickerson that Miranda is constitutionally grounded.

We agree in part with Faulkingham: Dickerson does strengthen his claim. But *93 Dickerson does not itself win the day for him. Dickerson cited Elstad without overruling it, stating that its "decision in that case—refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases—does not prove that Miranda is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." Id. at 440, 86 S.Ct. 1602. The various differences in purpose behind the Fourth and Fifth amendments, articulated in Elstad, continue unchanged by Dickerson, and those differences affect the remedial options appropriate for violations of the two distinct constitutional amendments, and, more specifically, for violations of the Miranda rule.

Unlike some other circuits, we are unwilling, at least until the Supreme Court addresses the issue, to say that the interest of deterrence may never lead to the suppression of derivative evidence from a Miranda violation. In Byram, this court suppressed both the original unwarned statements and later statements made at trial. The court considered the circumstances surrounding both the original confession and the later statement. Byram, 145 F.3d at 410. Between the two statements, Byram was kept in jail without ready access to counsel, subpoenaed, given no new warning, and deliberately asked questions by the prosecutor to elicit the same self-incriminating statements he had given earlier. Id. at 410; cf. United States v. Esquelin, 208 F.3d 315, 318-21 (1st Cir.2000) (suppressing the first un-Mirandized statement, but admitting the post-Miranda statements after examining the circumstances surrounding those statements and whether they were voluntary); Tankleff v. Senkowski, 135 F.3d 235, 244-45 (2d Cir.1998) (after considering the "totality of the circumstances," the court did not suppress the second statement because the defendant was warned between the first and second statements and the statement was voluntary).

But deterrence weighs less heavily on the Fifth Amendment legal scale, which balances the value of the derivative evidence to the truth seeking process against the protection of the defendant's Fifth Amendment rights, once the defendant's own statements are suppressed. The balance, to the extent the Supreme Court's case law may permit balancing, necessarily involves weighing the reliability of the unwarned derivative evidence against the need for deterrence. Here, the derivative evidence is itself reliable. Further, the defendant's own statements were not coerced and were not unreliable in the classic sense of involuntariness. See Dickerson, 530 U.S. at 432-33, 120 S.Ct. 2326 (stating that before Miranda, "the law governing the admission of confessions" was concerned with the unreliability of coerced confessions); Elstad, 470 U.S. at 304, 105 S.Ct. 1285 (same). Where, as here, negligence is the reason that the police failed to give a Miranda warning, the role of deterrence is weaker than in a case, such as Byram, where the apparent reason the police failed to give a warning was their intention to manipulate the defendant into giving them information.

Faulkingham's claim, taking all the surrounding circumstances into account, simply does not tip the balance toward a strong need for deterrence. Faulkingham's statement was not the result of "coercive official tactics." Faulkingham, 156 F.Supp.2d at 67 (internal quotations marks omitted) (quoting Byram, 145 F.3d at 407). There was no deliberate misconduct by the MDEA agents here. There was no misleading or manipulation by the government, as was true in Byram. The findings of the magistrate judge and the trial judge *94 give us no reason to think that the agents deliberately failed to give the warning in order to get to the physical evidence or that they did so to get to another witness who might or might not incriminate Faulkingham. The agents' negligence resulted in the suppression of Faulkingham's confession, itself a detriment to the
agents, who conceded at the suppression hearing that they did not administer the *Miranda* warning, and that they should have done so.

In fact, Faulkingham himself started talking without much questioning. Agent Hutchings requested Faulkingham's cooperation, but Faulkingham, on his own, began to give the agents the information about Mark Power. When Faulkingham told the agents the crucial information that he must make the call to Power in the next few minutes, the agents were not even in their car with Faulkingham. They were in the process of searching Faulkingham's car, and Faulkingham got their attention because he wanted to speak to them.

The facts of this case also do not raise any of the concerns that are typically raised under other constitutional provisions that do trigger the fruits doctrine: there is no Fourth Amendment violation and no violation of the right to counsel. In addition, there is nothing to shock the conscience of the court and no fundamental unfairness. We do not say what the appropriate remedy would be if the facts surrounding the *Miranda* violation involved some of these other concerns or a very strong need for deterrence. Perhaps the Supreme Court will address those facts before we need to do so.

We do hold, on the facts here, that Faulkingham's far weaker argument for recognition of a deterrence interest for suppression of derivative evidence arising from a negligent violation of his *Miranda* rights is insufficient to carry the day.

Accordingly, we reverse the grant of the suppression motion and remand for further proceedings not inconsistent with this opinion. *So ordered.*
Briefs and Other Related Documents

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellant, v. Samuel Francis PATANE, Defendant-Appellee.

No. 01-1503.


Defendant was indicted for being a felon in possession of a firearm. The United States District Court for the District of Colorado, Walker Miller, J., granted motion to suppress firearm, and government appealed. The Court of Appeals, Ebel, Circuit Judge, held that (1) probable cause for arrest existed, but (2) firearm was properly suppressed as fruit of Miranda violation.

Affirmed.

West Headnotes

110k1144.12 Most Cited Cases

[1] Criminal Law § 1158(4)
110k1158(4) Most Cited Cases

In reviewing district court's probable cause determination, Court of Appeals considers the evidence in a light most favorable to the district court's legal determinations, and reviews the court's findings of historical fact for clear error; absent any finding of fact, Court of Appeals will uphold district court's legal determination if any reasonable view of the evidence supports it. U.S.C.A. Const.Amd. 4.

110k1139 Most Cited Cases

Court of Appeals reviews the ultimate determinations of reasonable suspicion to stop and probable cause to arrest de novo. U.S.C.A. Const.Amd. 4.

[3] Arrest § 63.4(7.1)
35k63.4(7.1) Most Cited Cases

Probable cause existed for defendant's arrest, on charge of violating a domestic violence restraining order, even though defendant was reported to have made only a single phone call to victim, and call might have been accidental; restraining order forbade defendant to contact victim, directly or indirectly, in person or by telephone. U.S.C.A. Const.Amd. 4.

[4] Arrest § 63.4(2)
35k63.4(2) Most Cited Cases

Probable cause for arrest does not require certainty of guilt or even a preponderance of evidence of guilt, but rather only reasonably trustworthy information that would lead a reasonable person to believe an offense was committed. U.S.C.A. Const.Amd. 4.

[5] Criminal Law § 394.1(3)
110k394.1(3) Most Cited Cases

Physical fruits of Miranda violation must be suppressed where necessary to serve Miranda's deterrent purpose, and that purpose requires suppression of physical fruits of negligent Miranda violation.

110k394.1(3) Most Cited Cases

Firearm found by police, following defendant's statement as to its location, was subject to suppression as fruit of officer's negligent failure to give complete Miranda warnings. U.S.C.A. Const.Amd. 5; 18 U.S.C.A. § 922(g)(1).

*1014 Joseph C. Wyderko, Attorney, Criminal Division, U.S. Department of Justice, Washington, D.C. (John W. Suthers, United States Attorney; Suneeta Hazra and Sean Connelly, Assistant United States Attorneys, Denver, CO, with him on the briefs), for Plaintiff-Appellant.


Before EBEL, ANDERSON, and HENRY, Circuit Judges.
EBEL, Circuit Judge.

The Government appeals from the district court's order suppressing the physical evidence against Samuel Francis Patane on charges of gun possession by a felon. The district court based its suppression order on its conclusion that the evidence was insufficient to establish probable cause to arrest Patane. We conclude, contrary to the district court, that probable cause existed to arrest Patane. However, we affirm the district court's order on the alternative ground that the evidence must be suppressed as the physical fruit of a Miranda violation.

I. BACKGROUND

Patane was indicted for possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The district court held a suppression hearing at which the police investigation leading to discovery of the gun was detailed. Ruling from the bench a week later, the court granted defendant's motion to suppress. Patane's arrest resulted from the intersection of two essentially independent investigations—one by Colorado Springs Detective Josh Benner regarding Patane's gun possession, and another by Colorado Springs Officer Tracy Fox regarding Patane's violation of a domestic violence restraining order.

The story begins when Patane was arrested for harassing and menacing his ex-girlfriend, Linda O'Donnell. He was released on bond from the El Paso, Colorado county jail on June 3, 2001, subject to a temporary restraining order. The restraining order is not in the record, but uncontested testimony indicates that it forbade Patane to contact O'Donnell, in person or by phone, directly or indirectly, in the 72 hours after his release on bond.

On June 6, an agent with the federal Bureau of Alcohol, Tobacco, and Firearms telephoned Detective Benner, a member of a local police drug interdiction unit that worked closely with the ATF. The agent said that a county probation officer had told him that Patane was a convicted felon who also had been convicted on a domestic violence charge, and that Patane possessed a Glock .40 caliber pistol. The record does not reveal how the probation officer knew that Patane had the gun. Detective Benner called O'Donnell to inquire about the gun, and she told him that Patane had the pistol with him at all times.

Seemingly by coincidence, at the moment Benner called O'Donnell to ask about the gun, Officer Fox had arrived at O'Donnell's residence, responding to a call from O'Donnell about an alleged violation of the restraining order. O'Donnell told Officer Fox that two days earlier, O'Donnell received a hang-up call. Using the *69 feature on her telephone, O'Donnell learned that the call originated from a number that O'Donnell recognized as Patane's home telephone. This call violated Patane's restraining order, O'Donnell stated, and she showed Officer Fox a copy of the order. O'Donnell said that she was afraid for her safety, that she knew Patane regularly had a gun, and that Patane kept a list of people he wanted to kill. Officer Fox confirmed by computer that a restraining order had been issued.

Officer Fox did not confirm O'Donnell's use of the call tracing, although she had done so in a prior, unrelated case and thus was aware it was possible. Neither Officer Fox nor Detective Benner ran a criminal background check on O'Donnell prior to Patane's arrest, which Patane asserts would have revealed that O'Donnell was herself out on bond for carrying a concealed weapon, criminal trespass, theft, and criminal damage.

Detective Benner and Officer Fox then spoke by phone. Officer Fox said she planned to arrest Patane for violating the restraining order by calling O'Donnell, and the two arranged to go to Patane's house. Officer Fox knocked on the door while Detective Benner went out back in case Patane attempted to flee. The woman who answered the door summoned Patane. Officer Fox asked Patane to step outside, which he did. She asked him about the hang-up call, and Patane denied having made the call or having contacted O'Donnell in any way. Officer Fox told Patane that he was under arrest and handcuffed him shortly afterward.

With Patane arrested and handcuffed, Detective Benner emerged from the back of the house and approached Patane. Detective Benner began advising Patane of his Miranda rights, but only got as far as the right to silence when Patane said that he knew his rights. No further Miranda warnings were given, a fact which the Government concedes on appeal resulted in a Miranda violation. Detective Benner told Patane he was interested in what guns Patane owned. Patane replied, "That is already in police custody." Detective Benner said, "I am more interested in the Glock." Patane said he was not sure he should tell Detective Benner about the Glock pistol because he did not want it taken away.
Detective Benner said he needed to know about it, and Patane said, "The Glock is in my bedroom on a shelf, on the wooden shelf." Detective Benner asked for permission to get the gun, which Patane granted, and Detective Benner went inside, found the gun where Patane described, and seized it. Detective Benner then told Patane, as the detective later testified, that "I wasn't going to arrest him *1016 for the gun at this time because I wanted to do some more investigations." Officer Fox took Patane to the police station and booked him for violating the restraining order.

The next day, Detective Benner met with Patane's probation officer and verified that Patane had a prior felony conviction for drug possession as well as a misdemeanor third degree assault conviction.

II. PROBABLE CAUSE

On appeal, the Government argues that the district court erred in concluding that the police lacked probable cause to arrest Patane for violating the domestic violence restraining order. We agree with the Government.

[1][2] In reviewing the district court's probable cause determination, "we consider the evidence in a light most favorable to the district court's legal determinations, and review the court's findings of historical fact for clear error. Absent any finding of fact, we will uphold the court's legal determination if any reasonable view of the evidence supports it. We review the ultimate determinations of reasonable suspicion to stop and probable cause to arrest de novo." United States v. Treto-Haro, 287 F.3d 1000, 1002 (10th Cir.2002) (citations omitted). We have articulated the substantive probable cause standard as follows:

An officer has probable cause to arrest if, under the totality of the circumstances, he learned of facts and circumstances through reasonably trustworthy information that would lead a reasonable person to believe that an offense has been or is being committed by the person arrested. Probable cause does not require facts sufficient for a finding of guilt; however, it does require more than mere suspicion.

United States v. Morris, 247 F.3d 1080, 1088 (10th Cir.2001) (internal quotation marks and citations omitted).

The district court's ruling that no probable cause existed to arrest Patane for violating the domestic violence restraining order was based on its view that domestic disputes often involve "claims and counterclaims ... thrown between people who have separated some sort of an intimate relationship," and therefore that uncorroborated allegations arising from such disputes are "just inadequate" to establish probable cause. Unexplored avenues of corroboration noted by the court were: the failure to check telephone records to confirm O'Donnell's allegation that a call had been placed from Patane's residence to hers during the time frame covered by the restraining order, "verification which presumably could have been done rather easily," the failure to investigate O'Donnell's credibility prior to the arrest, the failure to corroborate O'Donnell's accusations apart from Detective Benner's confirmation that Patane indeed possessed a gun, which "has nothing to do with the crime for which he was arrested," and the failure to determine whether persons other than Patane had access to Patane's telephone. The court also noted that "[i]t's just one contact which ... could, in my life experience, have been an innocent mistake" because "people do make calls to numbers with which they are familiar, not intending to make the call," that Patane denied having contacted O'Donnell, and that O'Donnell delayed two days in reporting the call to the police.

We reject any suggestion that victims of domestic violence are unreliable witnesses whose testimony cannot establish probable cause absent independent corroboration. We have stated, "when examining informant evidence used to support a claim of probable cause for a warrantless arrest, *1017 the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness." Easton v. City of Boulder, 776 F.2d 1441, 1449 (10th Cir.1985); see also Gazell v. Hiler, 223 F.3d 518, 519-20 (7th Cir.2000) ("Police are entitled to base an arrest on a citizen complaint ... of a victim ... without investigating the truthfulness of the complaint, unless ... they have reason to believe it's fishy." (citations omitted)). See generally 2 Wayne R. LaFave, Search and Seizure § 3.4(a), at 209-11 (3d ed.1996) (noting that "[b]y far the prevailing view" is that corroboration is not essential in victim-witness cases, and arguing "that when an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such may not be the case").

We find no basis for the suggestion that domestic violence victims are undeserving of the presumption of veracity accorded other victim-witnesses. Indeed,
our decision in Easton forecloses such a position. In Easton, probable cause to arrest for child molestation was based on the accusations of two child witnesses, one five years old and the other three years old. We rejected as "an entirely unacceptable point of view" the argument that the children's testimony was suspect, stating:

In a great many child molestation cases, the only available evidence that a crime has been committed is the testimony of children. To discount such testimony from the outset would only serve to discourage children and parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution. Easton, 776 F.2d at 1449. [FN1] A strict corroboration requirement in domestic violence cases would create precisely the same proof problems we found dispositive in Easton.

FN1. We noted in Easton that the accusations of the children contained "significant" discrepancies, and even noted the possibility that their testimony would be inadmissible in court due to an inability to understand the oath, yet we held that the children's accusations established probable cause. 776 F.2d at 1449-50.

In this case, neither the district court nor Patane point to any evidence in the record suggesting that O'Donnell lied about the purported hang-up call out of personal animosity against Patane arising from their failed relationship, let alone that the police were aware of such evidence at the time of arrest. For example, there was no evidence that O'Donnell had threatened to lie in such a manner, or that she had lied in such a manner in the past. To the contrary, there was evidence that Patane recently had been arrested for harassing and menacing O'Donnell after he threatened to kill her, that O'Donnell knew that Patane carried a gun and kept a list of persons (including police officers) he wanted to kill, and that O'Donnell feared that Patane would kill her. Admittedly, O'Donnell waited two days before reporting the hang-up call, a fact that could cast some doubt on the veracity of her report. However, we do not believe that fact alone was sufficient to require the officers to treat her complaint with special skepticism.

In any event, we note that the officers here did corroborate O'Donnell's veracity in two respects. First, the district court found as fact that, prior to the arrest, Detective Benner had learned from a probation officer that Patane possessed a gun. Second, Officer Fox verified that a restraining order had been issued against *1018 Patane. The mere fact that further corroboration was possible is not dispositive of whether the information available would lead a reasonable person to believe that an offense had been committed.

[3][4] At oral argument, Patane argued that, as a matter of law, a single hang-up phone call could not constitute a violation of the restraining order. We disagree. As noted above, the evidence showed that the restraining order forbade Patane to contact O'Donnell, directly or indirectly, in person or by telephone, and counsel for Patane conceded that multiple hang-up phone calls would amount to a violation of the restraining order. We find no basis to conclude that a single call is not "contact" with the victim, or that a single call does not implicate the same concerns about intimidation and harassment that multiple calls would. Cf. 42 U.S.C. § 1366(a), (b)(1) ("encouraging) States ... to treat domestic violence as a serious violation of criminal law" by authorizing Attorney General to make grants to implement "mandatory arrest or prosecutor programs and ... policies for protection order violations"). We acknowledge that it is conceivable that a single hang-up call might result from careless rather than willful behavior. However, probable cause does not require certainty of guilt or even a preponderance of evidence of guilt, but rather only reasonably trustworthy information that would lead a reasonable person to believe an offense was committed. Morris, 247 F.3d at 1088. The possibility that the hang-up call here was accidental does not defeat probable cause.

Accordingly, we conclude that Patane's arrest was supported by probable cause to believe that Patane had violated the domestic violence restraining order. [FN2]

FN2. In light of our conclusion that the officers had probable cause to arrest for violation of the restraining order, it is unnecessary to reach the Government's alternative argument that the arrest was justified by probable cause to believe that Patane was a felon in possession of a gun. The district court declined to decide whether the officers had probable cause to arrest on the basis of Patane's gun violation. ("[T]o allow the arresting officers after the fact to go back and scramble ... for evidence that might justify an arrest on another charge ...
would not be a good rule to establish....
).
On appeal, the Government argued that this reasoning is foreclosed by United States v. Santona-Garcia, 264 F.3d 1188, 1192-93 (10th Cir.2001) (officer’s subjective belief as to non-existence of probable cause not dispositive); see also Treto-Haro, 287 F.3d at 1006 (same). Patane correctly conceded that the district court’s reasoning was erroneous in light of our precedent, and on appeal he argued only that the officers lacked probable cause to believe that he was a felon in possession of a gun. The district court did not reach this issue, and we decline to do so in the first instance on appeal.

III. SUPPRESSION OF THE PHYSICAL FRUITS OF A MIRANDA VIOLATION

Our conclusion that the district court erroneously based suppression of the gun on the absence of probable cause to arrest does not end our inquiry. Patane argues that suppression of the gun should be affirmed because, even if the arrest was proper, the ensuing Miranda violation independently requires suppression of the physical evidence.

The district held, and the Government concedes on appeal, that a Miranda violation occurred when the police questioned Patane about his possession of a gun without administering the complete Miranda warnings. As explained above, this questioning led Patane to admit that he possessed a gun in his bedroom, which admission in turn led immediately to seizure of the gun. The Government correctly concedes that Patane’s admissions in response to questioning were inadmissible under *1019 Miranda, but argues that the physical fruit of the Miranda violation—the gun—is admissible.

The district court determined that it was unnecessary to decide whether the physical fruits of a Miranda violation must be suppressed because it had concluded that the underlying arrest that led to the confession was unconstitutional. Because we have reversed the conclusion that the arrest was unconstitutional, we are now squarely presented with the issue whether the gun should be suppressed in any event because it was obtained as the fruits of an unconstitutional confession. This issue was fully briefed and presented below and it is again fully briefed on appeal. Resolution of this issue involves our answering a purely legal question (i.e., whether the physical fruits of a Miranda violation must be suppressed), a question that potentially would render remand and further proceedings unnecessary. Thus, we now turn to that issue. Smith v. Plati, 258 F.3d 1167, 1174 (10th Cir.2001).

Below, we conclude that the physical evidence that was the fruit of the Miranda violation in this case must be suppressed.

A. Supreme Court precedent

The Government relies primarily on two Supreme Court cases for its argument that the fruits doctrine does not apply to Miranda violations: Michigan v. Tucker, 417 U.S. 433, 445-46, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), and Oregon v. Elstad, 470 U.S. 298, 306, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). Both cases, it is true, declined to apply the fruits of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), to suppress evidence obtained from an un-Mirandized confession. However, both cases were predicated upon the premise that the Miranda rule was a prophylactic rule, rather than a constitutional rule.

Elstad, 470 U.S. at 305, 105 S.Ct. 1285 ("The prophylactic Miranda warnings are not themselves rights protected by the Constitution ...." (quoting New York v. Quarles, 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)) (internal quotation marks omitted)); id. at 308, 105 S.Ct. 1285 ("Since there was no actual infringement of the suspect’s constitutional rights, [Tucker ] was not controlled by the doctrine expressed in Wong Sun that fruits of a constitutional violation must be suppressed." (emphasis added)); Tucker, 417 U.S. at 445-46, 94 S.Ct. 2357 (distinguishing Wong Sun because “the police conduct at issue here did not abridge respondent’s constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard that privilege”). Because Wong Sun requires suppression only of the fruits of unconstitutional conduct, the violation of a prophylactic rule did not require the same remedy.

However, the premise upon which Tucker and Elstad relied was fundamentally altered in Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). In Dickerson, the Supreme Court declared that Miranda articulated a constitutional rule rather than merely a prophylactic one. Id. at 444, 86 S.Ct. 1602 ("Miranda announced a constitutional rule that Congress may not supersede legislatively."); see id. at 432, 438, 440, 86 S.Ct. 1602. Thus, Dickerson undermined the logic underlying Tucker and Elstad.

Additionally, a close reading of Tucker and Elstad
reveals other distinctions that lead us to conclude that those cases should not be given the sweeping reading the Government is asserting. We examine each decision below.

*Tucker* involved an un-Mirandized custodial interrogation that occurred prior to *1020* the issuance of the *Miranda* decision. [FN3] During the course of the interrogation, the defendant identified a relevant witness of whom the police previously had been ignorant. The defendant argued before the Court that the testimony of the witness so identified by the defendant should have been barred as the fruit of the *Miranda* violation. The Court’s rejection of this argument rested largely on its conclusion that excluding the fruits of this confession would have minimal prophylactic effect because the officers were acting in complete good faith under prevailing pre-*Miranda* law that barred only coerced confessions. After noting in the opening paragraph of the opinion that the interrogation took place prior to *Miranda, Tucker, 417 U.S. at 435, 94 S.Ct. 2357,* the Court explained:

[FN3. *Miranda* nonetheless applied because it was issued prior to Tucker’s trial. In fact, the defendant received all the warnings later incorporated into the *Miranda* requirements except for the advice that he could receive free counsel if he was indigent.]

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right.... Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

We consider it significant to our decision in this case that the officers’ failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda.* Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. For the time respondent was questioned these police officers were guided, quite rightly, by the principles established in *Escobedo v. Illinois,* .... *Id. at 447, 94 S.Ct. 2357* (emphasis added, footnote omitted). The Court then noted that no coercion rendered the challenged testimony unreliable. *Id. at 449, 94 S.Ct. 2357.*

The other Supreme Court case offered by the Government to support its argument is *Eliasd, 470 U.S. at 306, 105 S.Ct. 1285.* In *Eliasd,* the defendant made incriminating statements while in custodial interrogation prior to the issuance of *Miranda* warnings. The police then administered *Miranda* warnings, and thereafter the defendant made further incriminating statements. The issue in *Eliasd* was whether the defendants post-Mirandized statements must be suppressed as the fruit of the earlier *Miranda* violation. *Id. at 303, 105 S.Ct. 1285.* The Supreme Court held that suppression was not required, rejecting the view that the post-warning statements were the unconstitutional product of "a subtle form of lingering compulsion, the psychological impact of the suspect’s conviction that he has let the cat out of the bag." *Id. at 311, 105 S.Ct. 1285.* After repeating the now-suspect reasoning that a *Miranda* violation was not necessarily a constitutional violation and thus not controlled by the fruits doctrine of *Wong Sun,* the Court stated:

[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution’s case in chief, does not require that the statements and their fruits be discarded as inherently tainted....

.... In deciding how sweeping the judicially imposed consequences of a failure to administer *Miranda* warnings should be, the *Tucker* Court noted that neither the general goal of deterring *1021* improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness’ testimony. The unwarned confession must, of course, be suppressed, but the Court ruled that introduction of the third-party witness’ testimony did not violate Tucker’s Fifth Amendment rights. We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused’s own voluntary testimony. As in *Tucker,* the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. The Court has often noted: A living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. *Id. at 307-09, 105 S.Ct. 1285* (first emphasis added, alterations and internal quotation marks omitted). *Eliasd* thus drew a distinction between fruits consisting of a subsequent confession by the
defendant after having been fully Mirandized and fruits consisting of subsequently obtained "inanimate evidentiary objects." \textit{Id.} at 309, 105 S.Ct. 1285. A subsequent, Mirandized confession need not be excluded because it is the product of "volition," willingly offered up by a defendant who already had been made aware of his Miranda rights. \textit{Id.} By implication, "inanimate evidentiary objects" would be excludable, because physical evidence derived from the defendant's un-Mirandized statement is not the product of volition after a defendant has been Mirandized properly. [FN4] See \textit{id.} at 347 n. 29, 105 S.Ct. 1285 (Brennan, J., dissenting) ("[T]oday's opinion surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a Miranda violation. The Court relies heavily on individual 'volition' as an insulating factor in successive-confession cases.... [This] factor is altogether missing in the context of inanimate evidence." (citation omitted)). [FN5]

FN4. \textit{See also Orozco v. Texas}, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969). In \textit{Orozco}, the officers interrogated a suspect in custody without giving Miranda warnings, learning that the suspect owned a gun and where it was located. \textit{Id.} at 325, 89 S.Ct. 1095. Ballistics tests of the gun indicated that it had been used to commit a murder. \textit{Id.} In a terse holding, the Court held that "the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self Incrimination Clause of the Fifth Amendment as construed in Miranda." \textit{Id.} at 326, 89 S.Ct. 1095 (emphasis added). The Court did not expressly consider whether the gun and the ballistics evidence would be admissible on remand. However, one plausible reading of \textit{Orozco} is that the reference to the unconstitutional "use" of the statements includes their use by police officers in obtaining the gun, as well as their introduction of the admission at trial.

This reading of \textit{Orozco} is reinforced by the Court's subsequent opinion in \textit{Kastigar v. United States}, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). \textit{Kastigar} noted that the privilege against self-incrimination "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used," \textit{id.} at 445, 92 S.Ct. 1653, and that "immunity from use and derivative use is coextensive with the scope of the privilege," \textit{id.} at 453, 92 S.Ct. 1653.

Indeed, in \textit{Miranda} itself the Court stated that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." \textit{384 U.S.} 436, 434, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (emphasis added).

FN5. There is a substantial argument that \textit{Elstad} ought not even be treated as a case involving application of the Wong Sun fruits doctrine in the first place, for precisely the reasons emphasized by \textit{Elstad} in its volition discussion. In rejecting the argument that the second confession was the result of some "subtle form of lingering compulsion," \textit{id.} at 311, \textit{Elstad} in effect concluded that the second confession was not evidence "obtained ... as a direct result" of the Miranda violation. \textit{Wong Sun}, 371 U.S. at 485, 83 S.Ct. 407. In other words, the post-Mirandized confession in \textit{Elstad} was admitted because it was not (rather than despite the fact that it was) the fruit of the poisonous tree.

While the reasoning regarding volition in \textit{Elstad}'s holding indicates that the physical fruits of a Miranda violation are subject to the Wong Sun fruits doctrine, we acknowledge that dicta elsewhere in the opinion has been cited for the contrary conclusion. See \textit{Elstad}, 470 U.S. at 307, 105 S.Ct. 1285 ("[T]he Miranda presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted."); \textit{id.} at 308, 105 S.Ct. 1285 (stating that \textit{Tucker}'s reasoning "applies with equal force when the alleged 'fruit' of a noncoercive Miranda violation is neither a witness nor an article of evidence but the accused's own voluntary testimony"). [FN6] These passages, in contrast to the volition discussion, provide only ambiguous support for the position for which they are cited. To the extent they do address the admissibility of the physical fruits of a Miranda violation rather than a subsequent Mirandized confession, they are dicta not part of the reasoning of the holding.

FN6. We also recognize that Justice O'Connor argued that the physical fruits of a
Miranda violation were not subject to Wong Sun suppression in her pre-Elstad concurrence in New York v. Quarles, 467 U.S. 649, 665-72, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part). As explained above, this argument was not adopted by the Court in Elstad or in any subsequent opinion of the Court. Justice O'Connor joined the majority opinion in Dickerson.

In any event, we do not suggest that the holding in Elstad relying on volition definitively establishes that the physical fruits of a Miranda violation must be suppressed. Rather, the essential point for our analysis is only that Elstad does not definitively establish the contrary rule. We think Justice White most accurately summarized the relevance of Elstad and Tucker to the issue of suppression of the physical fruits of a Miranda violation:

In Michigan v. Tucker, this Court expressly left open the question of the admissibility of physical evidence obtained as a result of an interrogation conducted contrary to the rules set forth in Miranda v. Arizona. Since that time, the state and federal courts have been divided on this question. Indeed, in Massachusetts v. White, 439 U.S. 280, 99 S.Ct. 712, 58 L.Ed.2d 519 (1978), this Court was evenly divided on the issue of the admissibility of physical evidence obtained from an interrogation that violated Miranda.

*1023 While Elstad has been considered illuminating by some Courts of Appeals on the question of admissibility of physical evidence yielded from a Miranda violation, that decision did not squarely address the question presented here, and in fact, left the matter open.


It is true that, prior to Dickerson, the Tenth Circuit applied Tucker and Elstad to the physical fruits of a Miranda violation and concluded that suppression was not required because "[w]here the uncounseled statement is voluntary ... there is no fifth amendment violation and the fruits may be admissible." United States v. McCurdy, 40 F.3d 1111, 1117 (10th Cir.1994) (internal quotations omitted). However, once again Dickerson has undercut the premise upon which that application of Elstad and Tucker was based because Dickerson now concludes that an un-Mirandized statement, even if voluntary, is a Fifth Amendment violation. Dickerson, 530 U.S. at 444, 120 S.Ct. 2326.

Accordingly, we reject the Government's position that Tucker and Elstad foreclose suppression of the physical fruits of a Miranda violation.

B. Lower court approaches

[5] Courts applying Dickerson have split on the proper application of Wong Sun to the physical fruits of a Miranda violation. The Third and Fourth Circuits have ruled that the physical fruits of a Miranda violation never are subject to Wong Sun suppression. United States v. Sterling, 283 F.3d 216, 218-19 (4th Cir.2002), cert. denied, --- U.S. ----, 122 S.Ct. 2606, 153 L.Ed.2d 792 (2002); United States v. DeSumma, 272 F.3d 176, 180-81 (3d Cir.2001), cert. denied, --- U.S. ----, 122 S.Ct. 1631, 152 L.Ed.2d 641 (2002); accord United States v. Newton, 181 F.Supp.2d 157, 179-81 & n. 16 (E.D.N.Y.2002); Taylor v. Stata, 274 Ga. 269, 553 S.E.2d 598, 605 (2001); State v. Walton, 41 S.W.3d 75, 88-90 (Tenn.2001); Abraham v. Kansas, 211 F.Supp.2d 1308, 1323 (D.Kan. July 2002) (holding that "[a]though the Court's holding in Dickerson seems to have altered this general rule that fruits of a Miranda violation need not be suppressed," the state court's failure to suppress physical fruits was not an "unreasonable application of federal law" under 28 U.S.C. § 2254(d)(1)); Worden v. McLemore, 200 F.Supp.2d 746, 752-53 (E.D.Mich.2002) (holding that state court's failure to suppress physical fruits of Miranda violation was not an unreasonable application of clearly established federal law because of "disagreement and confusion" among courts regarding application of Dickerson). The First Circuit, by contrast, has ruled that the physical fruits of a Miranda violation must be suppressed in certain circumstances, depending on the need for deterrence of police misconduct in light of the circumstances of each case. United States v. Faulkingham, 295 F.3d 85, 90-94 (1st Cir.2002). Below, we analyze the merits of each of these approaches. We conclude that the First Circuit is correct that the physical fruits of a Miranda violation must be suppressed where necessary to serve Miranda's deterrent purpose. However, we part company with the First Circuit in the application of that standard, because we conclude that Miranda's deterrent purpose requires suppression of the physical fruits of a negligent Miranda violation. We therefore conclude that suppression of the gun in the present case was appropriate.
The Third and Fourth Circuits have concluded that the fruits doctrine simply does not apply to Miranda violations even after Dickerson, United States v. Sterling, 283 F.3d 216, 218-19 (4th Cir.2002), cert. denied, --- U.S. ----, 122 S.Ct. 2606, 153 L.Ed.2d 792 (2002); United States v. DeSumma, 272 F.3d 176, 180-81 (3d Cir.2001), cert. denied, --- U.S. ----, 122 S.Ct. 1631, 152 L.Ed.2d 641 (2002). Both of these cases held that the physical fruits of a Miranda violation were admissible. Sterling, 283 F.3d at 219 (shotgun found in vehicle as a result of Miranda violation); DeSumma, 272 F.3d at 180-81 (gun found in vehicle as a direct result of Miranda violation). Both Sterling and DeSumma relied on substantially the same reasoning, focusing primarily an isolated passage in Dickerson. Dickerson noted at the outset of the opinion that "Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." 530 U.S. at 432, 120 S.Ct. 2326. Later in the opinion, in the course of rejecting various arguments supporting the erroneous view that Miranda was not a constitutional decision, the Court stated:

The Court of Appeals also noted that in Oregon v. Elstad we stated that "[t]he Miranda exclusionary rule ... serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself." 475 U.S. at 12, 106 S.Ct. 876 (White, J., dissenting from denial of certiorari). By wholly undermining the doctrinal foundation upon which those holdings were built, Dickerson effectively left Elstad and Tucker standing but prevented lower courts from extending their holdings. Of course, prior to Dickerson many lower courts (including this one) already had expanded the holdings of Elstad and Tucker by concluding that Miranda violations do not require suppression of physical fruits, but Dickerson explicitly limited its saving language to Miranda's "progeny in this Court." 530 U.S. at 432, 120 S.Ct. 2326 (emphasis added). Far from endorsing pre-Dickerson lower court case law, then, Dickerson instead signaled the contrary view.

The second fundamental problem with the reasoning in DeSumma and Sterling is that the language that they rely on for the proposition that Dickerson endorsed the extension of Elstad to physical fruits in fact said only that Elstad "recognizes ... that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." Dickerson, 530 U.S. at 441, 120 S.Ct. 2326 (emphasis added). The critical question, of course, is how the two are different. At oral argument in the present case, the Government argued only that the way that Fourth Amendment violations
differ from Fifth Amendment violations is that the Wong Sun fruits doctrine applies to the former and not the latter. This argument already has been rejected by the Supreme Court. Nix v. Williams, 467 U.S. 431, 442 & n.3, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (noting that the Court has applied the fruits doctrine to violations of the Fifth Amendment, citing Murphy v. Waterfront Comm’n, 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)); Katigar v. United States, 406 U.S. 441, 460-61, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Although Dickerson itself does not explain how searches under the Fourth Amendment are "different," Elstad does just that: "a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine." 470 U.S. at 306, 105 S.Ct. 1285 (emphasis added). [FN7] This language indicates that Miranda violations are "different" because a narrowed application of the fruits doctrine applies to Miranda violations, not because the fruits doctrine does not apply at all. Cf. id. at 306, 105 S.Ct. 1285 (referring to "the Miranda exclusionary rule").

FN7. Elstad also stated that a second way that Fourth Amendment violations are different from Miranda violations is that only the former are constitutional violations. 470 U.S. at 305-07, 105 S.Ct. 1285. This difference, of course, is one that Dickerson itself rejects.

Of course, Elstad’s explanation of how application of the fruits doctrine is "different" in Miranda cases begs the question of what a "broad" application means. We conclude that the broad application of the fruits doctrine is that defined in Nix: "the prosecution is not to be put in a better position than it would have been in if no illegality had transpired." 467 U.S. at 443, 104 S.Ct. 2501. Application of the fruits doctrine in the Miranda context is not "broad" because a number of exceptions to this pure rule have been recognized, circumstances where the prosecution is permitted to benefit from the Miranda violation. See Elstad, 470 U.S. at 314, 105 S.Ct. 1285; Tucker, 417 U.S. at 447-48, 94 S.Ct. 2357; New York v. Quarles, 467 U.S. 649, 657, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (unwarned answers to questions in a situation posing a threat to the public safety "may be used"); Harris v. New York, 401 U.S. 222, 225-26 & n. 2, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) (unwarned statements may be used for impeachment on cross-examination).

*1026 One could argue that further narrowing of the pure fruits doctrine in the Miranda context--narrowing beyond that already effected by the holdings of Elstad and Tucker [FN8]--also is appropriate. However, we are unpersuaded that the additional narrowing articulated in DeSumma and Sterling (refusing to apply the fruits exclusion to physical evidence obtained as a result of the illegally obtained confession) reflects a correct understanding of the way in which Miranda violations are, in Dickerson’s words, "different" from Fourth Amendment violations.

FN8. Tucker’s narrowing would seem no longer applicable because it appeared to establish an exception only for questioning that pre-dated Miranda itself. Elstad’s narrowing would still have applicability today because it declined to apply the fruits exclusion to a subsequent voluntary confession rendered after the Miranda warnings are given.

A blanket rule barring application of the fruits doctrine to the physical fruits of a Miranda violation would mark a dramatic departure from Supreme Court precedent. The Court consistently has recognized that deterrence of police misconduct, whether deliberate or negligent, is the fundamental justification for the fruits doctrine. Nix, 467 U.S. at 442-43, 104 S.Ct. 2501 ("The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections."); see also Elstad, 470 U.S. at 308, 105 S.Ct. 1285 (identifying trustworthiness and deterrence as the two rationales for a broad fruits suppression rule); Tucker, 417 U.S. at 447, 94 S.Ct. 2357 (noting "the deterrent purpose of the exclusionary rule"). The Court also has been consistent in narrowing the scope of the fruits doctrine in the Miranda context only where deterrence is not meaningfully implicated. See Elstad, 470 U.S. at 308-09, 105 S.Ct. 1285 (stating that admission of voluntary post-warning statements will not undercut deterrence because the suspect remains "free to exercise his own volition in deciding whether or not to make a [post-warning] statement to the authorities"); Tucker, 417 U.S. at 447-48, 94 S.Ct. 2357 (explaining that the "deterrence rationale loses much of its force" in that case because the
unwarned interrogation occurred prior to Miranda's issuance).

In sharp contrast with Elstad and Tucker, however, the rule argued for by the Government here risks the evisceration of the deterrent provided by the fruits doctrine, as this case well illustrates. As a practical matter, the inability to offer Patane's statements in this case affords no deterrence, because the ability to offer the physical evidence (the gun) renders the statements superfluous to conviction. See generally United States v. Kruger, 151 F.Supp.2d 86, 101-02 (D.Me.2001) ("The exclusion of the cocaine, the substance--indeed essence--of the suppressed statements, is necessary to deter law enforcement officers from foregoing the administration of Miranda warnings ...,"), overruled by Faulkingham, 295 F.3d at 92-94; Yale Kamisar, On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony, 93 Mich. L.Rev. 929, 933 (1995) ("Unless the courts bar the use of the often-valueable evidence derived from an inadmissible confession, as well as the confession itself, there will remain a strong incentive to resort to forbidden interrogation methods."); David A. Wollin, Policing the Police: Should Miranda Violations Bear Fruit?, 53 Ohio St. L.J. 805, 843-48 (1992) ("Police officers seeking physical evidence are not likely to view the loss of an unwarned confession as particularly great *1027 when weighed against the opportunity to recover highly probative non-testimonial evidence, such as a murder weapon or narcotics."). The present case is hardly anomalous in this respect, as demonstrated by the multitude of reported cases where the record demonstrated that the interrogating authorities intentionally (and in some cases pursuant to official policy and training) violated a suspect's Miranda rights in order to procure derivative evidence. E.g., United States v. Orso, 234 F.3d 436, 441 (9th Cir.2000), aff'd in part, rev'd in part, 266 F.3d 1030 (9th Cir.2001) (en banc); Henry v. Kornan, 197 F.3d 1021, 1026, 1028 (9th Cir.1999); Pope v. Zenon, 69 F.3d 1018, 1023-24 (9th Cir.1995), overruled by Orso, 266 F.3d 1030; Cooper v. Dupnik, 963 F.2d 1220, 1224-27 (9th Cir.1992); United States v. Carter, 884 F.2d 368, 373 (8th Cir.1989); United States v. Esquillrn, 42 F.Supp.2d 20, 33 (D.Me.1999), aff'd, 208 F.3d 315 (1st Cir.2000).

Further, the rule urged upon us by the Government appears to make little sense as a matter of policy. From a practical perspective, we see little difference between the confessional statement "The Glock is in my bedroom on a shelf," which even the Government concedes is clearly excluded under Miranda and Wong Sun, and the Government's introduction of the Glock found in the defendant's bedroom on the shelf as a result of his unconstitutionally obtained confession. If anything, to adopt the Government's rule would allow it to make greater use of the confession than merely introducing the words themselves.

Accordingly, we decline to adopt the position of the Third and Fourth Circuits that the Wong Sun fruits doctrine never applies to Miranda violations.

2. Faulkingham

With its recent decision in United States v. Faulkingham, 295 F.3d 85 (1st Cir.2002), the First Circuit rejected the Third and Fourth Circuits' blanket refusal to apply Wong Sun suppression to the fruits of a Miranda violation. Id. at 90-91. Faulkingham acknowledged, contrary to Sterling and Desumma, that Dickerson's recognition that Miranda violations are constitutional violations strengthened the argument that their physical fruits must be suppressed. Id. at 92-93. However, Faulkingham concluded that suppression of the fruits of a Miranda violation was not required in every case. Rather, it adopted a rule mandating suppression of the fruits of a Miranda violation in individual cases where "a strong need for deterrence" outweighs the reliability of that evidence. Id. at 93. Because the physical fruits of a Miranda violation generally will be trustworthy evidence, it appears that in most cases the First Circuit's analysis boils down to a rule excluding the fruits of a Miranda violation only when there is a "strong need for deterrence." On each of Faulkingham's two basic points--that Dickerson alters the analysis regarding suppression of the fruits of a Miranda violation, and that suppression of the physical fruits is required where necessary to effectuate Miranda's deterrent purpose--we agree with the First Circuit. For reasons already stated above, we conclude that each of these propositions is compelled by Supreme Court precedent.

Turning to the application of this standard to circumstances--present both in Faulkingham and in the present case--where an officer negligently rather than intentionally violates a defendant's Miranda rights, however, we disagree with the First Circuit. In Faulkingham, the court concluded that, where the Miranda violation resulted from mere negligence on the part of the interrogating officer, there is no strong need for deterrence and thus *1028 the physical fruits of the Miranda violation need not be excluded. We conclude that Faulkingham's cramped view of deterrence leads it to an erroneous conclusion.
regarding negligent *Miranda* violations.

Faulkingham asserted, without elaboration, that "[o]nce the un-*Mirandized* inculpatory statements of the defendant are themselves suppressed, the role of deterrence under the Fifth Amendment becomes less primary." *Id.* at 92. The heart of the court's analysis is the following:

Where, as here, negligence is the reason that the police failed to give a *Miranda* warning, the role of deterrence is weaker than in a case ... where the apparent reason the police failed to give a warning was their intention to manipulate the defendant into giving them information.

Faulkingham's claim, taking all the surrounding circumstances into account, simply does not tip the balance toward a strong need for deterrence. Faulkingham's statement was not the result of "coercive official tactics." There was no deliberate misconduct by the [police] agents here. There was no misleading or manipulation by the government.... The findings of the magistrate judge and the trial judge give us no reason to think that the agents deliberately failed to give the warning in order to get to the physical evidence or that they did so to get to another witness who might or might not incriminate Faulkingham. The agents' negligence resulted in the suppression of Faulkingham's confession, itself a detriment to the agents....

*Id.* at 93-94 (citation to opinion below omitted).

The court noted that "Faulkingham himself started talking without much questioning" and observed that "there is nothing to shock the conscience of the court and no fundamental unfairness." *Id.* at 94. In light of the totality of the circumstances, the court held "that Faulkingham's far weaker argument for recognition of a deterrence interest for suppression of derivative evidence arising from a negligent violation of his *Miranda* rights is insufficient to carry the day." *Id.*

We do not believe that "the role of deterrence ... becomes less primary" once the statement itself has been suppressed. *Id.* at 92. Instead, the relevant question remains whether suppression of the statement alone provides deterrence sufficient to protect citizens' constitutional privilege against self-incrimination. As we already have stated above, see *supra* at 1026-27, we answer this question in the negative.

Nor do we share *Faulkingham* 's view that there is a strong need for deterrence only where the officer's actions were deliberate rather than negligent. Finally, *Miranda* itself made clear that the privilege against self-incrimination was animated, not by a desire merely to deter intentional misconduct by police, but by the "one overriding thought" that "the constitutional foundation underlying the privilege is the respect a government ... must accord to the dignity and integrity of its citizens." *Miranda*, 384 U.S. at 460, 86 S.Ct. 1602; see also *id.* ("[T]he privilege has come rightfully to be recognized in part as an individual's substantive right ... to a private enclave where he may lead a private life." (internal quotation marks omitted)). The personal right to be free of government invasions of the privilege against self-incrimination is violated just as surely by a negligent failure to administer *Miranda* warnings as a deliberate failure. Deterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that officers diligently (non-negligently) protect—and properly are trained to protect—the constitutional rights of citizens. *1029* The call for deterrence may be somewhat less urgent where negligence rather than intentional wrongdoing is at issue, but in either case we conclude that the need is a strong one.

Moreover, we conclude that a rule limiting *Wong Sun* suppression of the physical fruits of a *Miranda* violation to situations where the police demonstrably acted in intentional bad faith would fail to vindicate the exclusionary rule's deterrent purpose. Even in cases where the failure to administer *Miranda* warnings was calculated, obtaining evidence of such deliberate violations of *Miranda* often would be difficult or impossible. *Cf. Whren v. United States*, 517 U.S. 806, 814, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (noting that one reason for the Court's adoption of an objective test for the reasonableness of a seizure was "the evidentiary difficulty of establishing subjective intent" of officers). An exclusionary rule turning on the subjective motivation of the police officer would burden courts with the difficult task of discerning, from the particular facts of each case, the thought processes of the officer that resulted in the *Miranda* violation. See *Carter*, 884 F.2d at 374 (reasoning that courts should not "once again be embroiled in the endless case-by-case voluntariness inquiries *Miranda* was designed to prevent [because] the ease-of-application rationale enunciated by the Supreme Court will be largely nullified"). We believe a rule that provides certainty in application and clarity for the officers charged with operating under it better serves the interests of citizens, officers, and judicial efficiency.

Accordingly, we agree with the First Circuit's conclusion that the *Wong Sun* fruits doctrine may apply to the physical fruits of *Miranda* violations, but we decline to adopt *Faulkingham* 's view that the physical fruits of a negligent *Miranda* violation are...
admissible. As a practical matter, we agree with the view of the United States District Court for the District of Maine, expressed in an opinion issued prior to Faulkingham:

Prior to the decision in Dickerson, the issue of suppression of evidence discovered as a result of a violation of Miranda turned on a complex and largely opaque analysis attempting to resolve on an ad hoc basis the tension between the reliability of the subject evidence and the goal of deterrence of police misconduct. This Court believes all of that has gone by the board with the conferral by Dickerson of constitutional status on the right to a Miranda warning. United States v. Kruger, 151 F.Supp.2d 86, 101-02 (D.Me.2001) (citations omitted), overruled by Faulkingham, 295 F.3d at 90-94.

[6] As explained above, we conclude that Miranda’s deterrent purpose would not be vindicated meaningfully by suppression only of Patane’s statement. We hold that the physical fruits of this Miranda violation must be suppressed.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court’s order suppressing the gun. [FN9]

FN9. Defendant Appellee’s Motion to Clarify Statements Made in Defendant Appellee’s Previously Filed Answer Brief is denied as moot.

304 F.3d 1013

Briefs and Other Related Documents (Back to top)

* 01-1503 (Docket)
(Oct. 31, 2001)

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Supreme Court of the United States
UNITED STATES, Petitioner,
v.
Samuel Francis PATANE.
No. 02-1183.

Background: Defendant was indicted for being felon in possession of firearm based on seizure of weapon at defendant's home in course of his arrest for violating restraining order. The United States District Court for the District of Colorado, Walker Miller, J., granted motion to suppress firearm. The United States Court of Appeals for the Tenth Circuit affirmed, 304 F.3d 1013. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Thomas, held that:
1) failure to give suspect Miranda warnings does not require suppression of physical fruits of suspect's unwarned but voluntary statements;
2) officers' failure to give Miranda warnings in conjunction with restraining-order arrest did not require suppression of weapon at firearms trial, since weapon was recovered based on defendant's voluntary statement that he possessed it.

Reversed and remanded.

Justice Kennedy filed opinion concurring in the judgment joined by Justice O'Connor.

Justice Souter filed dissenting opinion joined by Justices Stevens and Ginsburg.

Justice Breyer filed dissenting opinion.

[1] Criminal Law 393(1)
110k393(1) Most Cited Cases

[1] Criminal Law 394.1(3)
110k394.1(3) Most Cited Cases

Self-incrimination Clause cannot be violated by introduction of nontestimonial evidence obtained as result of voluntary statements; thus, failure to give suspect Miranda warnings does not require suppression of physical fruits of suspect's unwarned but voluntary statements. (Per Justice Thomas with two Justices concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 5.

[2] Criminal Law 412.2(3)
110k412.2(3) Most Cited Cases

Although Miranda rule creates presumption of coercion, in absence of specific warnings, that is generally irrebuttable for purposes of prosecution's case in chief, unwarned statements that are not actually compelled can be used to impeach defendant's testimony at trial. (Per Justice Thomas with two Justices concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 5.

[2] Witnesses 390.1
410k390.1 Most Cited Cases

Although Miranda rule creates presumption of coercion, in absence of specific warnings, that is generally irrebuttable for purposes of prosecution's case in chief, unwarned statements that are not actually compelled can be used to impeach defendant's testimony at trial. (Per Justice Thomas with two Justices concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amend. 5.

[3] Criminal Law 412.2(3)
110k412.2(3) Most Cited Cases

Extension of prophylactic rules designed to protect Self-incrimination Clause's core privilege, including Miranda rule, must be justified by necessity for protection of actual right against compelled self-

[4] Criminal Law [394.1(3)]
110k394.1(3) Most Cited Cases

[4] Criminal Law [412.2(3)]
110k412.2(3) Most Cited Cases

Miranda rule does not require that statements taken without complying with rule and their fruits be discarded as inherently tainted. (Per Justice Thomas with two Justices concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amdt. 5.

[5] Criminal Law [394.1(3)]
110k394.1(3) Most Cited Cases

Police officers' failure to give Miranda warnings after arresting suspect for violating restraining order and before questioning him about weapon he reportedly possessed did not require suppression of weapon at felon-in-possession-of-firearm trial, since weapon was recovered based on suspect's voluntary statements that he possessed it and advising officers were it could be found; there was no risk of admission at trial of any coerced self-incriminating statements. (Per Justice Thomas with two Justices concurring and two Justices concurring in the judgment.) U.S.C.A. Const.Amdt. 5; 18 U.S.C.A. § 922(g)(1).

Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

*1 After Officer Fox began to investigate respondent's apparent violation of a temporary restraining order, a federal agent told Fox's colleague, Detective Benner, that respondent, a convicted felon, illegally possessed a pistol. Officer Fox and Detective Benner proceeded to respondent's home, where Fox arrested him for violating the restraining order. Benner attempted to advise respondent of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, but respondent interrupted, asserting that he knew his rights. Benner then asked about the pistol and retrieved and seized it. Respondent was indicted for possession of a firearm by a convicted felon, 18 U.S.C. § 922(g)(1). The District Court granted his motion to suppress the pistol, reasoning that the officers lacked probable cause to arrest him, and declining to rule on his alternative argument that the gun should be suppressed as the fruit of an unwarned statement. The Tenth Circuit reversed the probable-cause ruling, but affirmed the suppression order on respondent's alternative theory. Rejecting the Government's argument that Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222, and Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182, foreclosed application of the fruit of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441, to the present context, the appeals court reasoned that Oregon and Tucker, which were based on the view that Miranda announced a prophylactic rule, were incompatible with Dickerson v. United States, 530 U.S. 428, 444, 120 S.Ct. 2326, 147 L.Ed.2d 405, in which this Court held that Miranda announced a constitutional rule. The appeals court thus equated Dickerson's ruling with the proposition that a failure to warn pursuant to Miranda is itself a violation of the suspect's Fifth Amendment rights.

Held: The judgment is reversed, and the case is remanded.

304 F.3d 1013, reversed and remanded.

Justice THOMAS, joined by THE CHIEF JUSTICE and Justice SCALIA, concluded that a failure to give a suspect Miranda warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements. Pp. ---- - ----4-12.

(a) The Miranda rule is a prophylactic employed to protect against violations of the Self-Incarnation Clause, U. S Const., Amdt. 5. That Clause's core protection is a prohibition on compelling a criminal defendant to testify against himself at trial. See, e.g., Chavez v. Martinez, 538 U.S. 760, 764-768, 123 S.Ct. 1994, 155 L.Ed.2d 984. It cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements. See, e.g., United States v. Hubbell, 530 U.S. 27, 34, 120 S.Ct. 2037, 147 L.Ed.2d 24. The Court has recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination. For example, the Miranda rule creates a presumption of coercion in custodial interrogations, in the absence of specific warnings, that is generally irrebuttable for
purposes of the prosecution's case in chief. E.g., 384 U.S., at 467, 86 S.Ct. 1602. But because such prophylactic rules necessarily sweep beyond the Self-Incrimination Clause's actual protections, see, e.g., Withrow v. Williams, 507 U.S. 680, 690-691, 113 S.Ct. 1745, 123 L.Ed.2d 407, any further extension of one of them must be justified by its necessity for the protection of the actual right against compelled self-incrimination, e.g., Chavez, supra, at 778, 123 S.Ct. 1994. Thus, uncompelled statements taken without Miranda warnings can be used to impeach a defendant's testimony at trial, see Eilstad, supra, at 307-308, 105 S.Ct. 1285, though the fruits of actually compelled testimony cannot, see New Jersey v. Portash, 440 U.S. 450, 458-459, 99 S.Ct. 1292, 59 L.Ed.2d 501. A blanket rule requiring suppression of statements noncompliant with the Miranda rule could not be justified by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, e.g., Eilstad, 470 U.S., at 308, 105 S.Ct. 1285, and would therefore fail the Court's requirement that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it. Furthermore, the Clause contains its own exclusionary rule that automatically protects those subjected to coercive police interrogations from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial. E.g., id., at 307-308, 105 S.Ct. 1285. This explicit textual protection supports a strong presumption against expanding the Miranda rule any further. Cf. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443. Finally, nothing in Dickerson calls into question the Court's continued insistence on its close-fit requirement. Pp. ---- - ----5-8.

(b) That a mere failure to give Miranda warnings does not, by itself, violate a suspect's constitutional rights or even the Miranda rule was evident in many of the Court's pre-Dickerson cases, see, e.g., Eilstad, supra, at 308, 105 S.Ct. 1285, and the Court has adhered to that view since Dickerson, see Chavez, supra, at 772-773, 123 S.Ct. 1994. This follows from the nature of the "fundamental trial right" protected by the Self-Incrimination Clause, e.g., Withrow, supra, at 691, 113 S.Ct. 1745, which the Miranda rule, in turn, protects. Thus, the police do not violate a suspect's constitutional rights (or the Miranda rule) by negligent or even deliberate failures to provide full Miranda warnings. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence. And, at that point, the exclusion of such statements is a complete and sufficient remedy for any perceived Miranda violation. Chavez, supra, at 790, 123 S.Ct. 1994. Unlike actual violations of the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter and therefore no reason to apply Wong Sun's "fruit of the poisonous tree" doctrine. It is not for this Court to impose its preferred police practices on either federal or state officials. Pp. ---- - ----8-10.

*2 (c) The Tenth Circuit erred in ruling that the taking of unwarned statements violates a suspect's constitutional rights. Dickerson's characterization of Miranda as a constitutional rule does not lessen the need to maintain the close-fit requirement. There is no such fit here. Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's pistol, does not implicate the Clause. It presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, the exclusion of unwarned statements is not a complete and sufficient remedy for any perceived Miranda violation. E.g., Chavez, supra, at 790, 123 S.Ct. 1994. Similarly, because police cannot violate the Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement, as the court below believed. The word "witness" in the constitutional text limits the Self-Incrimination Clause's scope to testimonial evidence. Hubbell, supra, at 34-35, 120 S.Ct. 2037. And although the Court requires the exclusion of the physical fruit of actually coerced statements, statements taken without sufficient Miranda warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. This Court declines to extend that presumption further. Pp. ---- - ----10-12.

Justice KENNEDY, joined by Justice O'CONNOR, concluded that it is unnecessary to decide whether the detective's failure to give Patane full Miranda warnings should be characterized as a violation of the Miranda rule itself, or whether there is anything to deter so long as the unwarmed statements are not later introduced at trial. In Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222, New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 28 L.Ed.2d 1, evidence obtained following unwarned interrogations was held admissible based in large part on the Court's recognition that the concerns underlying the Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, rule must be accommodated to other objectives of the criminal

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justice system. Here, it is sufficient to note that the Government presents an even stronger case for admitting the evidence obtained as the result of Patane's unwarned statement than was presented in Estelle and Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182. Admission of nontestimonial physical fruits (the pistol here) does not run the risk of admitting into trial an accused's coerced incriminating statements against himself. In light of reliable physical evidence's important probative value, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation. Pp. ---- ----1-2.

*3 THOMAS, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA, J., joined. KENNEDY, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS and Ginsburg, JJ., joined. BREYER, J., filed a dissenting opinion.

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Justice THOMAS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice SCALIA join.

*4 In this case we must decide whether a failure to give a suspect the warnings prescribed by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), requires suppression of the physical fruits of the suspect's unwarned but voluntary statements. The Court has previously addressed this question but has not reached a definitive conclusion. See Massachusetts v. White, 439 U.S. 280, 99 S.Ct. 712, 58 L.Ed.2d 519 (1978) (per curiam) (dividing evenly on the question); see also Patterson v. United States, 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988) (White, J., dissenting from denial of certiorari). Although we believe that the Court's decisions in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), and Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), are instructive, the Courts of Appeals have split on the question after our decision in Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). See, e.g., United States v. Villalba-Alvarado, 345 F.3d 1007 (C.A.8 2003) (holding admissible the physical fruits of a Miranda violation); United States v. Sterling, 283 F.3d 216 (C.A.4 2002) (same); United States v. DeSumma, 272 F.3d 176 (C.A.3 2001) (same); United States v. Faulkingham, 295 F.3d 85 (C.A.1 2002) (holding admissible the physical fruits of a negligent Miranda violation). Because the Miranda rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements, we answer the question presented in the negative.

In June 2001, respondent, Samuel Francis Patane, was arrested for harassing his ex-girlfriend, Linda O'Donnell. He was released on bond, subject to a temporary restraining order that prohibited him from contacting O'Donnell. Respondent apparently violated the restraining order by attempting to telephone O'Donnell. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department began to investigate the matter. On the same day, a county probation officer informed an agent of the Bureau of Alcohol, Tobacco, and Firearms (ATF), that respondent, a convicted felon, illegally possessed a .40 Glock pistol. The ATF relayed this information to Detective Josh Benner, who worked closely with the ATF. Together, Detective Benner and Officer Fox proceeded to respondent's residence.

After reaching the residence and inquiring into respondent's attempts to contact O'Donnell, Officer Fox arrested respondent for violating the restraining order. Detective Benner attempted to advise respondent of his Miranda rights but got no further
than the right to remain silent. At that point, respondent interrupted, asserting that he knew his rights, and neither officer attempted to complete the warning. [FN1] App. 40.

FN1. The Government concedes that respondent's answers to subsequent on-the-scene questioning are inadmissible at trial under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), despite the partial warning and respondent's assertions that he knew his rights.

*5 Detective Benner then asked respondent about the Glock. Respondent was initially reluctant to discuss the matter, stating: "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." Id., at 41. Detective Benner persisted, and respondent told him that the pistol was in his bedroom. Respondent then gave Detective Benner permission to retrieve the pistol. Detective Benner found the pistol and seized it.

A grand jury indicted respondent for possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The District Court granted respondent's motion to suppress the firearm, reasoning that the officers lacked probable cause to arrest respondent for violating the restraining order. It therefore declined to rule on respondent's alternative argument that the gun should be suppressed as the fruit of an unwarned statement.

The Court of Appeals reversed the District Court's ruling with respect to probable cause but affirmed the suppression order on respondent's alternative theory. The court rejected the Government's argument that this Court's decisions in Elstad, supra, and Tucker, supra, foreclosed application of the fruit of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), to the present context. 304 F.3d 1013, 1019 (C.A.10 2002). These holdings were, the Court of Appeals reasoned, based on the view that Miranda announced a prophylactic rule, a position that it found to be incompatible with this Court's decision in Dickerson, supra, at 444, 120 S.Ct. 2326 ("Miranda announced a constitutional rule that Congress may not supersede legislatively"). [FN2] The Court of Appeals thus equated Dickerson's announcement that Miranda is a constitutional rule with the proposition that a failure to warn pursuant to Miranda is itself a violation of the Constitution (and, more particularly, of the suspect's Fifth Amendment rights). Based on its understanding of Dickerson, the Court of Appeals rejected the post-Dickerson views of the Third and Fourth Circuits that the fruits doctrine does not apply to Miranda violations. 304 F.3d, at 1023-1027 (discussing United States v. Sterling, 283 F.3d 216 (C.A.4 2002), and United States v. DeSumma, 277 F.3d 176 (C.A.3 2001)). It also disagreed with the First Circuit's conclusion that suppression is not generally required in the case of negligent failures to warn, 304 F.3d, at 1027-1029 (discussing United States v. Faulkingham, 295 F.3d 85 (C.A.1 2002)), explaining that "[d]eterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that officers diligently (non-negligently) protect--and properly are trained to protect--the constitutional rights of citizens," 304 F.3d, at 1028-1029. We granted certiorari. 538 U.S. 976, 123 S.Ct. 1788, 155 L.Ed.2d 664 (2003).

FN2. The Court of Appeals also distinguished Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 272 (1985), on the ground that the second (and warned) confession at issue there was the product of the defendant's volition. 304 F.3d, at 1019, 1021. For the reasons discussed below, we do not find this distinction relevant.

As we explain below, the Miranda rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the Miranda rule to this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the Miranda rule. The Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as Wong Sun does not apply. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

II

*6 [1] The Self-Incrimination Clause provides: "No person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amdt. 5.
We need not decide here the precise boundaries of the Clause's protection. For present purposes, it suffices to note that the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. See, e.g., Chavez v. Martinez, 538 U.S. 760, 764-768, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) (plurality opinion); id., at 777-779, 123 S.Ct. 1994 (SOUTER, J., concurring in judgment); 8 J. Wigmore, Evidence § 2263, p. 378 (J. McNaughton rev. ed.1961) (explaining that the Clause “was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence”); see also United States v. Hubbell, 530 U.S. 27, 49-56, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (THOMAS, J., concurring) (explaining that the privilege might extend to bar the compelled production of any incriminating evidence, testimonial or otherwise). The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements. See, e.g., id., at 34, 120 S.Ct. 2037 (noting that the word “witness” in the Self-Incrimination Clause “limits the relevant category of compelled incriminating communications to those that are ‘testimonial in character’”; id., at 35, 120 S.Ct. 2037 (discussing why compelled blood samples do not violate the Clause; cataloging other examples and citing cases); Elstad, 470 U.S., at 304, 105 S.Ct. 1285 (“The Fifth Amendment, of course, is not concerned with nontestimonial evidence”); id., at 306-307, 105 S.Ct. 1285 (“The Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony”); Withrow v. Williams, 507 U.S. 680, 705, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (O’CONNOR, J., concurring in part and dissenting in part) (describing “true Fifth Amendment claims as [the] extraction and use of compelled testimony”); New York v. Quarles, 467 U.S. 649, 665-672, and n. 4, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) (O’CONNOR, J., concurring in judgment in part and dissenting in part) (explaining that the physical fruit of a Miranda violation need not be suppressed for these reasons).

To be sure, the Court has recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination. See, e.g., Chavez, supra, at 770-772, 123 S.Ct. 1994 (plurality opinion). For example, although the text of the Self-Incrimination Clause at least suggests that “its coverage [is limited to] compelled testimony that is used against the defendant in the trial itself,” Hubbell, supra, at 37, 120 S.Ct. 2037, potential suspects may, at times, assert the privilege in proceedings in which answers might be used to incriminate them in a subsequent criminal case. See, e.g., United States v. Balys, 524 U.S. 666, 671-672, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998); Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984); cf. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) (holding that the Government may compel grand jury testimony from witnesses over Fifth Amendment objections if the witnesses receive “use and derivative use immunity”); Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of City of New York, 392 U.S. 280, 284, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968) (allowing the Government to use economic compulsion to secure statements but only if the Government grants appropriate immunity). We have explained that “[t]he natural concern which underlies [these] decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage.” Tucker, 417 U.S., at 440-441, 94 S.Ct. 2357.

*7 [2] Similarly, in Miranda, the Court concluded that the possibility of coercion inherent in custodial interrogations unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated. See Dickerson, 530 U.S., at 434-435, 120 S.Ct. 2326; Miranda, 384 U.S., at 467, 86 S.Ct. 1602. To protect against this danger, the Miranda rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief.

[3] But because these prophylactic rules (including the Miranda rule) necessarily sweep beyond the actual protections of the Self-Incrimination Clause, see, e.g., Withrow, supra, at 690-691, 113 S.Ct. 1745; Elstad, supra, at 306, 105 S.Ct. 1285, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination, Chavez, supra, at 778, 123 S.Ct. 1994 (opinion of SOUTER, J.) (requiring a "powerful showing" before "expand[ing] ... the privilege against compelled self-incrimination"). Indeed, at times the Court has declined to extend Miranda even where it has perceived a need to protect the privilege against self-incrimination. See, e.g., Quarles, supra, at 657, 104 S.Ct. 2626 (concluding "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination").

[4] It is for these reasons that statements taken
without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial, see *Elstad*, supra, at 307-308, 105 S.Ct. 1285; *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), though the fruits of actually compelled testimony cannot, see *New Jersey v. Portash*, 440 U.S. 450, 458-459, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979). More generally, the *Miranda* rule "does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted," *Elstad*, 470 U.S., at 307, 105 S.Ct. 1285. Such a blanket suppression rule could not be justified by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, *id.*, at 308, 105 S.Ct. 1285; see *Tucker*, supra, at 446-449, 94 S.Ct. 2357; *Harris*, supra, at 225-226, and n. 2, 91 S.Ct. 643, and would therefore fail our close-fit requirement.

*8* Furthermore, the Self-Incrimination Clause contains its own exclusionary rule. It provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Amdt. 5. Unlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is self-executing. We have repeatedly explained "that those subjected to coercive police interrogations have an automatic protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." *Chavez*, 538 U.S., at 769, 123 S.Ct. 1994 (plurality opinion) (citing, for example, *Elstad*, supra, at 307-308, 105 S.Ct. 1285). This explicit textual protection supports a strong presumption against expanding the *Miranda* rule any further. Cf. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

Finally, nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, 530 U.S., at 444, 120 S.Ct. 2326, changes any of these observations. Indeed, in *Dickerson*, the Court specifically noted that the Court's "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming [Miranda] 's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.*, at 443-444, 86 S.Ct. 1602. This description of *Miranda*, especially the emphasis on the use of "unwarned statements ... in the prosecution's case in chief," makes clear our continued focus on the protections of the Self-Incrimination Clause. The Court's reliance on our *Miranda* precedents, including both *Tucker* and *Elstad*, see, e.g., *Dickerson*, supra, at 438, 441, 120 S.Ct. 2326, further demonstrates the continuing validity of those decisions. In short, nothing in *Dickerson* calls into question our continued insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it.

**III**

*9* Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule. So much was evident in many of our pre-*Dickerson* cases, and we have adhered to this view since *Dickerson*. See *Chavez*, supra, at 772-773, 123 S.Ct. 1994 (plurality opinion) (holding that a failure to read *Miranda* warnings did not violate the respondent's constitutional rights); *United States v. Yohey*, 512 U.S. 143, 114 S.Ct. 2351, 129 L.Ed.2d 123 (1994) (KENNEDY, J., concurring in part and dissenting in part) (agreeing "that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues"); *Elstad*, supra, at 308, 105 S.Ct. 1285; *Quarles*, 467 U.S., at 654, 104 S.Ct. 2626; cf. *Chavez*, supra, at 777-779, 123 S.Ct. 1994 (opinion of SOUTER, J.). This, of course, follows from the nature of the right protected by the Self-Incrimination Clause, which the *Miranda* rule, in turn, protects. It is "a fundamental trial right." *Withrow*, 507 U.S., at 691, 113 S.Ct. 1745 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990)). See also *Chavez*, supra, at 766-768, 123 S.Ct. 1994 (plurality opinion); *id.*, at 790, 123 S.Ct. 1994 (KENNEDY, J., concurring in part and dissenting in part) ("The identification of a *Miranda* violation and its consequences, then, ought to be determined at trial").

It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation. *Chavez*, supra, at 790, 123 S.Ct. 1994.  

**FN3** We acknowledge that there is language in some of the Court's post-*Miranda* decisions that might suggest that the *Miranda* rule operates as a direct constraint.

FN5. It is worth mentioning that the Court of Appeals did not have the benefit of our decision in Chavez v. Martinez, 538 U.S. 760, 123 S.Ct. 1994, 115 L.Ed.2d 984 (2003).

[5] But Dickerson's characterization of Miranda as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it. And there is no such fit here. Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived Miranda violation. Chavez, 538 U.S., at 790, 123 S.Ct. 1994 (KENNEDY, J., concurring in part and dissenting in part). See also H. Friendly, Benchmarks 280-281 (1967). There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of Miranda to this context.

Thus, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the "fruit of the poisonous tree" doctrine of Wong Sun, 371 U.S., at 488, 83 S.Ct. 407. [FN4] See also Nix v. Williams, 467 U.S. 431, 441, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (discussing the exclusionary rule in the Sixth Amendment context and noting that it applies to "illegally obtained evidence [and] other incriminating evidence derived from [it]") (emphasis added)). It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts.

FN4. We reject respondent's invitation to apply the balancing test of Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). Brief for Respondent 15-33. At issue in Nardone was the violation of a federal wiretap statute, and the Court employed an exclusionary rule to deter those violations. But, once again, there are no violations (statutory or constitutional) to deter here.

IV

*10 In the present case, the Court of Appeals, relying on Dickerson, wholly adopted the position that the taking of unwarned statements violates a suspect's constitutional rights. 304 F.3d, at 1028-1029. [FN5] And, of course, if this were so, a strong deterrence-based argument could be made for suppression of the fruits. See, e.g., Nix, supra, at 441-444, 104 S.Ct. 2501; Wong Sun, supra, at 484-486, 83 S.Ct. 407; cf. Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

FNPVI
the scope of the Self-Incrimination Clause to testimonial evidence. *Hubbell*, 530 U.S., at 34-35, 120 S.Ct. 2037. The Constitution itself makes the distinction. [FN6] And although it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. See Part II, supra. For the reasons discussed above, we decline to extend that presumption further. [FN7]

FN6. While Fourth Amendment protections extend to "persons, houses, papers, and effects," the Self-Incrimination Clause prohibits only compelling a defendant to be "a witness against himself," Amdt. 5.


Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

*11 It is so ordered.*

Justice KENNEDY, with whom Justice O'CONNOR joins, concurring in the judgment.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, dissenting.

The majority repeatedly says that the Fifth Amendment does not address the admissibility of nontestimonial evidence, an overstatement that is beside the point. The issue actually presented today is whether courts should apply the fruit of the poisonous tree doctrine lest we create an incentive for the police to omit *Miranda* warnings, see *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before custodial interrogation. [FN1] In closing their eyes to the consequences of giving an
evidentiary advantage to those who ignore *Miranda*, the majority adds an important inducement for interrogators to ignore the rule in that case.

FN1. In so saying, we are taking the legal issue as it comes to us, even though the facts give off the scent of a made-up case. If there was a *Miranda* failure, the most immediate reason was that Patane told the police to stop giving the warnings because he already knew his rights. There could easily be an analogy in this case to the bumbling mistake the police committed in *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). See *Missouri v. Seibert*, --- S.Ct., at ---- - ---- (plurality opinion) (slip op., at 12-13).

*Miranda* rested on insight into the inherently coercive character of custodial interrogation and the inherently difficult exercise of assessing the voluntariness of any confession resulting from it. Unless the police give the prescribed warnings meant to counter the coercive atmosphere, a custodial confession is inadmissible, there being no need for the previous time-consuming and difficult enquiry into voluntariness. That inducement to forestall involuntary statements and troublesome issues of fact can only atrophy if we turn around and recognize an evidentiary benefit when an unwarned statement leads investigators to tangible evidence. There is, of course, a price for excluding evidence, but the Fifth Amendment is worth a price, and in the absence of a very good reason, the logic of *Miranda* should be followed: a *Miranda* violation raises a presumption of coercion, *Oregon v. Elstad*, 470 U.S. 298, 306-307, and n. 1, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), and the Fifth Amendment privilege against compelled self-incrimination extends to the exclusion of derivative evidence, see *United States v. Hubbell*, 530 U.S. 27, 37-38, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (recognizing "the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from ... [actually] compelled testimony"); *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). That should be the end of this case.

FN2. To the extent that *Michigan v. Tucker*, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) (admitting the testimony of a witness who was discovered because of an unwarned custodial interrogation), created another exception to *Miranda*, it is off the point here. In *Tucker*, we explicitly declined to lay down a broad rule about the fruits of unwarned statements. Instead, we "place[d] our holding on a narrower ground," relying principally on the fact that the interrogation occurred before *Miranda* was decided and was conducted in good faith according to constitutional standards governing at that time. 417 U.S., at 447-448, 94 S.Ct. 2357 (citing *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)). There is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained. The incentive is an odd one, coming from the Court on the same day it decides *Missouri v. Seibert, ante*. I respectfully dissent.

Justice BREYER, dissenting.

*12* The fact that the books contain some exceptions to the *Miranda* exclusionary rule carries no weight here. In *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), it was respect for the integrity of the judicial process that justified the admission of unwarned statements as impeachment evidence. But Patane's suppression motion can hardly be described as seeking to "pervert" *Miranda* "into a license to use perjury" or otherwise handicap the "traditional truth-testing devices of the adversary process." 401 U.S., at 225-226, 91 S.Ct. 643. Nor is there any suggestion that the officers' failure to warn Patane was justified or mitigated by a public emergency or other exigent circumstance, as in *New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984). And of course the premise of *Oregon v. Elstad*, supra, is not on point; although a failure to give *Miranda* warnings before one individual statement does not necessarily bar the admission of a subsequent statement given after adequate warnings, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222; cf. *Missouri v. Seibert*, --- U.S., --- S.Ct., ---, ---, ---, --- L.Ed., ---, 2004 WL 1431864 (slip op., at 12-13) (2004) (plurality opinion), that rule obviously does not apply to physical evidence seized once and for all. [FN2]

*13* For reasons similar to those set forth in Justice SOUTER's dissent and in my concurring opinion in
Missouri v. Seibert, --- S.Ct., at ----, I would extend to this context the "fruit of the poisonous tree" approach, which I believe the Court has come close to adopting in Seibert. Under that approach, courts would exclude physical evidence derived from unwarned questioning unless the failure to provide Miranda warnings was in good faith. See Seibert, --- S.Ct., at ---- (slip op., at 1) (BREYER, J., concurring); cf. ante, at ----, n. 1 (SOUTER, J., dissenting). Because the courts below made no explicit finding as to good or bad faith, I would remand for such a determination.

2004 WL 1431768, 2004 WL 1431768 (U.S.)
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Manuel MARTINEZ-GALLEGOS, Defendant-Appellant.

No. 86-3077.


Defendant entered conditional plea of guilty in the United States District Court for the District of Idaho, Harold L. Ryan, J. The Court of Appeals held that preponderance of evidence indicated that Immigration and Naturalization Service agents would have consulted with defendant's immigration file absent unwarned statements, and thus, inevitable discovery exception to exclusionary rule applied.

Affirmed.

West Headnotes

[1] Criminal Law \(\text{[394.1(3)]}\) 110k394.1(3) Most Cited Cases

Inevitable discovery doctrine applies when prosecution can show by preponderance of evidence that evidence would have been discovered inevitably by lawful means.

[2] Criminal Law \(\text{[394.1(3)]}\) 110k394.1(3) Most Cited Cases


[3] Criminal Law \(\text{[394.6(4)]}\) 110k394.6(4) Most Cited Cases

Preponderance of evidence indicated that Immigration and Naturalization Service agents would have consulted defendant's immigration file absent unwarned incriminatory statements; thus, inevitable discovery exception to exclusionary rule applied and information in immigration file was not subject to suppression as illegal fruit of unwarned statements.

[4] Criminal Law \(\text{[1169.12]}\) 110k1169.12 Most Cited Cases

Delay in taking defendant before magistrate was not prejudicial where incriminating statements were made shortly after arrest. Fed.Rules Cr.Proc.Rule 5(a), 18 U.S.C.A.


Raymundo G. Pena, Rupert, Idaho, for defendant-appellant.

Appeal from the United States District Court for the District of Idaho.

Before BROWNING, Chief Judge, WRIGHT, Circuit Judge, ORRICK [FN*], District Judge.

FN* The Honorable William H. Orrick, Jr., Senior United States District Judge, Northern District of California, sitting by designation.

PER CURIAM:

Appellant Martinez-Gallegos appeals a conditional guilty plea on the ground that the district court erroneously denied his motion to suppress evidence showing he had re-entered the United States after deportation in violation of 8 U.S.C. § 1326 (1982). Martinez-Gallegos claims a statement obtained by Immigration and Naturalization Service (INS) agents in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), led the agents to consult INS's "A" file on Martinez-Gallegos containing the record of his previous deportations. Martinez-Gallegos argues as an alternative ground for suppression that he was in federal custody for ten days in violation of Fed.R.Crim.P. 5(a). We affirm.

Jerome County, Idaho, Deputy Sheriff George Silver stopped Martinez-Gallegos on November 28, 1985 because Martinez-Gallegos was driving a vehicle without a current registration sticker. Silver arrested
Martinez-Gallegos when he could not produce proof of insurance or registration, a driver's license, or identification of any kind. Silver asked Martinez-Gallegos if he was a citizen of the United States. Martinez-Gallegos stated he was not. Martinez-Gallegos then attempted to flee by foot, but was captured and eventually brought to the county jail where he was detained on state charges. Martinez-Gallegos gave his true name during the booking procedure at the county jail.

The following day, INS agents Dan Brinson and David Offutt went to the county jail to talk to illegal aliens in custody. The agents were told by a jailer or dispatcher that Martinez-Gallegos was in custody and was an illegal alien. The agents asked Martinez-Gallegos for his name and information pertaining to his background called for by INS "Form I-213." Martinez-Gallegos was given no Miranda warnings. Immediately after questioning Martinez-Gallegos, the agents asked the county jail officials not to release him without informing the INS.

On the same day (November 29), agents Brinson and Offutt received from their Assistant District Director an administrative arrest warrant for Martinez-Gallegos, an order to show cause and a bail bond of $15,000. Martinez-Gallegos was not released into federal custody until December 10 and was placed under federal bond on the same day. Government counsel's uncontroverted explanation at oral argument was that the delay was caused by the arraignment and guilty plea of Martinez-Gallegos on state charges and his subsequent five-or-six-day incarceration on those charges.

The agents received Martinez-Gallegos' "A" file on December 13, and reviewed it on December 14. The "A" file contained documents establishing that Martinez-Gallegos had previously been deported from the United States, first in 1972 when the "A" file was opened, and last on June 29, 1984. On the basis of the "A" file, Agent Offutt decided to initiate criminal charges.

*870 A complaint and arrest warrant were issued on December 17, and Martinez-Gallegos was brought before a magistrate on the same day. He was formally arraigned on December 20.

The government conceded Martinez-Gallegos' statement to the INS agents should be suppressed. Martinez-Gallegos sought suppression of the information contained in the "A" file as illegal fruit of his unwarned statements to the INS agents, and because the government violated Fed.R.Crim.P. 5(a) by not promptly bringing him before a federal magistrate for arraignment. The district court denied his motion.

[1][2] The government argues the information in the "A" file should not be suppressed because it would have been discovered without the unwarned statement. The "inevitable discovery" doctrine is an exception to the exclusionary rule. See Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984); United States v. Andrade, 784 F.2d 1431, 1433 (9th Cir. 1986). It applies when the prosecution can show by a preponderance of the evidence that the evidence would have been discovered inevitably by lawful means. Nix, 467 U.S. at 444, 104 S.Ct. at 2509; Andrade, 784 F.2d at 1433. The inevitable discovery doctrine applies to fifth amendment violations. United States v. Schmidt, 573 F.2d 1057, 1065 n. 9 (9th Cir.) ("Even if the search [leading to incriminating physical evidence was] considered the result of one of Schmidt's coerced statements, the resulting [evidence] would have been discovered by independent investigative procedures... If evidence, otherwise inadmissible under the exclusionary rule, would have been discovered independently, it need not be excluded."). cert. denied, 439 U.S. 881, 99 S.Ct. 221, 58 L.Ed.2d 194 (1978); see also Nix, 467 U.S. at 440 n. 2, 104 S.Ct. at 2507 n. 2 (citing Schmidt).

[3] A preponderance of the evidence indicates the INS agents would have consulted Martinez-Gallegos' "A" file absent his unwarned statements. The "A" file was in INS records when the agents questioned him; it was opened in 1972 and last updated in 1984. The agents testified at the suppression hearing that if Martinez-Gallegos had refused to answer the agents' questions pertaining to his identity and background, the agents' next step, indeed the only step available to them, would have been to consult his "A" file. The file was readily retrievable since county officials had obtained Martinez-Gallegos' true name during the booking procedure.

[4] Martinez-Gallegos' reliance on Fed.R.Crim.P. 5(a) [FN1] is equally fruitless. Martinez-Gallegos claims he was held in violation of Rule 5(a) for ten days: from December 10, 1985, when he was taken into federal custody, until December 20, when he was formally arraigned on the federal charge.

FN1. Fed.R.Crim.P. 5(a) provides:
An officer making an arrest under a warrant issued upon a complaint or any person
making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041....

Martinez-Gallegos made the statements leading the INS agent to consult his "A" file on November 29, shortly after he was taken into state custody, and well before the period of federal custody of which he complains. Statements made shortly after arrest do not offend Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), or McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943). See United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir.1977), cert. denied, 435 U.S. 947, 98 S.Ct. 1532, 55 L.Ed.2d 545 (1978). Here, as in Montes-Zarate, the challenged period of federal custody "had no prejudicial effect upon the defendant." Id.

AFFIRMED.

807 F.2d 868

END OF DOCUMENT
MEMORANDUM

TO: Harry Winthrop; Bandele file
FROM: B. Ray Neack
RE: Abasi Bandele – Appeal

You asked me to evaluate our chances of success on appeal, assuming that Mr. Sadiki’s asylum file contains exculpatory material. Below are my preliminary research findings, which I am providing in outline fashion. I will supplement this with a full memorandum shortly.

Disclosure to the defense of material contained in a witness’s asylum file

I. The government is required to disclose all exculpatory material in its custody or control to the defense in advance of trial. See Brady v. Maryland, 373 U.S. 83 (1963).

II. “Exculpatory material” includes material that bears on a witness’s credibility. See Giglio v. United States, 405 U.S. 150 (1972)

III. Once it has been determined that the material is exculpatory, it should be turned over notwithstanding the asserted countervailing privacy interest.

A. Pennsylvania v. Ritchie, 480 U.S. 39 (1987): 5th Amendment due process rights can trump third party privacy interest. HELD: agency files protected by qualified statutory privilege could be disclosed if the trial court after in camera review deems the information material. In order to get in camera review, the defendant must establish a plausible showing that the file contains material evidence.

B. Davis v. Alaska, 415 U.S. 308 (1974): Defendant has 6th Amendment right to cross-examine gov’t witness on issues of bias and motive to lie; this right outweighs state’s interest in maintaining privacy of witness’s probationary status as juvenile delinquent

C. In other situations, courts have considered whether privacy interests are outweighed by a defendant’s constitutional rights:

VI-171

#63943
1. **U.S. v. Molina**, 356 F.3d 269 (2d Cir. 2004): Defendant sought, for sentencing purposes, to have an examination of his co-defendants' presentence reports (PSR). The court determined that disclosure was not warranted under the following test: (1) sentencing court examines requested PSR in camera for exculpatory or impeachment material that might aid the defendant requesting it; (2) court then determines if the policy of confidentiality is outweighed by a compelling need for disclosure to meet the ends of justice. Applying this test, Molina ruled the defendant had made "no showing of how the presentence reports of non-witnesses are essential to ensure the fairness of his hearing or the reliability of the facts presented to the court."

2. Work product privilege may be outweighed by criminal defendant's need for materials. See **United States v. Marcus Schloss & Co.**, No. 88 Cr. 796, 1989 WL 62729 (SDNY June 5, 1989) (Haight, J.)

3. **U.S. v. Lindstrom**, 698 F.2d 1154 (11th Cir. 1983): Reversible error to deny defendants access to psychiatric materials suggesting that key prosecution witness was suffering from ongoing mental illness, that caused her to misperceive and misinterpret words and actions of others and that might seriously affect her ability to know, comprehend and relate the truth. "The government strenuously argues that the privacy interest of a patient in the confidentiality of her medical records and the societal interest in encouraging the free flow of information between patient and psychotherapist require reaffirmance of the trial court’s rulings. While we recognize the general validity of those interests, they are not absolute and, in the context of this criminal trial, must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case." See also **U.S. v. Society of Independent Gasoline Marketers of America**, 624 F.2d 461 (4th Cir. 1980): Key gov’t witness had been hospitalized twice for psychiatric problems. Held: witness’s interest in privacy of medical files outweighed by defendant’s paramount interest in effective cross-examination.
CODE OF FEDERAL REGULATIONS
TITLE 8--ALIENS AND NATIONALITY
CHAPTER I--IMMIGRATION AND NATURALIZATION SERVICE;
DEPARTMENT OF JUSTICE
SUBCHAPTER B--IMMIGRATION REGULATIONS
PART 208--PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL
SUBPART A--ASYLUM AND WITHHOLDING OR REMOVAL

§ 208.6 Disclosure to third parties.

(a) Information contained in or pertaining to any asylum application shall not be
disclosed without the written consent of the applicant, except as permitted by this
section or at the discretion of the Attorney General.

(b) The confidentiality of other records kept by the Service that indicate that a
specific alien has applied for asylum shall also be protected from disclosure. The
Service will coordinate with the Department of State to ensure that the
confidentiality of these records is maintained if they are transmitted to
Department of State offices in other countries.

(c) This section shall not apply to any disclosure to:

(1) Any United States Government official or contractor having a need to
examine information in connection with:

   (i) The adjudication of asylum applications;

   (ii) The defense of any legal action arising from the adjudication of
        or failure to adjudicate the asylum application;

   (iii) The defense of any legal action of which the asylum application
        is a part; or

   (iv) Any United States Government investigation concerning any
        criminal or civil matter; or

(2) Any Federal, state, or local court in the United States considering any
legal action:

   (i) Arising from the adjudication of or failure to adjudicate the
       asylum application; or

   (ii) Arising from the proceedings of which the asylum application is
       a part.
Briefs and Other Related Documents

Supreme Court of the United States

John L. BRADY, Petitioner,
v.
STATE OF MARYLAND.

No. 490.

Argued March 18 and 19, 1963.
Decided May 13, 1963.

Proceeding for post-conviction relief. Dismissal of the petition by the trial court was affirmed by the Maryland Court of Appeals, 226 Md. 422, 174 A.2d 167, which remanded the case for retrial on the question of punishment but not the question of guilt. On certiorari, the Supreme Court, speaking through Mr. Justice Douglas, held that where the question of admissibility of evidence relating to guilt or innocence was for the court under Maryland law, and the Maryland Court of Appeals held that nothing in the suppressed confession of petitioner's confederate could have reduced petitioner's offense below murder in the first degree, the decision of that court to remand the case, because of such confession withheld by the prosecution, for retrial on the issue of punishment only did not deprive petitioner of due process.

Affirmed.

Mr. Justice Harlan and Mr. Justice Black dissent.

West Headnotes

170Bk503 Most Cited Cases
(Formerly 106k393)


92k268(5) Most Cited Cases
(Formerly 92k257)

Prosecution's action, on defendant's request to examine extra-judicial statements made by defendant's confederate, in withholding one such statement, in which confederate admitted he had done actual killing, denied due process as guaranteed by Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law C;; 268(5)
92k268(5) Most Cited Cases
(Formerly 92k257)

Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of prosecution. U.S.C.A.Const. Amend. 14.

110k734 Most Cited Cases

Under Maryland law, despite constitutional provision that jury in criminal case are judges of law, as well as of fact, trial courts pass upon admissibility of evidence which jury may consider on issue of innocence or guilt of accused. Const.Md. art. 15, § 5.

170Bk371 Most Cited Cases
(Formerly 106k359(1), 106k359)

State courts, state agencies and state legislatures are final expositors of state law under our federal regime. Const. Md. art 15, § 5.

92k271 Most Cited Cases

Where question of admissibility of evidence relating to guilt or innocence was for court under Maryland law, and Maryland Court of Appeals ruled that suppressed confession of confederate would not have been admissible on issue of guilt or innocence since
nothing in confession could have reduced petitioner's offense below murder in first degree, remandment of case, because of such confession withheld by prosecution, for retrial on issue of punishment but not on issue of guilt did not deprive petitioner of due process. Code Md.1957, art. 27, § 413; Code Supp.Md. art. 27, § 645A et seq.; Const.Md. art. 15, § 5; U.S.C.A.Const. Amend. 14.

**1195** *84* E. Clinton Bamberger, Jr., Baltimore, Md., for petitioner.

Thomas W. Jamison, III, Baltimore, Md., for respondent.

Opinion of the Court by Mr. Justice DOUGLAS, announced by Mr. Justice BRENNAN.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A.2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.' Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

[FN1] Neither party suggests that the decision below is not a 'final judgment' within the meaning of 28 U.S.C. § 1257(3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that 'final judgment in a criminal case means sentence. The sentence is the judgment' (Berman v. United States, 302 U.S. 211, 212, 58 S.Ct. 164, 166, 82 L.Ed. 204) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt 'that presents a serious and unsettled question' (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 547, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528) that 'is fundamental to the further conduct of the case' (United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311). This question is 'independent of, and unaffected by' (Radio Station WOW v. Johnson, 326 U.S. 120, 126, 65 S.Ct. 1475, 1479, 89 L.Ed. 2092) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See Largent v. Texas, 318 U.S. 418, 421–422, 63 S.Ct. 667, 668–669, 87 L.Ed. 873. Cf. Local No. 438 Const. and General Laborers' Union v. Curty, 371 U.S. 542, 549, 83 S.Ct. 531, 536, 9 L.Ed.2d 514.

**1196** The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words 'without capital punishment.' 3 Md.AnnotatedCode, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are 'the Judges of Law, as well as of fact.' Art. XV, s 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

*86* [2] We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two
prosecution of evidence favorable to an accused upon request violates **1197 due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' [FN2] A prosecution that withholds evidence on demand of an accused which, if made available, *88 would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169.

FN2. Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:
'The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.'

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:
'There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he
wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Bobbit's hands that twisted the shirt about the victim's neck. * * * (It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady.

'Not without some doubt, we conclude that the withholding of this particular confession of Bobbit's was prejudicial to the defendant Brady. * * *

The appellant's sole claim of prejudice goes to the punishment imposed. If Bobbit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree. We, therefore, see no occasion to retry that issue.' 226 Md., at 429-430, 174 A.2d, at 171. (Italics added.)

*89 If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense 'below murder in the first degree'? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

[3][5][6] But Maryland's constitutional provision making the jury in criminal cases 'the Judges of Law' does not mean precisely what it seems to say.

[FN3] The present status of that provision was reviewed recently in Giles v. State, 229 Md. 370, 183 A.2d 359, appeal dismissed, 372 U.S. 767, 83 S.Ct. 1102, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that 'Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused.' 229 Md., at 383, 183 A.2d, at p. 365. The cases cited make up a long line going back nearly a century. Wheeler v. State, 42 Md. 563, 570, stated that instructions to the jury were advisory only, 'except in regard to questions as to what shall be considered as evidence.' And the court 'having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction.' Bell v. State, 57 Md. 108, 120. And see Beard v. State, 71 Md. 275, 280, 17 A. 1044, 1045, 4 L.R.A. 675; Dick v. State, 107 Md. 11, 21, 68 A. 286, 290. Cf. Vogel v. State, 163 Md. 267, 162 A. 705.

FNT. See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md.St.Bar Assn.Rept. 246, 253--254.

*90 We usually walk on treacherous ground when we explore state law, [FN4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the 'admissibility of evidence' pertinent to 'the issue of the innocence or guilt of the accused.' Giles v. State, supra. In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession 'could have reduced the appellant Brady's offense below murder in the first degree.' We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. [FN5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial (cf. Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

FN4. For one unhappy incident of recent vintage see Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 60 S.Ct. 215, 84 L.Ed. 447, 537, that replaced an earlier opinion in the same case, 309 U.S. 703.

FN5. 'In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and
sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa.L.Rev. 34, 39. See also Bell v. State, supra, 57 Md. at 120; Vogel v. State, 163 Md., at 272, 162 A., at 706-707.

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding by the State of material evidence exculpatory to an accused is a violation **1199 of due process' without citing the United States Constitution or the Maryland Constitution which also has a due process clause. [FN*] We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See New York City v. Central Savings Bank, 306 U.S. 661, 59 S.Ct. 790, 83 L.Ed. 1058; Minnesota v. National Tea Co., 309 U.S. 551, 60 S.Ct. 675, 84 L.Ed. 920. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, *92 wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, 'The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted his new trial to the question of punishment.' After discussing at some

length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: 'The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment.'


The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for new, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

Mr. Justice HARLAN, whom Mr. Justice BLACK joins, dissenting.

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection? [FN1] In my opinion an affirmative answer would *93 be required if the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

FN1. I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 1196--1197 of its opinion.
The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases 'the Judges of Law, as **1200 well as of fact,' as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under s 645G of the Maryland Post Conviction Procedure Act, Md.Code, Art. 27 (1960 Cum.Suppl.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case, [FN2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A.2d, at 171. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is dispositive *94 of the crucial issue here. 226 Md., at 427–429, 174 A.2d, at 170. [FN3]

Nor do I find anything in any of the other Maryland cases cited by the Court (ante, p. 1197) which bears on the admissibility vel non of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not 'overrule' the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that 'in the final analysis the jury are the judges of both the law and the facts, and the verdict in this case is entirely the jury's responsibility.' (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement would have been admissible at the trial on the issue of guilt. [FN4]

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**FN2.** Section 645G provides in part: 'If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.' Rule 870 provides that the Court of Appeals 'will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended.'

**FN3.** It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of Day v. State, 196 Md. 384, 76 A.2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

**FN4.** In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: 'It would have been, yes.'
When reliability of a given witness may well be
determinative of guilt or innocence, nondisclosure of
evidence affecting credibility falls within rule that
suppression of material evidence justifies a new trial
irrespective of good faith or bad faith of the
prosecution.

[3] Criminal Law 919(1)
110k919(1) Most Cited Cases

[3] Criminal Law 959
110k959 Most Cited Cases

A new trial is not automatically required whenever
the comng of the prosecutor's files after the trial has
disclosed evidence possibly useful to the defense but
not likely to have changed the verdict; a finding of
materiality of the evidence is required; a new trial is
required if the false testimony could in any
reasonable likelihood have affected the judgment of
the jury.

46k7 Most Cited Cases

92k268(9) Most Cited Cases
(Formerly 92k268(8))

If assistant United States attorney, who first dealt
with key Government witness, promised witness that
he would not be prosecuted if he cooperated with the
Government, such a promise was attributable to the
Government, regardless of whether attorney had
authority to make it, and nondisclosure of promise,
which was not communicated to assistant United
States attorney who tried the case, would constitute a
violation of due process requiring a new trial.

Reversed and remanded.

Mr. Justice Powell and Mr. Justice Rehnquist took
no part in consideration or decision of case.

West Headnotes

[1] Criminal Law 706(2)
110k706(2) Most Cited Cases
(Formerly 110k700)

Deliberate deception of a court and jurors by
presentation of known false evidence is incompatible
with rudimentary demands of justice.

[2] Criminal Law 919(1)
110k919(1) Most Cited Cases

Where Government's case depended almost entirely
on testimony of a witness who was named as a
coconspirator but was not indicted, and without it
there could have been no indictment and no evidence
to carry case to jury, such witness' credibility was
important issue in case, and evidence of any
understanding or agreement as to future prosecution
would be relevant to such witness' credibility and
jury was entitled to know of it.
Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. Held: Neither the Assistant's lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution's duty to present all material evidence to the jury was not fulfilled and constitutes a violation of due process requiring a new trial. Pp. 765--766.

Reversed and remanded.

James M. LaRossa, New York City, for petitioner.

Harry R. Sachse, New Orleans, La., for respondent.

Mr. Chief Justice BURGER delivered the opinion of the Court.

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government *151 had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge $2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and petitioner was indicted; thereafter, he was named as a coconspirator with petitioner but was not indicted.

Trial commenced two years after indictment. Taliento testified, identifying petitioner as the instigator of the *965 scheme. Defense counsel vigorously cross-examined, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency:

'(Counsel.) Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

'(Taliento.) Nobody told me I wouldn't be prosecuted.

Q. They told you you might not be prosecuted?

A. I believe I still could be prosecuted.

*152 Q. Were you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

A. Not at that particular time.

Q. To this date, have you been charged with any crime?

A. Not that I know of, unless they are still going to prosecute.'

In summation, the Government attorney stated, '(Taliento) received no promises that he would not be indicted.'

The issue now before the Court arose on petitioner's motion for new trial based on newly discovered evidence. An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola, [FN1] that if he testified before the grand jury and at trial he would not be prosecuted. [FN2] DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to
Taliento. [FN3] The United *153 States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the 'good judgment and conscience of the Government' as to whether he would be prosecuted. [FN4]

FN1. During oral argument in this Court it was stated that DiPaola was on the staff of the United States Attorney when he made the affidavit in 1969 and remained on that staff until recently.

FN2. DiPaola's affidavit reads, in part, as follows:

'It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted. . . . It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted.'

FN3. Golden's affidavit reads, in part, as follows:

'Mr. DiPaola . . . advised that . . . Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant Giglio.'

FN4. The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

The District Court did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys, DiPaola and Golden, but proceeded on the theory that even if a promise had been made by DiPaola it was not authorized and its disclosure to the jury would not have affected its verdict. We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney--the first one who dealt with Taliento--now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

**766 [1][2][3] As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, '(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' See American *154 Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a). When the 'reliability of a given witness may well be deterrentive of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if the 'false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .' Napue, supra, at 271, 79 S.Ct., at 1178.

[4] In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second) of Agency s 272. See also American Bar
Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

[5] Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore *155 an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

For these reasons, the due process requirements enunciated in Napue and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

92 S.Ct. 763, 405 U.S. 150, 31 L.Ed.2d 104
Supreme Court of the United States

Josashaway DAVIS, Petitioner, v.
State of ALASKA.

No. 72--5794.

Decided Feb. 27, 1974.

By a judgment of the Superior Court, Third Judicial District, Anchorage, the defendant was convicted of burglary and grand larceny, and he appealed. The Alaska Supreme Court, 499 P.2d 1025, affirmed and certiorari was granted. The Supreme Court, Chief Justice Burger, held that refusal to allow defendant to cross-examine key prosecution witness to show his probation status following an adjudication of juvenile delinquency denied defendant his constitutional right to confront witnesses, notwithstanding state policy protecting anonymity of juvenile offenders.

Reversed and remanded.

Mr. Justice Stewart filed a concurring opinion.

Mr. Justice White filed a dissenting opinion in which Mr. Justice Rehnquist joined.

[1] Criminal Law C 662.1
110k662.1 Most Cited Cases
(Formerly 110k662.3, 110k662(1))

Constitutional right of an accused in criminal prosecution to be confronted with witnesses against him is secured for all defendants in state as well as federal criminal proceedings. U.S.C.A.Const. Amend. 6.

[2] Criminal Law C 662.7
110k662.7 Most Cited Cases
(Formerly 110k662(1))

Constitutional right of accused to be confronted with witnesses against him means more than being allowed to confront witnesses physically and a primary interest secured by it is the right of cross-examination. U.S.C.A.Const. Amend. 6.

410k329 Most Cited Cases

410k330(1) Most Cited Cases

Subject always to the broad discretion of trial judge to preclude repetitive and unduly harassing interrogation, cross-examiner is not only permitted to delve into witness' story to test witness' perceptions and memory but is traditionally allowed to impeach, that is, discredit the witness.

410k363(1) Most Cited Cases

Partiality of witness is subject to exploration at trial and is always relevant as discrediting witness and affecting weight of his testimony.

410k372(1) Most Cited Cases

Exposure of a witness' motivation in testifying is a proper and important function of constitutionally protected right of cross-examination.

110k662.7 Most Cited Cases
(Formerly 110k662(1))

Defendant, who was prosecuted for grand larceny and burglary, was denied his constitutional right of confrontation of witnesses in state trial where he was precluded by protective order from cross-examining key prosecution witness to show that witness was on probation following an adjudication of juvenile delinquency, notwithstanding state statutory policy of protecting the anonymity of juvenile offenders; defendant had right to attempt to show that prosecution witness was biased because of his vulnerable status. U.S.C.A.Const. Amend. 6; Alaska Rules of Children's Procedure, rule 23; AS 47.10.080(g).

[7] Criminal Law C 1170.5(5)
Denial of right of effective cross-examination was a constitutional error of the first magnitude so that no amount of showing of want of prejudice could cure it. U.S.C.A.Const. Amend. 6.


FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Petitioner was convicted of grand larceny and burglary following a trial in which the trial court on motion of the prosecution issued a protective order prohibiting questioning Green, a key prosecution witness, concerning Green's adjudication as a juvenile delinquent relating to a burglary and his probation status at the time of the events as to which he was to testify. The trial court's order was based on state provisions protecting the anonymity of juvenile offenders. The Alaska Supreme Court affirmed. Held: Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments, Pp. 1110--1112.

(a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing his possible bias. Pp. 1110--1111.

(b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 1111--1112.

When the Polar Bar in Anchorage closed in the early morning hours of February 16, 1970, well over a thousand dollars in cash and checks was in the bar's Mosler safe. About midday, February 16, it was discovered that the bar had been broken into and the safe, about two feet square and weighing several hundred pounds, had been removed from the premises.

Later that afternoon the Alaska State Troopers received word that a safe had been discovered about 26 miles outside Anchorage near the home of Jess Straight and his family. The safe, which was subsequently determined to be the one stolen from the Polar Bar, had been pried open and the contents removed. Richard Green, Jess Straight's stepson, told investigating troopers on the scene that at about noon on February 16 he had seen and spoken with two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered. The next day Anchorage police investigators brought him to the police station where Green was given six photographs of adult Negro males. After examining the photographs for 30 seconds to a minute, Green identified the photograph of petitioner as that of one of the men he had encountered the day before and described to the police. Petitioner was arrested the next day, February
18. On February 19, Green picked petitioner out of a lineup of seven Negro males.

At trial, evidence was introduced to the effect that paint chips found in the trunk of petitioner's rented blue Chevrolet could have originated from the surface of the stolen safe.

Richard Green was a crucial witness for the prosecution. He testified at trial that while on an errand for his mother he confronted two men standing beside a late-model metallic blue Chevrolet, parked on a road near his family's house. The man standing at the rear of the car spoke to Green asking if Green lived nearby and if his father was home. Green offered the men help, but his offer was rejected. On his return from the errand Green again passed the two men and he saw the man with whom he had had the conversation standing at the rear of the car with 'something like a crowbar' in his hands. Green identified petitioner at the trial as the man with the 'crowbar.' The safe was discovered later that afternoon at the point, according to Green, where the Chevrolet had been parked.

Before testimony was taken at the trial of petitioner, the prosecutor moved for a protective order to prevent any reference to Green's juvenile record by the defense in the course of cross-examination. At the time of the *311 trial and at the time of the events Green testified to, Green was on probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins. Green was 16 years of age at **1108 the time of the Polar Bar burglary but had turned 17 prior to trial.

In opposing the protective order, petitioner's counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary. From this petitioner would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question.

The trial court granted the motion for a protective order, relying on Alaska Rule of Children's Procedure 23, [FN1] and Alaska Stat. § 47.10.080(g) (1971). [FN2]

FN1. Rule 23 provides:
'No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.'

FN2. Section 47.10.080(g) provides in pertinent part:
'The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . .'

*312 Although prevented from revealing that Green had been on probation for the juvenile delinquency adjudication for burglary at the same time that he originally identified petitioner, counsel for petitioner did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home. Green denied that he was upset or uncomfortable about the discovery of the safe. He claimed not to have been worried about any suspicions the police might have been expected to harbor against him, though Green did admit that it crossed his mind that the police might have thought he had something to do with the crime.

Defense counsel cross-examined Green in part as follows:
'Q. Were you upset at all by the fact that this safe was found on your property?
'A. No, sir.
'Q. Did you feel that they might in some way suspect you of this?
'A. No.
'Q. Did you feel uncomfortable about this though?
'A. No, not really.
'Q. The fact that a safe was found on your property?
'A. No.
'Q. Did you suspect for a moment that the police might somehow think that you were involved in
this?
'A. I thought they might ask a few questions is all.
'Q. Did that thought ever enter your mind that you-
that the police might think that you were somehow
connected with this?
*313 'A. No, it didn't really bother me, no.
'Q. Well, but . . .
'A. I mean, you know, it didn't--it didn't come into
my mind as worrying you, you know.
'Q. That really wasn't--wasn't my question, Mr.
Green. Did you think that-- not whether it worried
you so much or not, but did you feel that there was
a possibility that the police might somehow think
that you had **1109 something to do with this, that
they might have that in their mind, and that you . .

'A. That came across my mind, yes, sir.
'Q. That did cross your mind?
'A. Yes.
'Q. So as I understand it you went down to the--you
drove in with the police in--in their car from mile
25, Glenn Highway down to the city police station?
'A. Yes, sir.
'Q. And then went into the investigators' room with
Investigator Gray and Investigator Weaver?
'A. Yeah.
'Q. And they started asking you questions about--
about the incident, is that correct?
'A. Yeah.
'Q. Had you ever been questioned like that before
by any law enforcement officers?
'A. No.
'MR. RIPLEY: I'm going to object to this, Your
Honor, it's a carry-on with rehash of the same
thing. He's attempting to raise in the jury's mind . . .

'THE COURT: I'll sustain the objection.'

Since defense counsel was prohibited from making
inquiry as to the witness' being on probation under a
juvenile court adjudication, Green's protestations of
unconcern over possible police suspicion that he
might *314 have had a part in the Polar Bar burglary
and his categorical denial of ever having been the
subject of any similar law-enforcement interrogation
went unchallenged. The tension between the right of
confrontation and the State's policy of protecting the
witness with a juvenile record is particularly evident
in the final answer given by the witness. Since it is
probable that Green underwent some questioning by
police when he was arrested for the burglaries on
which his juvenile adjudication of delinquency
rested, the answer can be regarded as highly suspect
at the very least. The witness was in effect asserting,
under protection of the trial court's ruling, a right to
give a questionably truthful answer to a cross-
examining pursuing a relevant line of inquiry; it is
doubtful whether the bold 'No' answer would have
been given by Green absent a belief that he was
shielded from traditional cross-examination. It would
be difficult to conceive of a situation more clearly
illustrating the need for cross-examination. The
remained of the cross-examination was devoted to
an attempt to prove that Green was making his
identification at trial on the basis of what he
remembered from his earlier identifications at the
photographic display and lineup, and not on the basis
of his February 16 confrontation with the two men on
the road.

The Alaska Supreme Court affirmed petitioner's
conviction, [FN3] concluding that it did not have to
resolve the potential conflict in this case between a
defendant's right to a meaningful confrontation with
adverse witnesses and the State's interest in
protecting the anonymity of a juvenile offender since
'our reading of the trial *315 transcript convinces us
that counsel for the defendant was able adequately to
question the youth in considerable detail concerning
the possibility of bias or motive.' 499 P.2d 1025,
1036 (1972). Although the court admitted that
Green's denials of any sense of anxiety or
apprehension upon the safe's being found close to his
home were possibly self-serving, 'the suggestion was
nonetheless brought to the attention of the jury, and
that body was afforded the opportunity to observe the
demeanor of the youth and **1110 pass on his
credibility.' Ibid. The court concluded that, in light of
the indirect references permitted, there was no error.

FN3. In the same opinion the Alaska
Supreme Court also affirmed petitioner's
conviction, following a separate trial, for
being a felon in possession of a concealable
firearm. That conviction is not in issue
before this Court.

Since we granted certiorari limited to the question of
whether petitioner was denied his right under the
Confrontation Clause to adequately cross-examine
Green, 410 U.S. 925, 93 S.Ct. 1392, 35 L.Ed.2d 586
(1973), the essential question turns on the correctness
of the Alaska court's evaluation of the 'adequacy' of
the scope of cross-examination permitted. We
disagree with that court's interpretation of the
Confrontation Clause and we reverse.

(2)
The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Professor Wigmore stated:

'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' (Emphasis in original.) 5 J. Wigmore, Evidence s 1395, p. 123 (3d ed. 1940).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). [FN4]

FN4. In Greene we stated: 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination...'. 360 U.S., at 496, 79 S.Ct., at 1413.

**1111 In the instant case, defense counsel sought to show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner. [FN5]

FN5. '(A) partiality of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying.' 3A J. Wigmore, Evidence s 940, p. 776 (Chadbourn rev. 1970). (Emphasis in original; footnotes omitted.)

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof...of petitioner's act.' Douglas v. Alabama, 380 U.S., at 419, 85 S.Ct., at 1077. The accuracy and
truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was *318 admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931) [FN6] as well as of Green's possible concern that he might be a suspect in the investigation.

FN6. Although Alford involved a federal criminal trial and we reversed because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in Alford is not in doubt. In Smith v. Illinois, 390 U.S. 129, 132–133, 88 S.Ct. 748, 750–751, 19 L.Ed.2d 956 (1968), we relied, in part, on Alford to reverse a state criminal conviction on confrontation grounds.

[7] We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked the degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314. Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968).

*319 (3)

The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender **1112 to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.

[8] We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. In re Gault, 387 U.S. 1, 25, 87 S.Ct. 1428, 1442, 18 L.Ed.2d 527 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

In Alford v. United States, supra, we upheld the right *320 of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as 'given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States.' 282 U.S., at 693, 51 S.Ct., at 220. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the Court stated:

'(N)O obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.' Id., at 694, 51 S.Ct., at 220.
As in Alford, we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is *321 remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice STEWART, concurring.

The Court holds that, in the circumstances of this case, the Sixth and Fourteenth Amendments conferred the right to cross-examine a particular prosecution witness about his delinquency adjudication for burglary and his status as a probationer. Such cross-examination was necessary in this case in order 'to show the existence of possible bias and prejudice . . . ,' ante, at 1111. In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a **1113 right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting.

As I see it, there is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination, followed by a
Defendant was convicted before the Court of Common Pleas, Criminal Division, No. CC7903887A, Allegheny County, of rape, involuntary sexual intercourse, incest, and corruption of minor, and defendant appealed. The Superior Court, No. 137 Pittsburgh 1981, 324 Pa.Super. 557, 472 A.2d 220, vacated and remanded for further proceedings. The Commonwealth appealed. The Supreme Court of Pennsylvania, No. 69 W.D. Appeal Docket 1984, McDermott, J., 509 Pa. 357, 502 A.2d 148, remanded. State sought writ of certiorari. The Supreme Court, Justice Powell, held that: (1) defendant was entitled to have Pennsylvania Children and Youth Services file reviewed by trial court to determine whether it contained information that probably would have changed outcome of trial, and (2) defense counsel was not entitled to examine confidential information in Children and Youth Services file. Furthermore, Justice Powell, with the Chief Justice and two other Justices concurring, and one Justice concurring in result, held that failure to disclose Children and Youth Services file did not violate the confrontation clause.

Affirmed in part, reversed in part, and remanded for further proceedings.

Justice Blackmun filed opinion concurring in part and concurring in judgment.

Justice Brennan, with whom Justice Marshall joined, filed dissenting opinion.

Justice Stevens, with whom Justices Brennan, Marshall, and Scalia, joined, filed dissenting opinion.
110k662.7 Most Cited Cases

Confrontation clause provides two types of protection for criminal defendant: right physically to face those who testify against him, and right to conduct cross-examination. (Per Justice Powell, with the Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

410k372(1) Most Cited Cases

Right to cross-examine includes opportunity to show that witness is biased, or that testimony is exaggerated or unbelievable. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

[7] Criminal Law 662.1
110k662.1 Most Cited Cases

Confrontation clause is not constitutionally compelled rule of pretrial discovery. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

[8] Criminal Law 662.7
110k662.7 Most Cited Cases

Right of confrontation is trial right, designed to prevent improper restrictions on types of questions that defense counsel may ask during cross-examination. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

[9] Criminal Law 627.6(1)
110k627.6(1) Most Cited Cases

[9] Criminal Law 700(2,1)
110k700(2,1) Most Cited Cases
(Formerly 110k700(2))

Ability to question adverse witnesses does not include power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

[10] Criminal Law 662.1
110k662.1 Most Cited Cases

Normally right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

110k662.7 Most Cited Cases

Confrontation clause only guarantees opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, defense might wish. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

[12] Criminal Law 662.4
110k662.4 Most Cited Cases

Confrontation clause was not violated by withholding Pennsylvania Children and Youth Services' child abuse investigative file from defendant; defense counsel was able to cross-examine all trial witnesses fully. (Per Justice Powell, with Chief Justice and two Justices concurring and one Justice concurring in result.) U.S.C.A. Const.Amd. 6.

[13] Witnesses 2(1)
410k2(1) Most Cited Cases

Criminal defendants have right under compulsory process clause to government's assistance in compelling attendance of favorable witnesses at trial and right to put before jury evidence that might influence determination of guilt. U.S.C.A. Const.Amd. 6.

[14] Witnesses 2(1)
410k2(1) Most Cited Cases

Sixth Amendment compulsory process provides no greater protection in areas governing defendant's right to discover identity of witnesses, or to require government to produce exculpatory evidence, than protections afforded by due process. U.S.C.A. Const.Ams. 6, 14.

Interest of defendant charged with child abuse, as well as that of Commonwealth of Pennsylvania, in insuring fair trial could be fully protected by requiring that Pennsylvania Children and Youth Services child abuse file be submitted only to trial court for in camera review; to allow full disclosure to defense counsel of file would sacrifice unnecessarily Commonwealth's compelling interest of protecting child abuse information.

Duty to disclose exculpatory information is ongoing. 39 Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent was charged with various sexual offenses against his minor daughter. The matter was referred to the Children and Youth Services (CYS), a protective service agency established by Pennsylvania to investigate cases of suspected child mistreatment and neglect. During pretrial discovery, respondent served CYS with a subpoena, seeking access to the records related to the immediate charges, as well as certain earlier records compiled when CYS investigated a separate report that respondent's children were being abused. CYS refused to comply with the subpoena, claiming that the records were privileged under a Pennsylvania statute which provides that all CYS records must be
kept confidential, subject to specified exceptions. One of the exceptions is that **992 CYS may disclose reports to a "court of competent jurisdiction pursuant to a court order." At an in-chambers hearing in the trial court, respondent argued that he was entitled to the information because the CYS file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. Although the trial judge did not examine the entire CYS file, he refused to order disclosure. At the trial, which resulted in respondent's conviction by a jury, the main witness against him was his daughter, who was cross-examined at length by defense counsel. On appeal, the Pennsylvania Superior Court held that the failure to disclose the daughter's statements contained in the CYS file violated the Confrontation Clause of the Sixth Amendment. The court vacated the conviction and remanded for further proceedings to determine whether a new trial should be granted. On the State's appeal, the Pennsylvania Supreme Court held that, by denying access to the CYS file, the trial court order had violated both the Confrontation and the Compulsory Process Clauses of the Sixth Amendment, and that the conviction must be vacated and the case remanded to determine if a new trial was necessary. The court concluded that defense counsel was entitled to review the entire file for any useful evidence.

*Held:* The judgment is affirmed in part and reversed in part, and the case is remanded.


Justice POWELL delivered the opinion of the Court as to Parts I, II, III-B, III-C, and IV, concluding that:

*40* 1. This Court does not lack jurisdiction on the ground that the decision below is not a "final judgment or decree," as required by 28 U.S.C. § 1257(3). Although this Court has no jurisdiction to review an interlocutory judgment, jurisdiction is proper where a federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had whatever the ultimate outcome of the case. Here, the Sixth Amendment issue will not survive for this Court to review regardless of the outcome of the proceedings on remand. The Sixth Amendment issue has been finally decided by the highest court of Pennsylvania, and unless this Court reviews that decision, the harm that the State seeks to avoid—the disclosure of the confidential file—will occur regardless of the result on remand. Pp. 996-998.

2. Criminal defendants have the right under the Compulsory Process Clause to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt. However, this Court has never held that the Clause guarantees the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence. Instead, claims such as respondent's traditionally have been evaluated under the broader protections of the Due Process Clause of the Fourteenth Amendment. Compulsory process provides no greater protections in this area than those afforded by due process, and thus respondent's claims more properly are considered by reference to due process. Pp. 1000-1001.

3. Under due process principles, the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Although the public interest in protecting sensitive information such as that in CYS records is strong, this interest does not necessarily prevent disclosure in all circumstances. Because the Pennsylvania Legislature contemplated some use of CYS records in judicial proceedings, there is no reason to believe that relevant information would not be disclosed when a court of competent jurisdiction determined that the information was "material" to the accused's **993 defense. The Pennsylvania Supreme Court thus properly ordered a remand for further proceedings. Respondent is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the CYS file contains no such information, or if the nondisclosure is harmless beyond a reasonable doubt, the trial court will be free to reinstate the prior conviction. Pp. 1001-1002.

*41* 4. The Pennsylvania Supreme Court erred in holding that defense counsel must be allowed to examine the confidential information. A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search the State's files and make the determination as to the materiality of the information. Both respondent's and the State's interests in ensuring a fair trial can be protected fully by requiring that the CYS files be
submitted only to the trial court for in camera review. To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the State's compelling interest in protecting its child abuse information. Pp. 1002-1004.

Justice POWELL, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR, concluded in Part III-A that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause. There is no merit to respondent's claim that by denying him access to the information necessary to prepare his defense, the trial court interfered with his right of cross-examination guaranteed by the Clause. Respondent argued that he could not effectively question his daughter because, without the CYS material, he did not know which types of questions would best expose the weaknesses in her testimony. However, the Confrontation Clause is not a constitutionally compelled rule of pretrial discovery. The right of confrontation is a trial right, guaranteeing an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish. Pp. 998-1000.

Justice BLACKMUN concluded that the Confrontation Clause may be relevant to limitations placed on a defendant's pretrial discovery. There may well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness. A State cannot avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage. However, the procedure the Court has set out for the lower court to follow on remand is adequate to address any confrontation problem. Pp. 1004-1006.

POWELL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-B, III-C, and IV, in which REHNQUIST, C.J., and WHITE, BLACKMUN, and O'CONNOR, J.J., joined, and an opinion with respect to Part III-A, in which REHNQUIST, C.J., and WHITE and O'CONNOR, J.J., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, post, p. ---. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. ---. STEVENS, J., filed a dissenting opinion, in which BRENNAN,

MARCHALL, and SCALIA, J.J., joined, post, p. 1009.

Edward Marcus Clark argued the cause for petitioner. With him on the briefs was Robert L. Eberhardt.

John H. Corbett, Jr., by invitation of the Court, 478 U.S. 1019, argued the cause and filed a brief as amicus curiae in support of the judgment below. With him on the brief was Lester G. Nauhaus.*


Justice POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-B, III-C, and IV, and an opinion with respect to Part III-A, in which THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR join.
The question presented in this case is whether and to what extent a State's interest **994 in the confidentiality of its investigative *43 files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence.

As part of its efforts to combat child abuse, the Commonwealth of Pennsylvania has established Children and Youth Services (CYS), a protective service agency charged with investigating cases of suspected mistreatment and neglect. In 1979, respondent George Ritchie was charged with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor. The victim of the alleged attacks was his 13-year-old daughter, who claimed that she had been assaulted by Ritchie two or three times per week during the previous four years. The girl reported the incidents to the police, and the matter then was referred to the CYS.

During pretrial discovery, Ritchie served CYS with a subpoena, seeking access to the records concerning the daughter. Ritchie requested disclosure of the file related to the immediate charges, as well as certain records that he claimed were compiled in 1978, when CYS investigated a separate report by an unidentified source that Ritchie's children were being abused. [FN1] CYS refused to comply with the subpoena, claiming that the records were privileged under Pennsylvania law. The relevant statute provides that all reports and other information obtained in the course of a CYS investigation must be kept confidential, subject to 11 specific exceptions. [FN2] One of those exceptions is that the agency may *44 disclose the reports to a "court of competent jurisdiction pursuant to a court order." Pa.Stat.Ann., Tit. 11, § 2215(a)(5) (Purdon Supp.1986).

Ritchie moved to have CYS sanctioned for failing to honor the subpoena, and the trial court held a hearing on the motion in chambers. Ritchie argued that he was entitled to the information because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. He also requested disclosure of a medical report that he believed was compiled during the 1978 CYS investigation. Although the trial judge acknowledged that he had not examined the entire CYS file, he accepted a CYS representative's assertion that there was no medical report in the record. [FN3] The judge then denied the motion and refused to order CYS to disclose the files. [FN4] See App. 72a.

FN1. Although the 1978 investigation took place during the period that the daughter claimed she was being molested, it is undisputed that the daughter did not tell CYS about the assaults at that time. No criminal charges were filed as a result of this earlier investigation.

FN2. The statute provides in part:
"(a) Except as provided in section 14 [Pa.Stat.Ann., Tit. 11, § 2214 (Purdon Supp.1986)], reports made pursuant to this

FN3. The trial judge stated that he did not read "50 pages or more of an extensive record." App. 72a. The judge had no knowledge of the case before the pretrial hearing. See id., at 68a.

FN4. There is no suggestion that the
Commonwealth's prosecutor was given access to the file at any point in the proceedings, or that he was aware of its contents.

**995 At trial, the main witness against Ritchie was his daughter. In an attempt to rebut her testimony, defense counsel *45 cross-examined the girl at length, questioning her on all aspects of the alleged attacks and her reasons for not reporting the incidents sooner. Except for routine evidentiary rulings, the trial judge placed no limitation on the scope of cross-examination. At the close of trial Ritchie was convicted by a jury on all counts, and the judge sentenced him to 3 to 10 years in prison.

On appeal to the Pennsylvania Superior Court, Ritchie claimed, *inter alia*, that the failure to disclose the contents of the CYS file violated the Confrontation Clause of the Sixth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment. [FN5] The court agreed that there had been a constitutional violation, and accordingly vacated the conviction and remanded for further proceedings. 324 Pa. Super. 557, 472 A.2d 220 (1984). The Superior Court ruled, however, that the right of confrontation did not entitle Ritchie to the full disclosure that he sought. It held that on remand, the trial judge first was to examine the confidential material in camera, and release only the verbatim statements made by the daughter to the CYS counselor. But the full record then was to be made available to Ritchie's lawyer, for the limited purpose of allowing him to argue the relevance of the statements. The court stated that the prosecutor also should be allowed to argue that the failure to disclose the statements was harmless error. If the trial judge determined that the lack of information was prejudicial, *46 Ritchie would be entitled to a new trial. Id., at 567-568, 472 A.2d, at 226.

FN5. The Sixth Amendment of the United States Constitution protects both the right of confrontation and the right of compulsory process:

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor."

Both Clauses are made obligatory on the States by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403-406, 85

On appeal by the Commonwealth, the Supreme Court of Pennsylvania agreed that the conviction must be vacated and the case remanded to determine if a new trial is necessary. 509 Pa. 357, 502 A.2d 148 (1985). But the court did not agree that the search for material evidence must be limited to the daughter's verbatim statements. Rather, it concluded that Ritchie, through his lawyer, is entitled to review the entire file to search for any useful evidence. [FN6] It stated: "When materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it." Id., at 367, 502 A.2d, at 153. The Pennsylvania Court concluded that by denying access to the file, the trial court order had violated both the Confrontation Clause and the Compulsory Process Clause. The court was unpersuaded by the Commonwealth's argument that the trial judge already had examined the file and determined that it contained no relevant information. It ruled that the constitutional infirmity in the trial court's order was that Ritchie was unlawfully denied the opportunity to have the records reviewed by "the eyes and the perspective of an advocate," who may see relevance in places that a neutral judge would not. Ibid.

FN6. The court noted that the trial court should take "appropriate steps" to guard against improper dissemination of the confidential material, including, for example, "fashioning of appropriate protective orders, or conducting certain proceedings in camera." 509 Pa., at 368, n. 16, 502 A.2d, at 153, n. 16. These steps were to be taken, however, subject to "the right of [Ritchie], through his counsel, to gain access to the information." Ibid.

In light of the substantial and conflicting interests held by the Commonwealth and Ritchie, we granted certiorari. 476 U.S. 1139, 106 S.Ct. 2244, 90 L.Ed.2d 690 (1986). We now affirm in part, reverse in part, and **996 remand for proceedings not inconsistent with this opinion.
Before turning to the constitutional questions, we first must address Ritchie's claim that the Court lacks jurisdiction, because the decision below is not a "final judgment or decree." See 28 U.S.C. § 1257(3); Market Street R. Co. v. Railroad Comm'n of California, 324 U.S. 548, 551, 65 S.Ct. 770, 772, 89 L.Ed. 1171 (1945). Normally the finality doctrine contained in § 1257(3) is not satisfied if the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved. Ibid.; Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 123-127, 66 S.Ct. 1475, 1477-1480, 89 L.Ed. 2092 (1945).

Ritchie argues that under this standard the case is not final, because there are several more proceedings scheduled in the Pennsylvania courts: at a minimum there will be an in camera review of the file, and the parties will present arguments on whether the lack of disclosure was prejudicial; after that, there could be a new trial on the merits. Ritchie claims that because the Sixth Amendment issue may become moot at either of these stages, we should decline review until these further proceedings are completed.

Although it is true that this Court is without jurisdiction to review an interlocutory judgment, it also is true that the principles of finality have not been construed rigidly. As we recognized in Cox Broadcasting Corp. v. Carn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), there are at least four categories of cases in which jurisdiction is proper even when there are further proceedings anticipated in the state court. One of these exceptions states that the Court may consider cases:

"[W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case... [I]n these cases, if the party seeking interlocummyreview ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the *48 governing state law would not permit him again to present his federal claims for review." Id., at 481, 95 S.Ct., at 1039.

We find that the case before us satisfies this standard because the Sixth Amendment issue will not survive for this Court to review, regardless of the outcome of the proceedings on remand. If the trial court decides that the CYS files do not contain relevant information, or that the nondisclosure was harmless, the Commonwealth will have prevailed and will have no basis to seek review. In this situation Ritchie's conviction will be reinstated, and the issue of whether defense counsel should have been given access will be moot. Should Ritchie appeal the trial court's decision, the Commonwealth's only method for preserving the constitutional issue would be by cross-claims. Thus the only way that this Court will be able to reach the Sixth Amendment issue is if Ritchie eventually files a petition for certiorari on the trial court's adverse ruling, and the Commonwealth files a cross-petition. When a case is in this procedural posture, we have considered it sufficiently final to justify review. See, e.g., New York v. Quarles, 467 U.S. 649, 651, n. 1, 104 S.Ct. 2626, 2629, n. 1, 81 L.Ed.2d 550 (1984); South Dakota v. Neville, 459 U.S. 553, 558, n. 6, 103 S.Ct. 916, 919, n. 6, 74 L.Ed.2d 748 (1983).

Alternatively, if Ritchie is found to have been prejudiced by the withholding and is granted a new trial, the Commonwealth still will be unable to obtain a ruling from this Court. On retrial Ritchie either will be convicted, in which case the Commonwealth's ability to obtain review again will rest on Ritchie's willingness to appeal; or he will be acquitted, in which case the Commonwealth will be barred from seeking review by the Double Jeopardy Clause. See ibid.; California v. Stewart, 384 U.S. 436, 498, n. 71, 86 S.Ct. 1602, 1640, n. 71, 16 L.Ed.2d 694 (1966) (decided with **997Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Therefore, if this Court does not consider the constitutional claims now, there may well be no opportunity to do so in the future. [FN7]

FN7. As Justice STEVENS' dissent points out, post, at ----, there is a third possibility. If the trial court finds prejudicial error and orders a retrial, the Commonwealth may attempt to take an immediate appeal of this order. See Pa.Rule App.Proc. 311(a). Justice STEVENS' dissent suggests that because the Commonwealth can raise the Sixth Amendment issue again in this appeal, respect for the finality doctrine should lead us to dismiss. But even if we were persuaded that an immediate appeal would lie in this situation, it would not necessarily follow that the constitutional issue will survive. The appellate court could find that the failure to disclose was harmless, precluding further review by the Commonwealth. Alternatively, the appellate court could agree that the error
was prejudicial, thus permitting the Commonwealth to claim that the Sixth Amendment does not compel disclosure. But as Justice STEVENS' dissent recognizes, the Pennsylvania courts already have considered and resolved this issue in their earlier proceedings; if the Commonwealth were to raise it again in a new set of appeals, the courts below would simply reject the claim under the law-of-the-case doctrine. Law-of-the-case principles are not a bar to this Court's jurisdiction, of course, and thus Justice STEVENS' dissent apparently would require the Commonwealth to raise a fruitless Sixth Amendment claim in the trial court, the Superior Court, and the Pennsylvania Supreme Court still another time before we regrant certiorari on the question that is now before us.

The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine--efficiency, judicial restraint, and federalism, see Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 2092 (1945); post, at ---- - ---- would be ill served by another round of litigation on an issue that has been authoritatively decided by the highest state court.

*49 [4] The Sixth Amendment issue has been finally decided by the highest court of Pennsylvania, and unless we review that decision, the harm that the Commonwealth seeks to avoid--the disclosure of the entire confidential file--will occur regardless of the result on remand. We thus cannot agree with the suggestion in Justice STEVENS' dissent that if we were to dismiss this case and it was resolved on other grounds after disclosure of the file, "the Commonwealth would not have been harmed." Post, at 1010. This hardly could be true, because of the acknowledged public interest in ensuring the confidentiality of CYS records. See n. 17, infra. Although this consideration is not dispositive, we have noted that "statutorily created finality requirements *50 should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered." Mathews v. Eldridge, 424 U.S. 319, 331, n. 11, 96 S.Ct. 893, 901, n. 11, 47 L.Ed.2d 18 (1976). We therefore reject Ritchie's claim that the Court lacks jurisdiction, and turn to the merits of the case before us. [FN8]

FN8. Nothing in our decision in United States v. Ryan, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971), requires a different result. In that case the respondent was served with a subpoena requiring him to produce business records for a grand jury. The District Court denied a motion to quash, and respondent appealed. We concluded that the District Court order was not appealable. Id., at 532, 91 S.Ct., at 1581. We rejected the contention that immediate review was necessary to avoid the harm of disclosing otherwise protected material, noting that parties who face such an order have the option of making the decision "final" simply by refusing to comply with the subpoena.

Although there are similarities between this case and Ryan, the analogy is incomplete. In Ryan the Court was concerned about the "necessity for expedition in the administration of the criminal law," id., at 533, 91 S.Ct., at 1587, an interest that would be undermined if all pretrial orders were immediately appealable. Ryan also rests on an implicit assumption that unless a party resisting discovery is willing to risk being held in contempt, the significance of his claim is insufficient to justify interrupting the ongoing proceedings. That is not the situation before us. Here the trial already has taken place, and the issue reviewed by the Commonwealth appellate courts. The interests of judicial economy and the avoidance of delay, rather than being hindered, would be best served by resolving the issue. Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-478, 95 S.Ct. 1029, 1037-1038, 43 L.Ed.2d 328 (1975) (exceptions to finality doctrine justified in part by need to avoid economic waste and judicial delay).

We also reject Ritchie's suggestion that we should dismiss this action and allow the case to return to the trial court, so that the Commonwealth can formally refuse to comply with the Pennsylvania Supreme Court decision and be held in contempt. Here we are not faced merely with an individual's assertion that a subpoena is unduly burdensome, but with a holding of a
State Supreme Court that the legislative interest in confidentiality will not be given effect. The Commonwealth's interest in immediate review of this case is obvious and substantial. Contrary to Justice STEVENS' dissent, we do not think that the finality doctrine requires a new round of litigation and appellate review simply to give the Commonwealth "the chance to decide whether to comply with the order." Post, at 996-997. See n. 7, supra. To prolong the proceedings on this basis would be inconsistent with the "pragmatic" approach we normally have taken to finality questions. See generally Bradley v. Richmond School Bd., 416 U.S. 696, 722-723, n. 28, 94 S.Ct. 2006, 2021-2022, n. 28, 40 L.Ed.2d 476 (1974) ( "This Court has been inclined to follow a 'pragmatic approach' to the question of finality") (citation omitted).

*51 **998 III

The Pennsylvania Supreme Court held that Ritchie, through his lawyer, has the right to examine the full contents of the CYS records. The court found that this right of access is required by both the Confrontation Clause and the Compulsory Process Clause. We discuss these constitutional provisions in turn.

A


[6] Ritchie argues that he could not effectively question his daughter because, without the CYS material, he did not know which types of questions would best expose the weaknesses in her testimony. Had the files been disclosed, Ritchie argues that he might have been able to show that the daughter made statements to the CYS counselor that were inconsistent with her trial statements, or perhaps to reveal that the girl acted with an improper motive. Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or *52 unbelievable. United States v. Abel, 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984); Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). Because this type of evidence can make the difference between conviction and acquittal, see Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), Ritchie argues that the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial. See United States v. Inadi, supra, 475 U.S., at 396, 106 S.Ct., at 1126.

The Pennsylvania Supreme Court accepted this argument, relying in part on our decision in Davis v. Alaska, supra. In Davis the trial judge prohibited defense counsel from questioning a witness about the latter's juvenile criminal record, because a state statute made this information presumptively confidential. We found that this restriction on cross-examination violated the Confrontation Clause, despite Alaska's legitimate interest in protecting the identity of juvenile offenders. 415 U.S., at 318-320, 94 S.Ct., at 1111-1112. The Pennsylvania Supreme Court apparently interpreted our decision in Davis to mean that a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that **999 might be used at trial to impeach or otherwise undermine a witness' testimony. See 509 Pa., at 365-367, 502 A.2d, at 152-153.

[7][8][9][10][11] If we were to accept this broad interpretation of Davis, the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. See California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970) ("[I]t is this literal

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right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause); Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968) ("The right to confrontation is basically a trial *53 right"). The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. [FN9] Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. Delaware v. Fensterer, 474 U.S., at 20, 106 S.Ct., at 294. In short, the Confrontation Clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id., at 20, 106 S.Ct., at 294 (emphasis in original). See also Ohio v. Roberts, supra, 448 U.S., at 73, n. 12, 100 S.Ct., at 2543, n. 12 (except in "extraordinary cases, no inquiry into 'effectiveness' [of cross-examination] is required").

FN9. This is not to suggest, of course, that there are no protections for pretrial discovery in criminal cases. See discussion in Part III-B, infra. We simply hold that with respect to this issue, the Confrontation Clause only protects a defendant's trial rights, and does not compel the pretrial production of information that might be useful in preparing for trial. Also, we hardly need say that nothing in our opinion today is intended to alter a trial judge's traditional power to control the scope of cross-examination by prohibiting questions that are prejudicial, irrelevant, or otherwise improper. See Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).

We reaffirmed this interpretation of the Confrontation Clause last Term in Delaware v. Fensterer, supra. In that case, the defendant was convicted in part on the testimony of the State's expert witness, who could not remember which scientific test he had used to form his opinion. Although this inability to recall frustrated defense counsel's efforts to discredit the testimony, we held that there had been no Sixth Amendment violation. The Court found that the right of confrontation was not implicated, "for the trial court did not limit the scope or nature of defense counsel's cross-

examination in any way." 474 U.S., at 19, 106 S.Ct. at 294. Fensterer was in full accord with our earlier decisions that have upheld a Confrontation Clause infringement claim on this issue only *54 when there was a specific statutory or court-imposed restriction at trial on the scope of questioning. [FN10]
reliability of the witness.” 415 U.S., at 318, 94 S.Ct., at 1111. Similarly, in this case the Confrontation Clause was not violated by the withholding of the CYS file; it only would have been impermissible for the judge to have prevented Ritchie’s lawyer from cross-examining the daughter. Because defense counsel was able to cross-examine all of the trial witnesses fully, we find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS file violated the Confrontation Clause.

*55 B

The Pennsylvania Supreme Court also suggested that the failure to disclose the CYS file violated the Sixth Amendment’s guarantee of compulsory process. Ritchie asserts that the trial court’s ruling prevented him from learning the names of the “witnesses in his favor,” as well as other evidence that might be contained in the file. Although the basis for the Pennsylvania Supreme Court’s ruling on this point is unclear, it apparently concluded that the right of compulsory process includes the right to have the State’s assistance in uncovering arguably useful information, without regard to the existence of a state-created restriction—here, the confidentiality of the files.

[13] This Court has had little occasion to discuss the contours of the Compulsory Process Clause. The first and most celebrated analysis came from a Virginia federal court in 1807, during the treason and misdemeanor trials of Aaron Burr. Chief Justice Marshall, who presided as trial judge, ruled that Burr’s compulsory process rights entitled him to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence. [FN11] United States v. Burr, 25 F.Cas. 30, 35 (No. 14,692d) (CC Va.1807). Despite the implications of the Burr decision for federal criminal procedure, the Compulsory Process Clause rarely was a factor in this Court’s decisions during the next 160 years.

[FN12] More recently,*56 however, the Court has articulated some of the specific rights secured by this part of the Sixth Amendment. Our cases establish, at a minimum, that criminal defendants have the right to the government’s assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt. [FN13]

[14] This Court has never squarely held that the Compulsory Process Clause guarantees **1001 the right to discover the identity of witnesses, or to require the government to produce exculpatory evidence. But cf. United States v. Nixon, 418 U.S. 683, 709, 711, 94 S.Ct. 3090, 3108, 3109, 41 L.Ed.2d 1039 (1974) (suggesting that the Clause may require the production of evidence). Instead, the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment. See United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). See also Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental

FN11. The evidence consisted of a letter that was sent to President Jefferson by General James Wilkinson that allegedly showed that Burr was planning to invade Mexico and set up a separate government under his control. After being ordered to do so, Jefferson eventually turned over an edited version of the letter. For an excellent summary of the Burr case and its implications for compulsory process, see Westen 101-108.


fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. Although we conclude that compulsory process provides no greater protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.

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[15][16] It is wellsettled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, supra, 373 U.S., at 87, 83 S.Ct., at 1196. Although courts have used different terminologies to define "materiality," a majority of this Court has agreed, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S., at 682, 105 S.Ct., at 3383 (opinion of BLACKMUN, J.); see id., at 685, 105 S.Ct., at 3385 (opinion of WHITE, J.).

At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file. The Commonwealth, however, argues that no materiality inquiry is required, because a statute renders the contents of the file privileged. Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file "might" have been useful to the defense.

[17] Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances. This is not a case where a state statute grants CYS the absolute authority to shield its files from all eyes. Cf. 42 Pa.Cons.Stat. § 5945.1(b) (1982) (unqualified statutory privilege for communications between sexual assault counselors and victims). [FN14]

Rather, the Pennsylvania *58 law provides that the information shall be disclosed in certain circumstances, including when CYS is directed to do so by court order. Pa.Stat.Ann., Title 11, § 2215(a)(5) (Purdon Supp.1986). Given that the Pennsylvania Legislature contemplated some use of CYS records in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions. In the absence of any apparent state policy to the contrary, we therefore have no reason to believe that relevant information would not **1002 be disclosed when a court of competent jurisdiction determines that the information is "material" to the defense of the accused.

[18] We therefore affirm the decision of the Pennsylvania Supreme Court to the extent it orders a remand for further proceedings. Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by CYS contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction. [FN15]

FN14. We express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to anyone, including law-enforcement and judicial personnel.

FN15. The Commonwealth also argues that Ritchie is not entitled to disclosure because he did not make a particularized showing of what information he was seeking or how it would be material. See Brief for Petitioner 18 (quoting United States v. Agurs, 427 U.S. 97, 109-110, 96 S.Ct. 2392, 2400-2401, 49 L.Ed.2d 342 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense ... does not establish 'materiality' in the constitutional sense")). Ritchie, of course, may not require the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence. See United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193 (1982) ("He must at least make some plausible showing of how their testimony would have been both
material and favorable to his defense"). Although the obligation to disclose exculpatory material does not depend on the presence of a specific request, we note that the degree of specificity of Ritchie's request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure. See United States v. Bagley, 473 U.S. 667, 682-683, 105 S.Ct. 3375, 3383-3384, 87 L.Ed.2d 481 (1985) (opinion of BLACKMUN, J.).

*59 C*

This ruling does not end our analysis, because the Pennsylvania Supreme Court did more than simply remand. It also held that defense counsel must be allowed to examine all of the confidential information, both relevant and irrelevant, and present arguments in favor of disclosure. The court apparently concluded that whenever a defendant alleges that protected evidence might be material, the appropriate method of assessing this claim is to grant full access to the disputed information, regardless of the State's interest in confidentiality. We cannot agree.

[19] A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files. See United States v. Bagley, supra, at 675, 105 S.Ct., at 3380; United States v. Agurs, supra, 427 U.S., at 111, 96 S.Ct., at 2401. Although the eye of an advocate may be helpful to a defendant in ferreting out information, Dennis v. United States, 384 U.S. 855, 875, 86 S.Ct. 1840, 1851, 16 L.Ed.2d 973 (1966), this Court has never held--even in the absence of a statute restricting disclosure--that a defendant alone may make the determination as to the materiality of the information. Settled practice is to the contrary. In the typical case where a defendant makes only a general request for exculpatory material under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, [FN16] the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance. See Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create one").

FN16. See Fed.Rule Crim.Proc. 16(d)(2); Pa.Rule Crim.Proc. 305(1) ("If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule [mandating disclosure of exculpatory evidence], the court may . . . enter such . . . order as it deems just under the circumstances").

[20][21] We find that Ritchie's interest (as well as that of the Commonwealth) in **1003 ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for in camera review. Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (e.g., the medical report), he is free to request it directly from the court, and argue in favor of its materiality. Moreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth--like all other States [FN17]--has made a commendable effort to assure victims *61 and witnesses that they may speak to the CYS counselors without fear of general disclosure. The Commonwealth's purpose would be frustrated if this confidential material had
to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exclamatory evidence. Neither precedent nor common sense requires such a result.

FN17. The importance of the public interest at issue in this case is evidenced by the fact that all 50 States and the District of Columbia have statutes that protect the confidentiality of their official records concerning child abuse. See Brief for State of California ex rel. John K. Van de Kamp et al. as Amici Curiae 12, n. 1 (listing illustrative statutes). See also Besharov, The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect, 23 Vill.L.Rev. 458, 508-512 (1978).

IV

We agree that Ritchie is entitled to know whether the CYS file contains information that may have changed the outcome of his trial had it been disclosed. Thus we agree that a remand is necessary. We disagree with the decision of the Pennsylvania Supreme Court to the extent that it allows defense counsel access to the CYS file. An in camera review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations. The judgment of the Pennsylvania Supreme Court is affirmed in part and reversed in part, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I, II, III-B, III-C, and IV of the Court's opinion. I write separately, however, because I do not accept the plurality's conclusion, as expressed in Part III-A of Justice POWELL's opinion, that the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery. In this, I am in substantial agreement with much of what Justice BRENNAN says, post, in dissent. In my view, there might well be a confrontation violation *62 if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.

The plurality recognizes that the Confrontation Clause confers upon a defendant a right to conduct cross-examination. **1004 Ante, at 998. It believes that this right is satisfied so long as defense counsel can question a witness on any proper subject of cross-examination. For the plurality, the existence of a confrontation violation turns on whether counsel has the opportunity to conduct such questioning; the plurality in effect dismisses--or, at best, downplays--any inquiry into the effectiveness of the cross-examination. Ante, at 999. Thus, the plurality confidently can state that the Confrontation Clause creates nothing more than a trial right. Ante, at 999.

If I were to accept the plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross-examination, I believe that in some situations the confrontation right would become an empty formality. As even the plurality seems to recognize, see ante, at 999, one of the primary purposes of cross-examination is to call into question a witness' credibility. This purpose is often met when defense counsel can demonstrate that the witness is biased or cannot clearly remember the events crucial to the testimony. The opportunity the Confrontation Clause gives a defendant's attorney to pursue any proper avenue of questioning a witness makes little sense set apart from the goals of cross-examination.

There are cases, perhaps most of them, where simple questioning of a witness will satisfy the purposes of cross-examination. Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (per curiam) is one such example. There the Court rejected a Confrontation Clause challenge brought on the ground that an expert witness for the prosecution could not remember the method by which he had determined that some hair of the victim, whom Fensterer was accused of killing, had been *63 forcibly removed. Although I did not join the summary reversal in Fensterer and would have given the case plenary consideration, see id., at 23, 106 S.Ct., at 296, it is easy to see why cross-examination was effective there. The expert's credibility and conclusions were seriously undermined by a demonstration that he had forgotten the method he used in his analysis. Simple questioning provided such a demonstration, and was reinforced by the testimony of the defendant's own expert who could undermine the other expert's opinion. See id., at 20, 106 S.Ct., at 295. [FN1]
FN1. Accordingly, the remark from Delaware v. Fensterer, which the plurality would use, ante, at 999, as support for its argument that confrontation analysis has little to do with inquiries concerning the effectiveness of cross-examination, actually suggests the opposite. The Court observed in Fensterer that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." 474 U.S., at 20, 106 S.Ct. at 294 (emphasis in original). This remark does not imply that concern about such effectiveness has no place in analysis under the Confrontation Clause. Rather, it means that when, as in Fensterer, simple questioning serves the purpose of cross-examination, a defendant cannot claim a confrontation violation because there might have been a more effective means of cross-examination.

There are other cases where, in contrast, simple questioning will not be able to undermine a witness' credibility and in fact may do actual injury to a defendant's position. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), is a specific example. There defense counsel had the juvenile record of a key prosecution witness in hand but was unable to refer to it during his cross-examination of the witness because of an Alaska rule prohibiting the admission of such a record in a court proceeding. Id., at 310-311, 94 S.Ct., at 1107-1108. The juvenile record revealed that the witness was on probation for the same burglary for which Davis was charged. Accordingly, the possibility existed that the witness was biased or prejudiced against Davis, in that he was attempting to turn towards Davis the attention of the police that would otherwise have been directed against him. *64 Although Davis' counsel was permitted to "question" the witness as to bias, any attempt to point to the reason for that bias was denied. Id., at 313-314, 94 S.Ct., at 1108-1109.

**1005 In the Court's view, this questioning of the witness both was useless to Davis and actively harmed him. The Court observed: "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination." Id., at 318, 94 S.Ct., at 1111. The Court concluded that, without being able to refer to the witness' juvenile record, "[p]etitioner was thus denied the right of effective cross-examination." Ibid.

The similarities between Davis and this case are much greater than any differences that may exist. In cross-examining a key prosecution witness, counsel for Davis and counsel for respondent were both limited to simple questioning. They could not refer to specific facts that might have established the critical bias of the witness: Davis' counsel could not do so because, while he had the juvenile record in hand, he could not refer to it in light of the Alaska rule, see id., at 311, n. 1, 94 S.Ct., at 1108, n. 1; respondent's attorney had a similar problem because he had no access at all to the CYS file of the child-abuse victim, see ante, at 994, and n. 2. Moreover, it is likely that the reaction of each jury to the actual cross-examination was the same—a sense that defense counsel was doing nothing more than harassing a blameless witness.

It is true that, in a technical sense, the situations of Davis and Ritchie are different. Davis' counsel had access to the juvenile record of the witness and could have used it but for the Alaska prohibition. Thus, the infringement upon Davis' confrontation right occurred at the trial stage when his counsel was unable to pursue an available line of inquiry. Respondent's attorney could not cross-examine his client's daughter with the help of the possible evidence in the CYS *65 file because of the Pennsylvania prohibition that affected his pretrial preparations. I do not believe, however, that a State can avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage.

Despite my disagreement with the plurality's reading of the Confrontation Clause, I am able to concur in the Court's judgment because, in my view, the procedure the Court has set out for the lower court to follow on remand is adequate to address any confrontation problem. Here I part company with Justice BRENNAN. Under the Court's prescribed procedure, the trial judge is directed to review the CYS file for "material" information. Ante, at 1002. This information would certainly include such evidence as statements of the witness that might have
been used to impeach her testimony by demonstrating any bias toward respondent or by revealing inconsistencies in her prior statements. [FN2] When reviewing confidential records in future cases, trial courts should be particularly aware of the possibility that impeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial. As the Court points out, moreover, the trial court's obligation to review the confidential record for material information is ongoing. *66 **106 Impeachment evidence is precisely the type of information that might be deemed to be material only well into the trial, as, for example, after the key witness has testified. [FN3]

FN2. In United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court rejected any distinction between exculpatory and impeachment evidence for purposes of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). 473 U.S., at 676, 105 S.Ct., at 3380. We noted that nondisclosure of impeachment evidence falls within the general rule of Brady "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence.' " Id., at 677, 105 S.Ct., at 3381, quoting Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). We observed moreover, that, while a restriction on pretrial discovery might not suggest as direct a violation on the confrontation right as would a restriction on the scope of cross-examination at trial, the former was not free from confrontation concerns. 473 U.S., at 678, 105 S.Ct., at 3381.

FN3. If the withholding of confidential material from the defendant at the pretrial stage is deemed a Confrontation Clause violation, harmless-error analysis, of course, may still be applied. See Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986).

I join Justice STEVENS' dissenting opinion regarding the lack of finality in this case. I write separately to challenge the Court's narrow reading of the Confrontation Clause as applicable only to events that occur at trial. That interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial. In this case, the trial court properly viewed Ritchie's vague speculations that the agency file might contain something useful as an insufficient basis for permitting general access to the file. However, in denying access to the prior statements of the victim the court deprived Ritchie of material crucial to any effort to impeach the victim at trial. I view this deprivation as a violation of the Confrontation Clause.


One way in which cross-examination may be restricted is through preclusion at trial itself of a line of inquiry that counsel seeks to pursue. See ante, at ----, n. 9 (citing cases). The logic of our concern for restriction on the ability to engage in cross-examination does not suggest, however, that the Confrontation Clause prohibits only such limitations. [FN*] A crucial avenue of cross-examination also may be foreclosed by the denial of access to material that would serve as the basis for this examination. Where denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought. Thus, he or she cannot point to a specific subject of inquiry that has been foreclosed, as can a counsel whose interrogation at trial has been limited by the trial judge. Nonetheless, there occurs as effective a preclusion of a topic of cross- examination as if the judge at trial had ruled an entire area of questioning off limits.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.
FN* The Court contends that its restrictive view is supported by statements in California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970), and Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968), that the right to confrontation is essentially a trial right. Neither statement, however, was intended to address the question whether Confrontation Clause rights may be implicated by events outside of trial. In Green, the Court held that it was permissible to introduce at trial the out-of-court statements of a witness available for cross-examination. The Court rejected the argument that the Confrontation Clause precluded the admission of all hearsay evidence, because the ability of the defendant to confront and cross-examine the witness at trial satisfied the concerns of that Clause. 399 U.S., at 157, 90 S.Ct., at 1934. In Barber, the Court held that, where a witness could be called to testify, the failure to do so was not excused by the fact that defense counsel had an opportunity to cross-examine the witness at a preliminary hearing. The Court held that, since the Confrontation Clause is concerned with providing an opportunity for cross-examination at trial, the failure to afford such an opportunity when it was clearly available violated that Clause. Thus, neither Green nor Barber suggested that the right of confrontation attached exclusively at trial.  

*68 The Court has held that the right of cross-examination may be infringed even absent limitations on questioning imposed at trial. Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), held that the defendant was entitled to obtain the prior statements of persons to government agents when those persons testified against him at trial. Impeachment of the witnesses was "singularly important" to the defendant, we said, id., at 667, 77 S.Ct., at 1012, and the reports were essential to the impeachment effort. Thus, we held that a defendant is entitled to inspect material "with a view to use on cross-examination" when that material "[is] shown to relate to the testimony of the witness." Id., at 669, 77 S.Ct., at 1014. As I later noted in Palermo v. United States, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959), Jencks was based on our supervisory authority rather than the Constitution, "but it would be idle to say that the commands of the Constitution were not close to the surface of the decision." 360 U.S., at 362-363, 79 S.Ct., at 1229-1230 (BRENNAN, J., concurring in result). In Palermo, I specifically discussed the Confrontation Clause as a likely source of the rights implicated in a case such as Jencks. 360 U.S., at 362, 79 S.Ct., at 1229.

The Court insists that the prerequisite for finding a restriction on cross-examination is that counsel be prevented from pursuing a specific line of questioning. This position has similarities to an argument the Court rejected in Jencks. The Government contended in that case that the prerequisite for obtaining access to witnesses' prior statements should be a showing by the defendant of an inconsistency between those statements and trial testimony. We rejected that argument, noting, "[t]he occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, ... the accused is helpless to know or discover conflict without inspecting the reports." 353 U.S., at 667-668, 77 S.Ct., at 1012-1013. Cf. United States v. Burr, 25 F.Cas. 187, 191 (No. 14,694) (CC Va. 1807) ("It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"). Similarly, *69 unless counsel has access to prior statements of a witness, he or she cannot identify what subjects of inquiry have been foreclosed from exploration at trial. Under the Court's holding today, the result is that partial denials of access may give rise to Confrontation Clause violations, but absolute denials cannot.

The Court in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), also recognized that pretrial events may undercut the right of cross-examination. In Wade, we held that a pretrial identification lineup was a critical stage of criminal proceedings at which the Sixth Amendment right to counsel was applicable. This holding was premised explicitly on concern for infringement of Confrontation Clause rights. The presence of counsel at a lineup is necessary, the Court said, "to preserve the defendant's right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." Id., at 227, 87 S.Ct., at 1932. If counsel is excluded from such a proceeding, he or she is at a serious disadvantage in calling into question an identification at trial. The "inability effectively to reconstruct at trial any
unfairness that occurred at the lineup" may then "deprive [the defendant] of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 232, 87 S.Ct., at 1934. The Court continued:

"Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential *1008 safeguard to his right to confront the witnesses against him. *Pointer v. Texas*, 380 U.S. 400 [85 S.Ct. 1065, 13 L.Ed.2d 923]." *Id.*, at 235, 87 S.Ct., at 1936 (emphasis added).

Since a lineup from which counsel is absent is potentially prejudicial, and "since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial," *Id.*, at 236, 87 S.Ct., at 1937 (emphasis added) (footnote omitted), the *70 Court in *Wade* concluded that a pretrial lineup is a stage of prosecution at which a defendant is entitled to have counsel present.

The exclusion of counsel from the lineup session necessarily prevents him or her from posing any specific cross-examination questions based on observation of how the lineup was conducted. The Court today indicates that this inability would preclude a finding that cross-examination has been restricted. The premise of the Court in *Wade*, however, was precisely the opposite: the very problem that concerned the Court was that counsel would be foreclosed from developing a line of inquiry grounded on actual experience with the lineup.

The Court suggests that the court below erred in relying on *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), for its conclusion that the denial of access to the agency file raised a Confrontation Clause issue. While *Davis* focused most explicitly on the restriction at trial of cross-examination, nothing in the opinion indicated that an infringement on the right to cross-examination could occur only in that context. Defense counsel was prevented from revealing to the jury that the government's witness was on probation. The immediate barrier to revelation was the trial judge's preclusion of counsel's effort to inquire into the subject on cross-examination. Yet the reason that counsel could not make such inquiry was a state statute that made evidence of juvenile adjudications inadmissible in court. Any counsel familiar with the statute would have no doubt that it foreclosed any line of questioning pertaining to a witness' juvenile record, despite the obvious relevance of such information for impeachment purposes. The foreclosure would have been just as effective had defense counsel never sought to pursue on cross-examination the issue of the witness' probationary status. The lower court thus properly recognized that the underlying problem for defense counsel in *Davis* was the prohibition on disclosure of juvenile records.

*71 The creation of a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself. In this case, the foreclosure of access to prior statements of the testifying victim deprived the defendant of material crucial to the conduct of cross-examination. As we noted in * Jencks*, a witness' prior statements are essential to any effort at impeachment:

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *353 U.S.*, at 667, 77 S.Ct., at 1013.

The right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject accusations to critical scrutiny. See *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980) ("underlying purpose" of Confrontation Clause is "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence"). Essential to testing a witness' account of events is the ability to compare that version with other versions the witness has earlier recounted. *1009 Denial of access to a witness' prior statements thus imposes a handicap that strikes at the heart of cross-examination.

The ability to obtain material information through reliance on a due process claim will not in all cases nullify the damage of the Court's overly restrictive reading of the Confrontation Clause. As the Court notes, *ante*, at ----, evidence is regarded as material only if there is a reasonable probability that it might
affect the outcome of the proceeding. Prior *72
statements on their face may not appear to have such
force, since their utility may lie in their more subtle
potential for diminishing the credibility of a witness.
The prospect that these statements will not be
regarded as material is enhanced by the fact that due
process analysis requires that information be
evaluated by the trial judge, not defense counsel.
Ante, at ----. By contrast, Jencks, informed by
confrontation and cross-examination concerns, insisted that defense counsel, not the court, perform
such an evaluation, "[b]ecause only the defense is
adequately equipped to determine the effective use
for the purpose of discrediting the Government's
witness and thereby furthering the accused's
defense." Jencks, supra, 353 U.S., at 668-669, 77
S.Ct., at 1013-1014. Therefore, while Confrontation
Clause and due process analysis may in some cases
be congruent, the Confrontation Clause has
independent significance in protecting against
infringements on the right to cross-examination.

The Court today adopts an interpretation of the
Confrontation Clause unwarranted by previous case
law and inconsistent with the underlying values of
that constitutional provision. I therefore dissent.

Justice STEVENS, with whom Justice BRENNAN,
Justice MARSHALL, and Justice SCALIA join,
dissenting.

We are a Court of limited jurisdiction. One of
the basic limits that Congress has imposed upon us is that
we may only review "[f]inal judgments or decrees rendered by the highest court of a State in which a
decision could be had." 28 U.S.C. § 1257. The
purposes of this restriction are obvious, and include
notions of efficiency, judicial restraint, and
federalism. See Construction Laborers v. Curry,
371 U.S. 542, 550, 83 S.Ct. 531, 536, 9 L.Ed.2d 514
(1963); Radio Station WOW, Inc. v. Johnson, 326
U.S. 120, 124, 66 S.Ct. 1475, 1478, 89 L.Ed. 2092
(1945). Over the years the Court has consistently
applied a strict test of finality to determine the
reviewability of state-court decisions remanding
cases for further proceedings, and the reviewability
of pretrial discovery orders. Given the plethora of
such decisions and orders and *73 the fact that they
often lead to the settlement or termination of
litigation, the application of these strict rules has
unquestionably resulted in this Court's not reviewing
countless cases that otherwise might have been
reviewed. Despite that consequence--indeed, in my
judgment, because of that consequence--I regard the

rule as wise and worthy of preservation.

I

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469,
95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), the Court
recognized some limited exceptions to the general
principle that this Court may not review cases in
which further proceedings are anticipated in the state
courts. One of these exceptions applies "where the
federal claim has been finally decided, with further
proceedings in the state courts to come, but in which
later review of the federal issue cannot be had,
whatever the ultimate outcome of the case." Id., at
481, 95 S.Ct., at 1039. The concern, of course, is
that the petitioning party not be put in a position
where he might eventually lose on the merits, but
would have never had an opportunity to present his
federal claims for review. Ibid. The most common
example of this phenomenon is where a State seeks
review of an appellate court's order that evidence be
suppressed. In such a case, if the State were forced
to proceed to trial prior to seeking review in this
Court, it could conceivably lose its case at trial, and,
because **1010 of the double jeopardy rule, never
have a chance to use what we might have held to be
admissible evidence. See, e.g., New York v. Quarles,
467 U.S. 649, 651, n. 1, 104 S.Ct. 2626, 2629, n. 1,

This case does not fit into that exception. Were we
to decline review at this time there are three possible
scenarios on remand. First, the Children and Youth
Services (CYS) might refuse to produce the
documents under penalty of contempt, in which case
appeals could be taken, and this Court could obtain
proper jurisdiction. See United States v. Ryan, 402
Alternatively, if CYS were to produce the documents,
the trial court might find the error to be *74 harmless,
in which case Ritchie's conviction would stand and
the Commonwealth would not have been harmed by
our having declined to review the case at this stage.
Finally, the trial court could determine that Ritchie's
lack of access to the documents was constitutionally
prejudicial, and thus order a new trial. If the
Commonwealth would then have no recourse but to
proceed to trial with the risk of an unreviewable
acquittal, I agree that the Cox exception would apply.
Under Pennsylvania law, however, the
Commonwealth would have the opportunity for an
immediate interlocutory appeal of the new trial order.

Pennsylvania Rule of Appellate Procedure 311(a)(5)
affords the Commonwealth a right to an interlocutory

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appeal in criminal cases where it "claims that the lower court committed an error of law." An argument that the trial court erred in evaluating the constitutionally harmless-error issue would certainly qualify under that provision. FN1 Moreover, the Commonwealth could, if necessary, reassert the constitutional arguments that it now makes here. Although the claims would undoubtedly be rejected in Pennsylvania under the law-of-the-case doctrine, that would not bar this Court from reviewing the claims. See Barclay v. Florida, 463 U.S. 939, 946, 103 S.Ct. 3418, 3422, 77 L.Ed.2d 1134 (1983); Hathorn v. Lovorn, 457 U.S. 255, 261-262, 102 S.Ct. 2421, 2425-2426, 72 L.Ed.2d 824 (1982); see *75 generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 132 (6th ed. 1986).

FN1. See Commonwealth v. Bievine, 453 Pa. 481, 482-483, 309 A.2d 421, 422 (1973) (whether "the testimony offered at trial by the Commonwealth was insufficient to support the jury's finding" is appealable issue of law); Commonwealth v. Melton, 402 Pa. 628, 629, 168 A.2d 328, 329 (1961) (citing case "where a new trial is granted to a convicted defendant on the sole ground that the introduction of certain evidence at his trial was prejudicial error" as example of appealable issue of law); Commonwealth v. Durrah-El, 344 Pa.Super. 511, 514, n. 2, 496 A.2d 1222, 1224, n. 2 (1985) (whether trial counsel provided ineffective assistance of counsel is appealable as asserted "error of law"); Commonwealth v. Carney, 310 Pa.Super. 549, 551, n. 1, 456 A.2d 1072, 1073, n. 1 (1983) (whether curative instruction was sufficient to remedy improper remark of prosecution witness is appealable as asserted "error of law").

The fact that the Commonwealth of Pennsylvania cannot irrevocably lose this case on the federal constitutional issue without having an opportunity to present that issue to this Court takes this case out of the Cox exception that the Court relies upon. Nonetheless, the Court makes the astonishing argument that we should hear this case now because if Ritchie's conviction is reinstated on remand, "the issue of whether defense counsel should have been given access will be moot," and the Court will lose its chance to pass on this constitutional issue. Ante, at 997. This argument is wholly contrary to our long tradition of avoiding, not reaching out to decide, constitutional decisions when a case may be disposed of on other grounds for legitimate reasons. See Ashwander v. TVA, 297 U.S. 346-347, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring); Rescue Army v. Municipal Court, 331 U.S. 549, 571, 67 S.Ct. 1409, 1421, 91 L.Ed. 1666 (1947). Indeed, the Court has explained that it is precisely the policy against unnecessary constitutional adjudication that demands strict application of the finality requirement.


II

The Court also suggests that a reason for hearing the case now is that, if CYS is forced to disclose the documents, the confidentiality will be breached and subsequent review will be too late. Ante, at 997, and n. 7. This argument fails in light of the longstanding rule that if disclosure will, in and of itself, be harmful, the remedy is for the individual to decline to produce the documents, and immediately appeal any contempt order that is issued. This rule is exemplified by our decision in United States v. Ryan, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971), a case in which a District Court denied a motion to quash a subpoena duces tecum commanding the respondent to produce certain documents located in Kenya. The Court of Appeals held that the order was appealable but we reversed, explaining:

*76 "Respondent asserts no challenge to the continued validity of our holding in Cobbyedick v. United States, 309 U.S. 323 [60 S.Ct. 540, 84 L.Ed. 783] (1940), that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey. Respondent, however, argues that Cobbyedick does not apply in the circumstances before us because, he asserts, unless immediate review of the District Court's order is available to him, he will be forced to undertake a substantial burden in complying with the subpoena, and will therefore be 'powerless to avert the mischief of the order.' Perlman v. United States, 247 U.S. 7, 13 [38 S.Ct. 417, 419, 62 L.Ed. 950] (1918).

"We think that respondent's assertion misapprehends the thrust of our cases. Of course, if he complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted in order to comply. But compliance is
not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review. But we have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court’s order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal. Cobbleduck v. United States, supra; Alexander v. United States, 201 U.S. 117 [26 S.Ct. 356, 50 L.Ed. 686] (1906); cf. United States v. Blue, 384 U.S. 251 [86 S.Ct. 1416, 16 L.Ed.2d 510] (1966); *77 DiBella v. United States, 369 U.S. 121 [82 S.Ct. 654, 7 L.Ed.2d 614] (1962); Carroll v. United States, 354 U.S. 394 [77 S.Ct. 1332, 1 L.Ed.2d 1442] (1957). Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual’s claims have we allowed exceptions to this principle." Id., 402 U.S., at 532-533, 91 S.Ct., at 1581-1582.

In the case before us today, the Pennsylvania Supreme Court has instructed the trial court to order CYS to produce certain documents for inspection by the trial court and respondent’s counsel. Although compliance with the order might be burdensome for a different reason than the burden of obtaining documents in Kenya, the burden of disclosure is sufficiently troublesome to CYS that it apparently objects to compliance. [FN2] But as was true in the Ryan case, it has yet not been given the chance to decide whether to comply with the order and therefore has not satisfied the condition for appellate review that we had, until today, consistently imposed. [FN3]

FN2. It is not clear to what extent counsel for the Commonwealth in this case represents CYS, or whether he only represents the Office of the District Attorney of Allegheny County. CYS is certainly not a party to this case; in fact it has filed an amicus curiae brief expressing its views. That CYS is not a party to the case makes it all the more inappropriate for the Court to relax the rule of finality in order to spare CYS the need to appeal a contempt order if it fails to produce the documents.

FN3. The Court has recognized a limited exception to this principle where the documents at issue are in the hands of a third party who has no independent interest in preserving their confidentiality. See Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918); see also United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971). This case presents a far different situation. As far as the disclosure of the documents go, it is CYS, not the prosecutor, that claims a duty to preserve their confidentiality and to implement Pennsylvania’s Child Protective Services Law. See Brief for Allegheny County, Pennsylvania, on behalf of Allegheny County Children and Youth Services as Amicus Curiae in Support of Petitioner 2.

Nor does this case come within the exception of United States v. Nixon, 418 U.S. 683, 691-692, 94 S.Ct. 3090, 3099-3100, 41 L.Ed.2d 1039 (1974), where the Court did not require the President of the United States to subject himself to contempt in order to appeal the District Court’s rejection of his assertion of executive privilege. As Judge Friendly explained, the rationale of that decision is unique to the Presidency and is “wholly inapplicable” to other government agents. See National Super Suds, Inc. v. New York Mercantile Exchange, 591 F.2d 174, 177 (CA2 1979); see also Newton v. National Broadcasting Co., 726 F.2d 591 (CA9 1984); United States v. Winner, 641 F.2d 825, 830 (CA10 1981); In re Attorney General of the United States, 596 F.2d 58, 62 (CA2), cert. denied, 444 U.S. 903, 100 S.Ct. 217, 62 L.Ed.2d 141 (1979); but see In re Grand Jury Proceedings (Wright II), 654 F.2d 268, 270 (CA3), cert. denied, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981); Branch v. Phillips Petroleum Co., 638 F.2d 873, 877-879 (CA5 1981).

*78 III

Finally, the Court seems to rest on the rationale that because this respondent has already been tried,
immediate review in this particular case will expedite the termination of the litigation. See ante, at 997, n. 7. I am not persuaded that this is so—if we had not granted certiorari, the trial court might have reviewed the documents and found that they are harmless a year ago—but even if it were, the efficient enforcement of the finality rule precludes a case-by-case inquiry to determine whether its application is appropriate. Only by adhering to our firm rules of finality can we discourage time-consuming piecemeal litigation.

Of course, once the case is here and has been heard, there is natural reluctance to hold that the Court lacks jurisdiction. It is misguided, however, to strain and find jurisdiction in the name of short-term efficiency when the long-term effect of the relaxation of the finality requirement will so clearly be inefficient. If the Court's goal is expediting the termination of litigation, the worst thing it can do is to extend an open-ended invitation to litigants to interrupt state proceedings with interlocutory visits to this Court.

I would therefore dismiss the writ because the judgment of the Supreme Court of Pennsylvania is not final.

107 S.Ct. 989, 480 U.S. 39, 94 L.Ed.2d 40, 55 USLW 4180, 22 Fed. R. Evid. Serv. 1


- 1986 WL 728022 (Appellate Brief) Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief (Aug. 08, 1986)


- 1986 WL 728026 (Appellate Brief) Motion for Leave to File Brief, Amici Curiae, and Brief, Amici Curiae, of the Sunny Von Bulow National Victim Advocacy Center, Inc. Joined by the New York State Crime Victims Board, the Legal Foundation of America, Inc. and the National Association of Counsel for Children, Inc. in Support of the Petitioner. (Aug. 05, 1986)
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee, v. Teddy MOLINA, also known as Samuel Molina, also known as Teddy Samuel Molina, Defendant-Appellant, Jose Ciren, also known as James Ortiz, Irvin Aviles Manso, also known as Irvin Aviles and Carlos Belez, Defendants.

Docket No. 02-1742.


Background: Defendant was convicted on guilty plea in the United States District Court for the Northern District of New York, McAvoy, J., of being felon in possession of firearm. The District Court, 224 F.Supp.2d 459, Munson, J., denied defendant's motion for release of presentence investigation reports (PSRs) of co-defendants, including those who did not testify for government at defendant's sentencing hearing. Defendant appealed.

Holdings: The Court of Appeals, Cardamone, Circuit Judge, held that:
(1) as a matter of first impression, defendant in requesting PSRs for non-testifying codefendants was required to make threshold showing that PSRs contained exculpatory evidence not available elsewhere, in order to trigger District Court's duty to conduct in camera review;
(2) any error in failing to conduct in camera review of PSRs of non-testifying codefendants was harmless;
(3) district court's express adoption of defendant's PSR in its written judgment did not satisfy court's separate statutory requirement to "state in open court" reasons for imposing particular sentence; but
(4) District Court did not plainly err by failing to expressly adopt PSR in open court.

Affirmed.

West Headnotes

[1] Sentencing and Punishment 293
350Hk293 Most Cited Cases

Presentence investigation reports are generally considered confidential, but their confidentiality is not absolute because of due process concerns that court not impose unjust sentence based on materially false information obtained from others besides defendant. U.S.C.A. Const.Amend. 5; Fed.Rules Cr.Proc.Rule 32(e), 18 U.S.C.A.

[2] Sentencing and Punishment 296
350Hk296 Most Cited Cases

Where federal defendant requests presentence report (PSR) of accomplice who is witness at defendant's sentencing hearing, sentencing court first examines requested report in camera for exculpatory or impeachment material that might aid defendant, then determines if policy of confidentiality is outweighed by compelling need for disclosure to meet ends of justice. Fed.Rules Cr.Proc.Rule 32(e), 18 U.S.C.A.

[3] Criminal Law 1147
110k1147 Most Cited Cases

Ordinarily, federal district court's decision as to disclosure of presentence investigation report is reviewed for abuse of discretion.

110k1139 Most Cited Cases

Court of Appeals reviewed de novo federal district court's ruling that defendant's motion for disclosure of codefendants' presentence reports (PSRs) was moot as to non-testifying defendants, since ruling was one of law. Fed.Rules Cr.Proc.Rule 32(e), 18 U.S.C.A.

[5] Sentencing and Punishment 296
350Hk296 Most Cited Cases

Defendant who requested presentence investigation reports (PSRs) for non-testifying codefendants was required to make threshold showing that PSRs contained exculpatory evidence not available elsewhere, in order to trigger federal district court's duty to conduct in camera review; abstract arguments
that reports might affect how defendant's counsel cross-examined testifying codefendant at sentencing hearing, or might lead defendant to present testimony via remaining codefendants, were insufficient. Fed.Rules Cr.Proc.Rule 32(e)(1), 18 U.S.C.A.

110k1177 Most Cited Cases

In federal prosecution in which prosecutor sought "aggravating role" sentencing enhancement based on defendant's role as organizer, even assuming that district court erred by failing to conduct in camera review upon defendant's request for presentence investigation reports (PSRs) of non-testifying codefendants, error was harmless since reports contained no exculpatory or impeachment material indicating that any codefendants served in role of organizer. U.S.S.G. § 3B1.1(c), 18 U.S.C.A..

[7] Sentencing and Punishment 995
350Hk995 Most Cited Cases

Federal district court must make specific factual findings to support "aggravating role" sentence enhancement. U.S.S.G. § 3B1.1, 18 U.S.C.A.

[8] Criminal Law 1158(1)
110k1158(1) Most Cited Cases

Court of Appeals reviews for clear error federal district court's findings as to defendant's role in offense that underlie decision whether to apply Sentencing Guidelines' "aggravating role" enhancement. U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

[9] Sentencing and Punishment 996
350Hk996 Most Cited Cases

Federal district court satisfies its obligation to make requisite specific factual findings underlying application of "aggravating role" sentence enhancement when it explicitly adopts factual findings set forth in presentence report, either at sentencing hearing or in written judgment filed later. U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

[10] Sentencing and Punishment 996
350Hk996 Most Cited Cases

Federal district court's express adoption of presentence report (PSR) in its written judgment, including PSR's reasons for imposing "aggravating role" sentence enhancement, did not satisfy court's separate statutory requirement to "state in open court" reasons for imposing particular sentence; at minimum, court should have adopted PSR in open court. 18 U.S.C.A. § 3553(c); U.S.S.G. § 3B1.1(c), 18 U.S.C.A.

350Hk995 Most Cited Cases

Purpose of statute requiring federal district court to give statement of reasons for imposing sentence at time of sentencing include: (1) to inform defendant of reasons for his sentence; (2) to permit meaningful appellate review; (3) to enable public to learn why defendant received particular sentence; and (4) to guide probation officers and prison officials in developing program to meet defendant's needs. 18 U.S.C.A. § 3553(c).

[12] Criminal Law 1030(1)
110k1030(1) Most Cited Cases

Finding of plain error requires finding that error: (1) has not been waived; (2) is plain; (3) affects substantial right of defendant; and (4) seriously affects fairness, integrity or public reputation of judicial proceedings.

[13] Criminal Law 1042
110k1042 Most Cited Cases

Federal district court did not plainly err by failing to expressly adopt presentence report (PSR) in open court, or otherwise explain in open court its imposition of "aggravating role" sentence enhancement; PSR contained adequate findings supporting enhancement, PSR was expressly adopted in court's written judgment, and evidence at sentencing hearing revealed that defendant had, inter alia, provided other participants in planned robbery with firearms and furnished information to other participants concerning intended victim and his address. 18 U.S.C.A. § 3553(c).


Richard R. Southwick, Assistant United States Attorney, Syracuse, New York (Glenn T. Suddaby, United States Attorney, Northern District of New York, Syracuse, New York, of counsel), submitted a brief for Appellee.


This appeal presents us with a sentencing record that we believe contains error. The error is not a reasoned error by the district court, but an error of omission. It is not uncommon when reviewing a record on appeal to be confronted with an error not so substantial as to require reversal, and yet not so insignificant that it may in justice be ignored. Such is the circumstance of this case, and the reason why we write.

FACTS

In the early morning hours of August 1, 2001 in Syracuse, New York, Teddy Molina with three other men--José Cireno, Carlos Belez, and Irvin Aviles Manso--were apprehended by Syracuse police after a citizen reported that they had been observed crouching in some shrubbery at a house on Seymour Street. When the police arrived, Molina and his cohorts fled, pursued by the police on foot. All four were quickly captured. But during the chase, the men dropped firearms that were later recovered by the police. In all, four firearms were found, including a sawed-off shotgun and three pistols, one of which had an obliterated serial number.

Subsequently, it turned out that Molina and the other three men were planning an armed robbery of an individual they believed was a drug dealer who had drugs and money in his Seymour Street home. On August 15, 2001 a federal grand jury handed down a four-count indictment charging all four participants with weapons charges, as follows: receiving stolen firearms (Count 1); selling defaced firearms (Count 2); unlawfully transporting firearms (Count 3); and possession of a firearm as a prohibited person (convicted felon) (Count 4). Teddy Molina pled guilty to Count 4, charging him with possession of firearms as a prohibited person in violation of § 922(g)(1).

His plea, pursuant to a plea agreement, satisfied his criminal liability under the indictment and left open the question of whether an aggravating role adjustment should be applied for his role in the offense. Molina's presentence investigation report (PSR) recommended a two-level enhancement for his role as manager or organizer under the U.S. Sentencing Guidelines Manual (U.S.S.G.) § 3B1.1(c). Before the sentencing hearing and to prepare for that hearing, defendant's counsel asked the district court that he be provided with the presentence reports and criminal histories of Molina's three co-defendants. The district court did not rule on this motion prior to holding Molina's sentencing hearing.

On September 23, 2002 the sentencing hearing was held on the proposed two-level enhancement for Molina being an organizer. The government called one of his co-defendants, José Luis Cireno, as a witness. Cireno testified with respect to Molina's role in organizing the crime, including the facts that Molina suggested the crime, provided each co-defendant with a firearm, brought tape to the purported crime scene to tie-up the intended victim, and brought walkie-talkies for communication. Defense *273 counsel cross-examined Cireno, but called no witnesses.

Several weeks later the district court denied by memorandum and order dated October 7, 2002 Molina's motion for disclosure of his co-defendants' PSRs. It ruled that neither the Jencks Act, 18 U.S.C. § 3500 (2000), nor our ruling in United States v. Charmer Industries, Inc., 711 F.2d 1164 (2d Cir.1983), supported Molina's request for co-defendants' presentence reports. Judge Munson noted that he had reviewed in camera co-defendant Cireno's presentence report and found that it contained no exculpatory or impeachment material. The district court ruled that since the other two co-defendants were not called to testify, defendant's request for their PSRs was moot.

On October 17, 2002 the district court granted the two-level sentence enhancement the government had requested, raising Molina's total offense level to 26, for which he was sentenced to 80 months in prison, three years of supervised release, and a $100 special assessment. This appeal followed.

DISCUSSION

On appeal, Molina contends the district judge erred by failing to conduct an in camera review of two of his co-defendants' presentence reports to determine whether they contained exculpatory and/or
impeachment material that appellant could present at his sentencing hearing; and, additionally erred in imposing a two-level enhancement for appellant's role in the offense pursuant to U.S.S.G. § 3B1.1(c) without making sufficient factual findings. We discuss each contention in turn.

I In Camera Review of Co-Defendants' PSRs


Focus turns to Federal Rule of Criminal Procedure 32, particularly Rule 32(c), which for the first time required the probation department to prepare a report on each defendant. Subdivision (d)(2) of Rule 32 sets out the information that a presentence report should contain. Insofar as pertinent here, it includes:

(A) the defendant's history and characteristics, including:
   (i) any prior criminal record;
   (ii) the defendant's financial condition; and
   (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;
(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;
   ....
   (F) any other information that the court requires.

[1] Thus, presentence investigation reports, created by the probation office, function primarily to assist the court in determining an appropriate sentence. For that reason they are generally viewed as confidential so as not to impede the free flow of information needed to assist the sentencing judge. See Charner, 711 F.2d at 1171, 1173. But the confidentiality of presentence reports has not been considered absolute because of due process concerns that a court not impose an unjust sentence based on materially false information obtained from others besides the defendant. Townsend v. Burke, 334 U.S. 736, 740-41, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).

[2] With this background in mind, we turn to the question before us: defendant's request to have an examination of his co-defendants' PSRs. With respect to third party disclosures, we have approved a procedure by which the sentencing court examines requested presentence reports in camera for exculpatory or impeachment material that might aid the defendant requesting it. The court then determines if the policy of confidentiality is outweighed by a compelling need for disclosure to meet the ends of justice. See Charner, 711 F.2d at 1175; United States v. Moore, 949 F.2d 68, 72 (2d Cir.1991). Here, it is undisputed that the district court examined the presentence report of the witness, Cireno. The question before us therefore is whether the district court erred in not following the same procedure with the two additional non-testifying co-defendants. This issue is a question of first impression.

[3][4] To begin, we set out our standard of review. Ordinarily, a district court's decision as to disclosure of a presentence investigation report is reviewed for an abuse of discretion. United States v. Pena, 227 F.3d 23, 27 (2d Cir.2000). In the instant case, however, the sentencing court ruled that the motion for disclosure was moot as to the two non-testifying defendants. Because that ruling was one of law, and not an exercise of discretion, we review it de novo. See Catanzano v. Wing, 277 F.3d 99, 107 (2d Cir.2001).

[5] The government had the burden at appellant's hearing to prove by a preponderance of the evidence that he was an organizer or leader in the criminal offense for which he was convicted. To discharge that burden the government is required to present facts sufficient to warrant the sentence enhancement. Because of our emphasis on the confidentiality of presentence reports, and because the presentence reports of those individuals--other than defendant
Carlos Belez. None of the co-defendants' presentence reports contain exculpatory or impeaching material indicating that any of the co-defendants served in place of or in the role of organizer of the planned robbery. [FN1] In short, there is no material for which appellant could reasonably be said to have a compelling need. As a consequence, even assuming that the sentencing court as a matter of preferred practice should examine all the co-defendants' PSRs in camera, its failure to do so in this case was harmless error.

FN1. We say "in the role of" in recognition of the fact that more than one person may be an organizer. See U.S.S.G. § 3B1.1, cmt. n. 4 (2002).

II Sentence Enhancement

[7][8] We turn next to examine the district court's factual findings to see if they are sufficient to support the two-level sentence enhancement imposed on appellant for being an organizer or leader. Our precedents are uniform in requiring a district court to make specific factual findings to support a sentence enhancement under U.S.S.G. § 3B1.1. United States v. Szur, 289 F.3d 200, 218 (2d Cir.2002); United States v. Zagarri, 111 F.3d 307, 330 (2d Cir.1997); United States v. Stevens, 985 F.2d 1175, 1184 (2d Cir.1993). We overturn a sentencing court's findings as to the defendant's role in the offense only if those findings are clearly erroneous. See Szur, 289 F.3d at 218.

A. Adoption of the Presentence Report


[10] In the present case the sentencing court's entire explanation of the sentence enhancement was as follows:

THE COURT: All right. Thank you, Mr. Southwick. Anything further?

MR. WELLS: No, Judge, except that I thought
you did not rule on the two-point enhancement on the day of the hearing, I thought you reserved it until time of sentencing.

THE COURT: Well, how much difference does that make?

MR. WELLS: Just that I wanted to make sure I also put on the record that I did not concede the issue that had been ruled on.

THE COURT: Well, I'll rule on it now.

MR. WELLS: Yes, sir.

THE COURT: I'll grant the two-point enhancement at this time. Mr. Molina, the Court finds that the Total Offense Level in this case is 26, and the Criminal History Category is III, and the Guideline Imprisonment Range is 78 to 97 months

...This is light treatment indeed, and it does not meet the requirement imposed on the district court of making specific factual findings. The quoted discussion does not indicate whether the trial court actually considered the requisite factors under § 3B1.1. Some of those factors are, for example, the defendant's exercise of decision making authority, his recruitment of accomplices, and the degree of his participation in organizing the offense. See U.S.S.G. § 3B1.1, cmt. n. 4. Such a lack of specificity devoid of any statement of reasons does not permit meaningful appellate review of the enhancement the district court imposed.

Moreover, a sentencing court that relies on a PSR must not only agree with that report, but must also adopt it "expressly." Despite the insufficiency of the explanation offered for the sentence enhancement, the district court arguably satisfied its fact-finding obligations under Thompson by expressly adopting the presentence report in the statement of reasons set out in its written judgment.

However, even if the district court was sufficiently "explicit" in satisfying its fact-finding obligations under Thompson, we still must consider whether the trial court satisfied its obligations under 18 U.S.C. § 3553(c) to "state in open court the reasons for its imposition of the particular sentence." The trial court did not satisfy this unambiguous mandate.

[11] Several of our cases contain language that might appear to be at odds with the terms of § 3553(c), which requires that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence" (emphasis added). See, e.g., Eyman, 313 F.3d at 745 ("A district court satisfies its obligation to make the requisite factual findings when it indicates in its written judgment that it is adopting the findings set forth in

the PSR." (emphasis added)); accord United States v. Martin, 157 F.3d 46, 50 (2d Cir.1998); United States v. Prince, 110 F.3d 921, 924 (2d Cir.1997); Thompson, 76 F.3d at 456. The issue before the court in those cases, however, was the district court's obligation to make sufficient factual findings—not its obligation to state those findings in open court—so it is not surprising that the cited *277 cases did not address the open court requirement. Consequently, we do not read them as dispensing with the requirements of § 3553(c). Congress had goals in mind when it enacted § 3553(c), including: (1) to inform the defendant of the reasons for his sentence, (2) to permit meaningful appellate review, (3) to enable the public to learn why defendant received a particular sentence, and (4) to guide probation officers and prison officials in developing a program to meet defendant's needs. See S.Rep. No. 98-225, at 79-80 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3262-63; United States v. Carey, 895 F.2d 318, 325 (7th Cir.1990). We are concerned that these goals may not be fully met when the fact-finding to support a sentence enhancement is set out only in the written judgment.

We recognize nonetheless that the "open court" requirement may be satisfied by the district court adopting the PSR in open court. Adopting the PSR in open court puts the defendant on notice of the grounds for the sentence imposed since the defendant usually has either seen his own PSR or is entitled to ask for it. However, in the present case the district court did not state either its reasons or adopt the PSR in open court.

B. Harmless Error Analysis

[12] Although this omission was error, we must examine the error to ascertain if it was harmless. This will depend on (1) whether the reasons supporting the finding that appellant was an organizer or leader were sufficiently explained in the presentence report, and (2) whether the district court satisfactorily adopted those findings in its statement of reasons. Inasmuch as appellant did not object at the time to the lack of specificity in the district court's factual findings, we review this issue for plain error. To determine if such exists, a court must find an error in the record before it that (1) has not been waived, (2) is plain, (3) affects a substantial right of the defendant (that is, it must normally have been prejudicial, United States v. Olano, 507 U.S. 725, 732-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)), and (4) "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Jones v. United States, 527 U.S. 373, 389, 119 S.Ct. 2090,
Two other courts have held that when the trial court failed to comply with § 3553’s open court provision, the district court’s adoption of a presentence report is sufficient for such failure to avoid plain error. See United States v. Gore, 298 F.3d 322, 325 (5th Cir.2002); United States v. Vences, 169 F.3d 611, 613 (9th Cir.1999). "If the defendant does not object and there is evidence to sustain the enhancement, the error is not reversible under the plain error standard." Gore, 298 F.3d at 325; United States v. Evans, 272 F.3d 1069, 1089 (8th Cir.2001), cert. denied, 535 U.S. 1029, 122 S.Ct. 1638, 152 L.Ed.2d 642 (2002). The same reasoning applies in the case before us, that is, although there were no specific factual findings and no explicit adoption by the district court of appellant’s PSR in open court, Molina took no objection. The adequate findings of defendant’s PSR were adopted in the written judgment.

Moreover, at the sentencing hearing the testimony revealed that Molina (1) provided the other participants with firearms; (2) furnished information regarding the intended victim of the planned robbery; (3) showed other participants where the proposed victim lived; and (4) brought duct tape to bind the victim’s hands during the robbery. These facts taken together sufficiently support the trial court’s two-level enhancement of defendant’s sentence.

*278 Consequently, although we conclude that with respect to the sentence enhancement the district court committed error, it was harmless error. The reason for that determination is because the error did not affect a substantial right of the defendant, although at the same time, it may not be said to be an unimportant trifle, like the trial judge neglecting to announce that the court would take a lunch break. Here the failure of the district court to give its reasons for enhancing defendant’s sentence in open court we think troublesome. But since this omission was not objected to at trial, we review it only for plain error. On that score defendant has not carried his burden of demonstrating any prejudice resulting from the omission. Hence, we affirm.

CONCLUSION

Accordingly, for the reasons stated, the judgment and sentence appealed from are affirmed.

356 F.3d 269
United States District Court, S.D. New York.

UNITED STATES of America,
v.
MARCUS SCHLOSS & COMPANY, INC. and D.
Ronald Yagoda, Defendants.

No. 88 CR. 796 (CSH).

June 5, 1989.

Benito Romano, United States Attorney for the Southern District of New York, New York City (Carl Loewenson, Howard E. Heiss, Elizabeth Glazer, of counsel), for U.S.

Stanley S. Arkin, New York City, for defendant D. Ronald Yagoda.

Lankler Siffert & Wohl, New York City (John S. Siffert, of counsel), for Andrew Solomon, a Witness.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

*1 This criminal case, currently on trial, involves charges of that activity known generically as "insider trading." The defendants are Marcus Schloss & Co., Inc. ("Schloss") a firm specializing in risk arbitrage, and D. Ronald Yagoda, at the times charged in the indictment the head of the trading desk at Schloss.

Andrew Solomon is a cooperating government witness who will testify at the trial. At the times charged in the indictment, Solomon was a junior analyst at Schloss. But Schloss is a relatively small firm; and not withstanding his junior status at Schloss, Solomon sat physically at the right hand of Yagoda at the firm's trading desk.

The case for the government is that Michael David, a faithless associate at the Paul Weiss law firm, misappropriated confidential information concerning Paul Weiss clients involved or potentially involved in takeovers, and conveyed that information to a number of tippees, including Solomon. Solomon, the government avers, passed on this inside information to his superior, Yagoda, who in turn, and with knowledge of the illicit character of the information, caused Schloss to trade in the shares of target companies.

The scheme having come to light, Solomon and David were arrested during the afternoon of March 26, 1986 and the early morning hours of March 27, respectively. Both signed cooperation agreements with the government. David's testimony has just been completed. Solomon is scheduled to testify in the near future.

Following his arrest, Solomon retained the firm of Lankler, Siffert, & Wohl (the "Lankler firm") to protect his interests. John S. Siffert, Esq., was and is the partner in charge of the matter.

Government attorneys and agents interviewed Solomon on a number of occasions. Various assistant United States attorneys and other government agents took notes of all those interviews, with the sole apparent exception of an interview conducted during the day before Solomon testified to the grand jury. At each of these interviews, a representative or representatives of the Lankler firm also attended and took notes. Finally a time came when Solomon reviewed the Lankler firm's notes for the purpose of compiling notes of his own as an "aide memoire."

In consideration of his cooperation, the government permitted Solomon to plead guilty to one count of conspiracy under 18 U.S.C. § 371. On November 26, 1986 Judge Goettel suspended the imposition of sentence, placed Solomon on probation for one year, fined him $10,000, and required Solomon to perform community service. As of the present date Solomon has completed his probation and public service; he has paid his fine; and he has successfully applied for readmission to the New York State Bar (he holds a legal degree) as well as SEC permission to resume securities trading. Insofar as the present record appears, no civil litigation is presently pending against Solomon arising out of his conduct at Schloss as described in this and related indictments.

*2 In these circumstances, counsel for defendant Yagoda served upon the Lankler firm a subpoena calling for the production of that firm's notes of the interviews of Solomon conducted by the office of the United States Attorney and other government agents.
The Lankler firm moves to quash that subpoena, on the ground that the notes constitute attorneys' work product, for whose production Yagoda has failed to make the requisite showing of necessity.

It is common ground that the Lankler firm's notes constitute attorneys' work product within the ambit of Rule 26(b)(3) of the Federal Rules of Civil Procedure. There is also appellate authority for the proposition that the civil discovery rules apply in the criminal context. See United States v. Paxson, 861 F.2d 730, 735-36 (D.C.Cir.1988) (applying Rule 26 principles in quashing subpoena duces tecum served by defendant in prosecution for false declarations and obstruction of justice upon attorneys for government witness seeking to reach attorney's notes of interviews between witness and government agents). At least two judges of this Court have dealt with comparable subpoenas: Judge Ward in United States v. Bilzerian, 88 Cr. 962 (RJW), and Judge Goettel in United States v. Yonkers Contracting Company, 87 Cr. 559 (GLG).

Rule 26 was amended in 1970 to reflect the policy declared in Hickman v. Taylor, 329 U.S. 495, 512 (1947), that the discovery rules did not entitle an opposing litigant to "inva[d]e the privacy of an attorney's course of preparation." The rule permits discovery of an attorney's work product "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

In the context of a criminal trial, courts properly consider possible prejudice to the witness represented by the attorney in question, as well as the necessity of the defendant for discovery of that attorney's notes. That is apparent from Judge Goettel's discussion in the Yonkers Construction case. While the circumstances are not fully stated in the transcript excerpts attached to the motion papers, Judge Goettel reasoned in quashing a mid-trial subpoena of the notes of counsel for cooperating witnesses that disclosure "would impact on the ability of defense counsel to represent his client both as a target, as an indicted defendant, and as a cooperating defendant not yet sentenced, who might be involved in other litigation because of it, were his notes allowed to be subpoenaed by other parties in a criminal case." Hearing on June 23, 1988 at Tr. 1549.

Of course, each case turns on its own facts; and in the case at bar, none of these circumstances presently applies to cooperating witness Andrew Solomon. Solomon is no longer a target of an investigation; he has been sentenced and has served that sentence; his professional licensing problems have been resolved entirely in his favor; and there is no suggestion of pending litigation against him. There is, in short, neither a showing nor a suggestion that disclosure of the interview notes of Solomon's attorneys would cause any prejudice to Solomon.

*3 It is appropriate to consider the circumstances existing at the time of a defendant's demand for discovery. Fully accepting the principle that discovery of such notes constitutes an "invasion" of "important rights" of both witness-client and his counsel, Paxson at 736, these concepts should not be considered in a vacuum, particularly in a criminal case where the defendant's liberty is at stake. The gravity of the invasion of Solomon's rights depends primarily upon the prejudice to him if disclosure is made. Here there is no prejudice.

Turning to Yagoda's showing of necessity for this disclosure, it is now apparent that Solomon is the government's key witness against Yagoda. The jury may accept David's account of his misappropriation of confidential information from Paul Weiss and conveying it to Solomon; nevertheless, there would appear to be a missing link in the prosecution of the defendants unless the jury also accepts Solomon's testimony concerning what he told Yagoda.

Notes of Solomon's extensive interviews with government attorneys and agents, from whatever source, are of obvious interest to Yagoda. The Lankler firm contends that Yagoda has not shown a sufficiently high level of necessity because the government is furnishing to defense counsel the interview notes made by prosecutors and agents, as well as Solomon's own notes which he compiled from a study of the Lankler firm's notes. It is true that in Paxson, supra, the District of Columbia Circuit, affirming the trial court's quashing of the subpoena, observed that defense counsel conducted an examination of the witness "that evidenced extensive knowledge of the alleged prior inconsistencies from whatever source he may have obtained the same." 861 F.2d at 736. However, as Judge Ward observed in Bilzerian, ordinarily "the prosecutor's notes are pretty sparse to begin with"

Hearing of April 11, 1989 at Tr. 89. That is true in the case at bar. I have examined in camera the § 3500 material and the Lankler firm's notes. They are typical lawyer's quasi-shorthand annotations of topics covered and statements made by the interviewee.
Counsel for Yagoda wishes to examine the interview notes of Solomon's attorneys so that he may compare them with the notes of prosecutors and other government agents, as well as the post-interview notes Solomon prepared himself. Possible inconsistencies or contradictions are of obvious interest to the defendant, considering the centrality of Solomon's role in the case against Yagoda, and the crucial issue of his credibility I therefore conclude that the potential usefulness of the Lankler firm's notes to the defense rises to the requisite level of "substantial need" under Rule 26(b)(3). In my view, "substantial need" as originally contemplated by the civil discovery rules should be defined more flexibly when applied to the interests of a criminal defendant. To the extent that the results I reach in this case run counter to the District of Columbia Circuit's holding in *Paxson*, I adhere to them nonetheless; I am aware of no Second Circuit authority in point.

*4 As Judge Ward held in *Bizerian* at Tr. 91, if the Lankler firm's notes do no more than reflect the "personal thoughts" of the attorneys, they are not discoverable. My examination of the notes indicates that they describe what Solomon said during these interviews rather than counsel's views about what he said. But I will give the Lankler firm an opportunity to indicate by highlighting those portions of the notes, if any, which they regard as constituting "personal thoughts" of counsel. Following that exercise, I will make these notes available to counsel for Yagoda. I do not regard it as necessary or necessary to undertake an in camera search of the several sets of notes for discrepancies or inconsistencies. Counsel know the case better than I; and, so long as statements of personal thought or belief on the part of Solomon's attorneys are excised from these notes, counsel for Yagoda should be able to examine them. [FN1]

I have carefully considered Mr. Siffert's vigorous argument that compelling disclosure of these notes would offend important principles in a manner extending far beyond the boundaries of the case. In the absence of any demonstrable prejudice to Solomon, Mr. Siffert is required to stress policy objections. He suggested at oral argument that disclosure of his firm's notes in this case would inhibit defense attorneys from note-taking during interviews of their clients or interviews of potential defense witnesses. I fully accept the sincerity with which Mr. Siffert expresses these concerns, but they do not reasonably arise from the holding in this case. A defense attorney's conversations with his client are protected by the attorney-client privilege, which interviews with government attorneys do not implicate. Nor does this opinion impact upon the work product privilege in the context of an attorney's conferences with potential defense witnesses. This Court's decision depends upon and arose from the particular circumstances presented, and it may be useful to reiterate them. In a criminal case, defense counsel is entitled to examine the notes of interviews with prosecutors or government agents kept by attorneys for an important government witness, where disclosure causes no prejudice to the witness, and expressions of the attorney's thoughts or beliefs are first excised from the notes. In those particular circumstances, the importance to the accused of exploring possible areas of impeachment rises to a level of necessity which in the absence of any countervailing factors requires disclosure. [FN2]

The Lankler firm is directed, within twenty-four (24) hours of their receipt of a copy of this Opinion and Order, to furnish the Court with a set of notes indicating those portions, if any, which the firm regards as constituting non-disclosable personal thoughts. If I agree with the firm's characterizations, copies of the notes, suitably redacted, will be furnished to counsel for defendant Yagoda.

It is SO ORDERED.

FN1. While counsel for Solomon suggested at oral argument that the very act of selection of what to write down in these non-verbatim notes constituted personal judgment, the phrase "personal thoughts" is not to be given so broad an interpretation in implementing this order. "Personal thoughts" means for present purposes expressions of personal belief, judgment, or evaluation, as opposed to notations (however incomplete or abbreviated) of what Solomon said during the interviews.

FN2. This order of disclosure may also extend to Solomon's notes referred to in the Lankler firm's supplemental memorandum at 3 n. 1. Their genesis is described at Tr. 21-24 of the June 1, 1989 hearing. The notes were clearly covered by the attorney-client privilege. But if Solomon used those notes "to refresh memory for the purpose of testifying", defendant is entitled to production under Rule 612, F.R.Evid. 1
have the sense this is so, although the record is not entirely clear. I direct production of these notes of Solomon unless counsel is in a position to represent that Solomon did not use them for Rule 612 purposes.

END OF DOCUMENT
United States Court of Appeals,  
Eleventh Circuit.  

UNITED STATES of America, Plaintiff-Appellee,   
v.  
Joanne LINDSTROM, Dennis Slater, Defendants-Appellants.  

No. 81-5901.  

Defendants were convicted before the United States District Court for the Middle District of Florida, George C. Carr, J., of conspiracy to commit mail fraud and mail fraud, and they appealed. The Court of Appeals, Vance, Circuit Judge, held that: (1) three-year period between initiation of investigation and rendering of indictment did not deny due process; (2) right of cross-examination was unconstitutionally curtailed by severely limiting inquiry designed to impeach key prosecution witness' credibility by demonstrating that her alleged vendetta against defendants resulted from continuing mental illness; and (3) it was reversible error to deny defendants access to psychiatric materials suggesting that the witness suffered from psychiatric illness, including delusions. 

Reversed and remanded.  

West Headnotes  

[1] Indictment and Information ➔ 4.5  
210k4.5 Most Cited Cases  


92k265 Most Cited Cases  

Due process clause of Fifth Amendment requires dismissal of indictment if a defendant shows that preindictment delay caused actual prejudice to the defendant and that the delay was product of deliberate action by the government to gain a tactical advantage. U.S.C.A. Const.Amend. 5.  

[3] Indictment and Information ➔ 4.5  
210k4.5 Most Cited Cases  

[3] Indictment and Information ➔ 144.1(1)  
210k144.1(1) Most Cited Cases  

Preindictment delay caused by good-faith ongoing investigation does not offend fundamental conceptions of justice, but delay that prejudices a defendant will require dismissal of the indictment if it was an intentional device to gain tactical advantage. U.S.C.A. Const.Amend. 5.  

92k265 Most Cited Cases  

Although during three-year delay between investigation of alleged wire fraud and prosecution two witnesses died, due process did not require dismissal of indictment where defendants failed to suggest what tactical advantage the government hoped to gain and case was complex one involving numerous documents and records and two successive grand juries participated in preindictment investigation. U.S.C.A. Const.Amend. 5.  

92k265 Most Cited Cases  

On claim of due process violation by preindictment delay the court need not examine government files until the defense at least has suggested what tactical advantage the government could gain. U.S.C.A. Const.Amend. 5.  

[6] Witnesses ➔ 266  
410k266 Most Cited Cases  


[7] Witnesses ➔ 267  
410k267 Most Cited Cases  

Discretionary authority to control scope of cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-

[8] Witnesses 330(1)
410k330(1) Most Cited Cases


[9] Criminal Law 742(1)
110k742(1) Most Cited Cases

[9] Witnesses 79(1)
410k79(1) Most Cited Cases

Witness competency is an issue quite different from that of credibility and credibility is a jury question whereas competency is a threshold question of law to be answered by the judge.

[10] Witnesses 344(1)
410k344(1) Most Cited Cases

Evidence rule governing specific conduct evidence for attacking credibility was not controlling on scope of cross-examination of prosecution witness relative to her psychiatric treatment and confinement, it being asserted that witness was carrying out a vendetta resulting from continuing mental illness. Fed.Rules Evid. Rule 608, 28 U.S.C.A.

410k372(2) Most Cited Cases

It was abuse of discretion and reversible error to extremely limit cross-examination of star prosecution witness to impeach witness' credibility by demonstrating that her alleged vendetta against defendants resulted from a continuing mental illness for which she had been periodically treated and confined, especially as disputed medical records suggested history of psychiatric disorders, manifesting themselves in violent threats and manipulative and destructive conduct. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 627.6(6)
110k627.6(6) Most Cited Cases

[12] Criminal Law 1166(10.10)
110k1166(10.10) Most Cited Cases
(Formerly 110k1166(1))

It was reversible error to deny defendants access to psychiatric materials suggesting that key prosecution witness, who assertedly was carrying out a vendetta against defendants, was suffering from ongoing mental illness which caused her to misperceive and misinterpret words and actions of others and which might seriously affect her ability to know, comprehend and relate the truth, and objections of cumulativeness and remoteness were insubstantial. U.S.C.A. Const.Amend. 6.

[13] Criminal Law 627.6(6)
110k627.6(6) Most Cited Cases

Privacy interest of key prosecution witness in confidentiality of her medical records and societal interest in encouraging free flow of information between patient and psychotherapist was insufficient to preclude defendants' access to psychiatric materials for purpose of cross-examining witness to show that her alleged vendetta against defendants resulted from continuing mental illness. U.S.C.A. Const.Amend. 6.

[14] Witnesses 208(1)
410k208(1) Most Cited Cases

Absent statutory modification of common law no physician-patient privilege exists under either federal or Florida law.

[15] Criminal Law 627.6(6)
110k627.6(6) Most Cited Cases

Desire to spare a witness embarrassment which disclosure of medical records might entail is insufficient justification for withholding such records from criminal defendants claiming denial of right of confrontation. U.S.C.A. Const.Amend. 6.

*1156 James H. Thompson, Thompson & Lavandera, P.A., Tampa, Fla. (Court Appointed), for Lindstrom.


Appeals from the United States District Court for the Middle District of Florida.

Before VANCE and ANDERSON, Circuit Judges,
and SCOTT [*FN*], District Judge.


VANCE, Circuit Judge:

This case presents a question recently resolved by *Greene v. Wainwright*, 634 F.2d 272 (5th Cir.1981). *Greene* involved an identical issue of law and an almost identical array of facts. Also as in *Greene*, we must overturn convictions, obtained after a lengthy trial, because the trial court's rulings deprived criminal defendants of their fundamental rights of confrontation and cross-examination.

Dennis Slater and Joanne Lindstrom appeal convictions and sentences for mail fraud, 18 U.S.C. § 1341 and § 1342, and conspiracy to commit mail fraud, 18 U.S.C. § 371. Neither appellant challenges the sufficiency of the evidence when viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). Slater and Lindstrom raise six issues on appeal, [*FN1*] but we conclude that it is necessary that we treat only two: whether preindictment delay deprived appellants of their right to due process and whether the district court erred in imposing restrictions on appellants' ability to review psychiatric information bearing on the credibility of the government's key witness and in limiting cross-examination [*FN2*] of that witness. Because we find that the trial court's restrictions on access to documents and on cross-examination denied appellants the right to confront their accusers, we reverse.

*FN1* Lindstrom and Slater also contend that the court's refusal to confer use immunity upon an alleged coconspirator violated their right to compulsory process; that the court erred in allowing the government to amend the bill of particulars two weeks before trial; and that the closing argument of the prosecutor denied appellants a fair trial. Lindstrom further argues that the court erred in failing to sever her trial from that of the other defendants. We conclude that no reversible error is shown in connection with any of such contentions.

The convictions centered around the activities of Bay Therapy, Inc., a Florida corporation purporting to provide physical therapy treatment to injured persons pursuant to doctors' prescriptions. Joanne Lindstrom was a legal secretary employed by Dennis Slater, who was a senior trial attorney with a Tampa law firm. Slater, Lindstrom and David Webster, also an attorney, formed Bay Therapy, Inc. in the summer of 1976, each owning a one-third interest. The three agreed that Lindstrom would oversee the clinic's operation. She leased a building, acquired the necessary equipment and employed Rosamond Sloan, a licensed practical nurse, to operate the clinic. In October 1976, Sloan was replaced by the person who became the government's star witness at trial.

After she had been operating Bay Therapy for about nine months, Sloan's replacement contacted her brother, a former FBI agent who was then employed by the Fraud Division of the Florida Insurance Commissioner's office. At the suggestion of the investigators, she began attempting to learn incriminating information from Lindstrom, Slater and Webster. She also initiated meetings with federal investigators.

Eventually, she became the key witness at the Bay Therapy trial. During 1978, 1979 and 1980, two successive federal grand juries heard extensive evidence on the operations of Bay Therapy before handing down an indictment. The indictment charged that the appellants, as part of a scheme to inflate medical costs and defraud insurance companies, caused patients to be sent to Bay Therapy for treatment they did not need and often did not even receive. The trial lasted for three weeks and involved the testimony of eighty-six witnesses.

The government's key witness testified that during the period when she was overseeing operations at Bay Therapy, she, Lindstrom and Slater had discussed alteration of records, that she and Lindstrom had in fact changed records, that Slater and Lindstrom had ordered her to duplicate billing cards and that patients signed up for treatments they did not receive. Other witnesses testified about Slater's attempts to secure business for the clinic, and a number of former patients related their divergent experiences with Bay Therapy. Insurance claims managers debated whether increased therapy bills would in fact result in higher settlements, and an attorney outlined the factors he customarily considered in settling personal injury cases. Both
appellants testified at the trial, denying all charges.

The jury found Slater and Lindstrom guilty of conspiracy to commit mail fraud and seventeen substantive counts of mail fraud. The district court sentenced Slater to concurrent sentences of five years imprisonment on all counts, but the court suspended all but six months of the sentence and placed Slater on four years probation. Lindstrom was placed on three years probation.

(1) Preindictment Delay

Lindstrom and Slater assert that the three-year period between the initiation of the investigation and the rendering of the indictment was excessive. Appellants contend that the delay, during which two witnesses died, deprived them of their fifth amendment right to due process and their sixth amendment right to speedy trial. We cannot agree.

[1][2] The speedy trial guarantee of the sixth amendment does not apply to preindictment delay. United States v. Lovasco, 431 U.S. 783, 788, 97 S.Ct. 2044, 2047, 52 L.Ed.2d 752 (1977); United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). The due process clause of the fifth amendment, however, requires dismissal of an indictment if a defendant makes a twofold showing: (1) that the delay caused actual prejudice to the conduct of his defense, and (2) that the delay was the product of deliberate action by the government designed to gain a tactical advantage. *1158 United States v. Marion, 404 U.S. at 324, 92 S.Ct. at 465; United States v. Townley, 665 F.2d 579, 581-82 (5th Cir.), cert. denied, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982); United States v. Hendricks, 661 F.2d 38, 39-40 (5th Cir.1981); United States v. Nixon, 634 F.2d 306, 310 (5th Cir.), cert. denied, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981); United States v. Willis, 583 F.2d 203, 207-08 (5th Cir.1978).

Appellants urge that they have demonstrated prejudice and that they have been denied the ability to demonstrate prosecutorial bad faith. They argue that the deaths of two witnesses, Dr. L.J. Cordrey and William Hapner, caused them "actual prejudice and not merely the real possibility of prejudice inherent in any extended delay." United States v. McGough, 510 F.2d 598, 604 (5th Cir.1975), quoting United States v. Marion, 404 U.S. at 326, 92 S.Ct. at 466.

We agree that appellants have made a prima facie showing of prejudice. Of the seven patient-clients who were the subject of the mail fraud counts, five were treated or examined by Dr. Cordrey. Slater had talked to Dr. Cordrey concerning his treatment of numerous patients whom the government alleged had been sent to Bay Therapy to unnecessarily boost their medical expenses. In many instances, Dr. Cordrey was the only physician to have examined these patients during their association with Bay Therapy. Further, appellants contend that William Hapner would have testified about his discussions with Slater on certain ethical and legal implications of Slater's involvement with Bay Therapy. Slater argues that Hapner would have testified as to why Slater referred numerous patients to certain defendants in the case and that Slater received no fees for the referrals.

[3] Prejudice, however, is not enough: "proof of prejudice is generally a necessary but not sufficient element of a due process claim ... [T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." United States v. Lovasco, 431 U.S. at 790, 97 S.Ct. at 2048. An appellant's showing of prejudice triggers a "sensitive balancing of the government's need for an investigative delay ... against the prejudice asserted by the defendant." United States v. Brand, 556 F.2d 1312, 1317 n.7 (5th Cir.1977), cert. denied, 434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 763 (1978). Delay caused by a good faith ongoing investigation will not offend "fundamental conceptions of justice," United States v. Lovasco, 431 U.S. at 791, 97 S.Ct. at 2049. Delay that prejudices a defendant will, however, require dismissal of an indictment if the delay was an intentional device to gain tactical advantage over the accused. United States v. Marion, 404 U.S. at 324, 92 S.Ct. at 465.

[4] Appellants have not suggested what tactical advantage the government could have hoped to gain by delay. As in United States v. Hendricks, 661 F.2d 38, 40 (5th Cir.1981) appellants have produced "no evidence even tending to show that the delay was a deliberate tactical maneuver by the government." Lindstrom and Slater contend that they could have demonstrated the cause of the delay had they been given access to the files of the United States Attorney. Appellants had requested the court to subpoena the files of the government, pursuant to United States v. Surface, 624 F.2d 23, 25 n.2 (5th Cir.1980), to determine whether the delays were for permissible reasons.

We do not know the extent to which Lindstrom and Slater were in fact granted access to the government's files. The United States tells us that "in response to
defense requests, the Court allowed the defense to rummage through prosecution files to determine if preindictment delays were properly motivated." Appellants reply that "at no time did the Court permit the defense to 'rummage through prosecution files.'"

The government contended in its Answer to Motion to Dismiss for Pre-Indictment Delay that the period of time between investigation and indictment was reasonable. This was a complex case involving numerous documents and records. Accord *1159United States v. Singer, 687 F.2d 1135, 1143 (8th Cir.1982). Two successive grand juries participated in the preindictment investigation. Targets of investigation were afforded opportunities to appear before the grand jury and time to consider the offers. The government doubtless spent considerable time locating the 199 Bay Therapy patients themselves.

[5] Although this is a close question, we are unable to conclude that appellants have made a showing sufficient to require an in camera inquiry. Under the dictates of Surface, the court need not examine government files until the defense at least has suggested what tactical advantage the government could gain from the delay. Appellants have presented no evidence whatever that the delay was intentionally designed to obtain some tactical advantage. Because we can discern no advantage to the government in delay, we decline to dismiss the indictment or to remand for further hearings on the issue.

We are most reluctant to fashion rules of decision that have the effect of encouraging the government to secure premature indictments. We do not wish to pressure prosecutors into resolving doubtful cases in favor of early--and possibly unwarranted--prosecutions. The determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions." United States v. Lovasco, 431 U.S. at 793, 97 S.Ct. at 2050. Further,

In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely "to gain tactical advantage over the accused," precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing

prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed." This the Due Process Clause does not require. Id. at 795-96, 97 S.Ct. at 2051 (footnotes and citations omitted).

(2) Restrictions on Cross-Examination

Appellants contend that the district court improperly (1) placed limitations on defense questioning of the government's chief witness relating to her prior psychiatric treatment and confinement, and (2) denied the defense access to medical records suggesting that the government's witness suffered from psychiatric illnesses, including delusions. In the alternative, appellants assert error in the district court's refusal to order an independent psychiatric examination of the witness. [FN2] Because we agree that the district court erroneously restricted cross-examination and defense access to documents pertaining to the psychiatric history of the government's witness, we need not reach appellants' alternative argument.

FN2. Appellants in their brief did not specify whether they would require an independent psychiatric examination of the witness even if they succeed in obtaining the extensive medical records they now seek. At oral argument, however, counsel for Dennis Slater stated that the trial "court either should have ordered an independent psychiatric examination to make that [competency] determination or, alternatively, should have permitted the defense to put on psychiatric testimony to test the witness' competency. His refusal to do either, we submit, has to be reversible error."

[6] The sixth amendment to the United States Constitution mandates that a criminal defendant has the right "to be confronted with the witnesses against him." The Supreme Court has repeatedly emphasized that its "cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) quoting Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *1160Ohio v. Roberts, 448 U.S. 56, 63.
distinguishing fact from fantasy and may have his memory distorted by delusions, hallucinations and paranoid thinking. A paranoid schizophrenic, though he may appear normal and his judgment on matters outside his delusional system may remain intact, may harbor delusions of grandeur or persecution that grossly distort his reactions to events. As one commentator succinctly summarized the interplay between mental disorders and legal issues of credibility:


[T]he delusions of the litigious paranoiac make him believe he has grievances, which he feels can be corrected only through the courts. His career as a litigant is frequently touched off by a lawsuit or legal controversy whose outcome left him dissatisfied. Often he will insist on conducting his own case, quoting voluminously from cases and statutes. Because he is likely to be of better-than-average intelligence, he may mislead a jury that is uninformed about his paranoid nature and actually convince them that his cause is just.

Trivial incidents and casual remarks may be interpreted in a markedly biased way, as eloquent proof of conspiracy or *1161 injustice. In his telling them, these trivial incidents may be retrospectively falsified by a grossly distorted and sinister significance. Even incidents of a decade or more ago may now suddenly be remembered as supporting his suspicions, and narrated in minute detail.

On the other hand, so far as the power of observation is concerned, the paranoid witness may be quite as competent as anyone, and perhaps more than most; his suspiciousness may make him more alert and keen-eyed in watching what goes on. Delusions of persecution may evoke intense hatred. This may lead to counter-accusations resting on false memory, which may be very real to the accused and be narrated by him with strong and convincing feeling. And indeed they may have a
kernel of truth; because of his personality and his behavior, many people probably do dislike him. As Freud said, a paranoid does not project into a vacuum. Such a person not infrequently feels the need for vengeance.


The government in this case contends that psychiatric evidence merely raises a collateral issue. But such labels cannot substitute for analysis. Whether called "collateral" or not, the issue of a witness' credibility is committed to the providence of the jury. Although the use of psychiatric evidence "does not fall within the traditional pattern of impeachment, the law should be flexible enough to make use of new resources." Weihofen, supra at 68. By this late date, use of this kind of evidence can hardly be termed "new."

[9] At trial the defense sought to show that the key witness for the government was not credible, arguing that her motive for initiating and pursuing the investigation of Bay Therapy was based on hatred of the appellants. [FN4] Lindstrom and Slater argued to the district court that this witness was carrying out a vendetta against them because she had not received a promised percentage of Bay Therapy when the business was sold. Appellants further sought to impeach the witness' credibility by demonstrating that her alleged vendetta resulted from a continuing mental illness, for which she had been periodically treated and confined. From public sources and from psychiatric records which the district court permitted defense counsel to review, the defense gathered material suggesting that in 1971 the witness was hospitalized following a serious suicide attempt; that in 1977 the witness, while she was running Bay Therapy, offered a patient of Bay Therapy $3,000 to murder the wife of the witness' alleged lover; that in 1978 she was involuntarily committed under Florida's Baker Act [FN5] after taking an overdose of drugs; that in 1980 she was arrested and charged with aggravated assault for having allegedly fired a shotgun through the window of her purported lover's house; that following this incident she was briefly placed in a stockade until, at the urging of her psychiatrist, she was transferred to Hillsborough County Hospital where she was involuntarily committed under the Baker Act; that during this confinement she was diagnosed "schizophrenic reaction, chronic undifferentiated type" and described by the Chief of Psychology at Hillsborough as being "immature, egocentric, [and] manipulative," having superficial relationships causing "marital problems and sexual conflicts in general" and seeing authority as something to be manipulated for self gratification and as an obstacle; that an unsigned chart entry noted that the patient had a "history of hallucinations" *1162 and was "suicidal--homicidal and delusional." Through effective questioning in these areas, appellants contend that they could have shown the witness' past pattern of aggressive and manipulative conduct toward persons close to her and that they could have demonstrated the witness' motivation and determination in pursuing a vendetta.

FN4. Appellants also contended that the witness was not competent to testify at all, an issue quite different from that of credibility. Credibility is a jury question, whereas competency is a "threshold question of law to be answered by the judge." United States v. Martino, 648 F.2d 367, 384 (5th Cir.1981), cert. denied, --- U.S. ----, ----, 102 S.Ct. 2006, 2007, 72 L.Ed.2d 465 (1982). We find no reversible error in the district court's resolution of the competency issue.

FN5. The Baker Act, Fla.Stat. § 394.451, et seq., sets forth the Florida procedure for voluntary and involuntary commitment of persons who pose a danger to themselves or to others.

[10] The trial court, fearing that the defense would attempt to put the witness herself on trial, stated: I think we should discuss, too, the extent of the cross-examination of this witness in regard to these activities. I am trying to think this through. I am not fully convinced it's a 608-B question, although I think it's akin to that. But any questions along this line probably would go further than what seems to be envisioned by 608-B, because you're testing the witness's credibility is what you're attempting to do, I would suppose. [FN6] So, within reason, there are two or three properly framed questions I'm going to allow you to at least let this jury know about the fact that this witness has had some mental and emotional problems in the past.

FN6. We agree with the trial court that Federal Rule of Evidence 608 is not
controlling:
The credibility of a witness can always be attacked by showing that his capacity to observe, remember or narrate is impaired. Consequently, the witness' capacity at the time of the event, as well as at the time of trial, are significant. Defects of this nature reflect on mental capacity for truth-telling rather than on moral inducements for truth-telling, and consequently Rule 608 does not apply. J. Weinstein, Weinstein's Evidence ¶ 607[4] (1981) (footnotes omitted) (emphasis in original).

I'm not going to allow the defense to try this witness, so to speak.

Three examples suffice to illustrate the extremely narrow limits within which the district judge permitted cross-examination of the witness. [FN7] First, the court refused to *1163 allow the defense to question the witness about the murder contract that she allegedly offered to a Bay Therapy patient. The defense proffered testimony by the patient to the effect that the witness had approached him and offered him $3,000 to shoot the wife of the witness' purported lover. The court sustained the government's objection to the questions, and also denied a defense request to ask the witness the questions out of the hearing of the jury. Secondly, the district court denied appellants the opportunity to cross-examine the witness about her own alleged attempt to shoot a shotgun through the window of her purported lover's house, after which she was committed under the Baker Act. Thirdly, the judge sustained the government's objection to defense questions focusing on whether, during her commitment, the witness had told hospital personnel that she had attempted suicide for the purpose of manipulating and punishing her boyfriend. Defense counsel proffered hospital records showing that the witness had in fact made such statements. During the ensuing side bar conference, defense counsel stated that the witness' history of manipulation was "the whole point of our defense. It's those people that cross her, Dennis Slater, Joanne Lindstrom, [or her alleged lover], she goes out to get them with a vendetta. She manipulated them. She did it to him on numerous occasions. She's doing the same thing to him. She's told two people that I have a witness for that she's out to get Dennis Slater."

FN7. The district court did allow some cross-examination on the witness' psychiatric history. The defense was permitted to ask whether the witness had ever been committed under the Baker Act. Counsel elicited that she had been committed for three weeks in January, 1980, first at Hillsborough County and then at St. Joseph's Hospital. Further, the defense elicited that the witness had been involuntarily committed in 1978:
Q. On occasion of November 1978, when you were committed under the Baker Act, was that voluntary or involuntary?
A. It started out as involuntary and turned into voluntary.
Q. And where were you treated on that occasion [sic]?
A. Tampa General Hospital.
Q. And was that initial commitment as the result of an overdosage of drugs?
A. Yes.
Q. Specifically what, if you recall? A. Oh, I recall. You want me to name the drug?
Q. Yes ma'am.
A. Lithium, Tofranil and one other that I can't recall.
Q. Transine?
A. Yes.
Q. About how many tablets?
A. I don't recall that.

MR. ATKINSON: Objection, Your Honor.
THE COURT: Objection sustained. That's not necessary, Mr. Devault.
Q. During, how long did you stay on that occasion?
A. Just a few days.
Q. Where were you located?
A. 4 north.
Q. 4 north at Tampa General?
A. Un-hum.
Q. On the occasion when you were there in Tampa General in November of 1978, did you tell any of the staff at the hospital--
MR. ATKINSON: Objection, Your Honor.
THE COURT: [Following a side-bar conference] The objection is sustained.
Q. How long was it that you stayed at 4 north on the occasion [sic] in November of '78? A. I remember it as being several days.
Q. I'm sorry?
A. Several days.
Q. Were you admitted to Tampa General Hospital psychiatric unit on any other occasions?
MR. ATKINSON: I would ask for a time frame, Your Honor, so we can establish...
remoteness.

THE COURT: All right, let's do that. Following a brief digression the cross-examination on the issue of the witness' psychological condition concluded:

Q. Other than the three occasions about which I've just asked you, have you been admitted to any psychiatric facility for care or treatment on any other occasions?

MR. ATKINSON: Again, Your Honor, can I have a time frame?

THE COURT: During '75, from the period of from 1975, was that the question?

MR. DEVAULT: No, I asked at any time, Your Honor.

THE COURT: Well, I sustain the objection. MR. ATKINSON: Thank you.

Q. Have there been other occasions of treatment during the last six years?

A. Yes. Q. And would you tell us when those occurred?

A. There was one last May, I think, May of 80.

Q. And where was that?

A. Memorial.

Q. Any others?

A. No.

Q. Are you under any psychiatric care at the present time?

A. I'm on a PRN basis, Mr. Devault.

Q. I'm sorry?

A. Whenever necessary basis.

Q. And on that basis, have you received care in the last month?

A. Yes.

We find Greene controls this issue. The restrictions on cross-examination in this case are even more egregious than those recently condemned in Greene, because the disputed medical records suggested a history of psychiatric disorders, manifesting themselves in violent threats and manipulative and destructive conduct having specific relevance to the facts at issue. As in Greene, the witness in question was the chief witness for the prosecution. She initiated and pursued the investigation of Bay Therapy. She was an insider to the fraud scheme, who testified in detail about the operation and about the activities of Slater and Lindstrom. Accord United States v. Summers, 598 F.2d 450, 460 (5th Cir.1979) ("where the witness the accused seeks to cross-examine is the 'star' government witness, providing an essential link in the prosecutor's case, the importance of full cross-examination to disclose possible bias is necessarily increased"). We find the district court committed reversible error in unconstitutionally depriving appellants of their *1164 sixth amendment guarantee of the right to confrontation and cross-examination.

In addition to claiming error in limiting their ability to cross-examine the government's witness, appellants contend that the trial judge abused his discretion in denying them access to the psychiatric records of that same witness. Lindstrom and Slater argue that this material was necessary to test the perception, credibility and motivation of the witness effectively. We agree.

Prior to trial, appellants sought subpoenas duces tecum to obtain records of the witness' psychiatric treatment. The district court, after in camera examination, permitted some of the records to be used for cross-examination, but declined to allow any records admitted into evidence. The trial judge denied appellants any opportunity to review four sets of records, Court's Exhibits 1, 2, 3, and 4.

Court's Exhibit 1 consisted of the 1972 records of Dr. Charles DeMinico. Dr. DeMinico wrote in a consultation report that his initial impression of the government's witness was:

Conversion Reaction with dissociative traits. [The patient] has all the classical symptoms of a Hysterical Personality in all aspects of her past life history, her interpersonal relationships, her marital histories, and her personal psychological maladjustments. [She] admitted, to a certain degree, the manipulation of one fasting blood sugar test and passed that off casually with some sort of

[11] These rulings by the district court constituted an abuse of discretion contradicting Supreme Court and former fifth circuit authority on the right of confrontation in general and the right to examine the psychiatric history of adverse witnesses in particular. In Greene v. Wainwright, 634 F.2d 272 (5th Cir.1981), the district court dismissed a petition for habeas corpus claiming a violation of the right to confrontation. The state trial judge had prohibited the defendant from questioning the state's chief witness about his "mental condition and about certain bizarre criminal actions." Id. at 274. "His credibility was crucial to the state's case." Id. at 275. The fifth circuit reversed, holding that the denial of an opportunity to present evidence regarding the "alleged recent history of mental instability ... exceed [ed] any possible trial court discretion." Id. at 276.
vague rationalization. However, she denied any conscious knowledge of having taken insulin to modify the results of the glucose tolerance test. To explain this she wove an intricate fabrication in a bland, detached way that is typical of "la belle indifference" of a classical Freudian hysterical.

The Exhibit also included a summary of a Minnesota Multiphasic Personality Inventory (MMPI) Report:
The unwillingness of this patient to admit to the relatively minor faults which most people have suggests that she is a person with strong needs to see herself, and to be seen by others, as an unusually virtuous person. Such people tend to be rigid, defensive, and uncompromising individuals who stress moral issues and emphasize their own integrity. They tend to be frustrated, insecure people who have little insight, and who are unaware of their own stimulus value. It is doubtful that these tendencies have invalidated the patient's test results, but they may have caused her to receive somewhat reduced scores on the clinical scales.

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She is inclined to be overly sensitive to the responses and intentions of those around her. She chronically misinterprets the words and actions of others, which leads to difficulties in her interpersonal relationships.

(emphasis added).

Court's Exhibit 2 consisted of the records of Dr. Marucio Rubio, who treated the witness following a 1971 suicide attempt. This Exhibit, as well as parts of Court's Exhibit 1, is substantially cumulative of the psychiatric materials disclosed to appellants at trial.

Court's Exhibit 3 consisted of reports made by Dr. Daniel Sprehe, who was the witness' treating psychiatrist from 1979 until the time of trial. The Exhibit contained a discharge summary dated November 7, 1979, noting that the witness had been admitted voluntarily because she was "nailing over thoughts of suicide." On the first evening after her admission, the witness "became very hysterical and demanded to sign out, so temporarily she was held on a Baker Act involuntary commitment." However, within twenty-four hours she calmed down and was able to sign as a voluntary patient. The Baker Act commitment thus was not carried out.

In a letter dated May 22, 1979, Dr. Sprehe described the patient as "very cynical about both doctors and lawyers and regales one with many very involved intrigues and treacheries of which she feels she has evidence in the medical and legal profession. She predicts that eventually she will kill 1165 herself. She is obviously very emotionally unstable with marked hysterical features."

In a History and Physical Examination dated February 11, 1980, approximately a month after the witness' aggravated assault on her alleged lover, Dr. Sprehe noted:

She has really deteriorated in the past couple of months and the weeks prior to coming into this hospital. There was an attempt to get her to agree to go into the hospital because she was calling nightly with suicide threats, homicide threats toward her boy-friend and on at least one occasion I sent a Fire Rescue Truck out to her house because she stated that she had just taken an overdose when she talked to me on the phone. She also was getting erratic about keeping her office appointments and in general was making paranoid demands. She fired her lawyer, then rehired him, fired myself on several occasions as her psychiatrist. She felt that everyone was against her, etc.

***

... She has also worked as a legal researcher and because of this she fancies herself as being a legal wizard and smarter than most lawyers, and also smarter than most doctors and this makes her in a position of constantly second-guessing her doctors and lawyers, and trying to manage her case herself ....

***

Pseudo-neurotic schizophrenia with marked paranoid trends and with questionable competency at the present time. She has marked impulsiveness and possible suicidal tendencies. It is felt that she should be watched closely.

A Discharge Summary dated February 29, 1980 observed that her "hospital course was quite stormy with a great deal of paranoid distrust of everyone. She felt that her doctor was in league with her ex-boyfriend." She was stated to be "near maximum medical improvement ... I would rate her to be 25% partial disability from psychiatric standpoint ...."

Court's Exhibit 4 consisted of records made by St. Joseph's Hospital. A Physician's Progress log dated November 11, 1979 noted that Dr. Sprehe convinced the witness to voluntarily enter the hospital on that date following repeated serious suicide threats. The
entry for that day noted that she "insists on signing out of the hospital for a variety of reason[s], all rather infantile and some of them delusional. Says she will go home and kill self to spite everyone."

The district court's rationale for denying appellants access to these records was that they were cumulative of records already disclosed to the defense; that some were remote in time from the events at issue; that the evidence might confuse the jury and that access to the confidential professional materials would violate the witness' privacy rights. We find none of these reasons sufficient to justify withholding this material evidence from the appellants.

This issue is controlled by United States v. Partin, 493 F.2d 750, 763-64 (5th Cir.1974), cert. denied, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). The former fifth circuit held in Partin that the exclusion of "portions of a hospital record showing statements of the patient-witness, notation of symptoms, and treatment," id. at 763-64, constituted reversible error. [FN8] The witness, who had voluntarily committed himself for psychiatric care approximately six months before the event about which he sought to testify, had been diagnosed as being an undifferentiated schizophrenic. The court reasoned, "In simple language the defendant has the right to explore every facet of relevant evidence pertaining to the credibility of those who testify against him," and evidence on mental capacity may be especially probative of the ability to "comprehend, know and correctly relate the "1166 truth,"' id. The Partin court concluded that:

FN8. As in Greene v. Wainwright, 634 F.2d 272, 277 (5th Cir.1981), we need not reach the issue of whether these hospital records or expert testimony based on them would be admissible into evidence. We note, however, that United States v. Partin, 493 F.2d 750 (5th Cir.1974), cert. denied, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977), strongly suggests that this material is admissible.

The readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness's credibility to aid in their determination of the truth.

Partin had the right to attempt to challenge Rogers' credibility with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify.

Id. at 762, 763 (citations omitted).

[12] We need not reach the issue of admissibility of these records in this case. The district court's denial of defendants' access to the psychiatric materials is alone sufficient to constitute reversible error. Following Partin, the fourth circuit recently reversed a conviction because defendants had been denied access to psychiatric records revealing that the principal witness was "delusional and hallucinatory with poor judgment and insight" and had been "secluded for his own welfare." United States v. Society of Independent Gasoline Marketers of America, 624 F.2d 461 (4th Cir.1979), cert. denied, 449 U.S. 1078, 101 S.Ct. 859, 66 L.Ed.2d 801 (1980). After an in camera inspection, the trial court informed counsel that the records reflected two periods of hospitalization (one during the charged conspiracy and one prior to it) and that the hospitalization involved a "mental disorder or illness at the time." Id. at 467. The trial judge permitted the defense to question the witness about the two periods of hospitalization but did not make the records themselves available. On appeal, the fourth circuit reversed:

The ability of defense counsel to impeach [the witness] regarding his ability to properly perceive events about which he testified was severely limited by counsel's inability to examine the hospital records. We can think of no more relevant or significant material than a hospital record indicating that a witness who is testifying against his former employer had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight.

Id. at 469.

The reasoning of Partin and Society of Independent Gasoline Marketers applies even more strongly in this case. The cumulative evidence of the psychiatric records suggests that the key witness was suffering from an ongoing mental illness which caused her to misperceive and misinterpret the words and actions of others, and which might seriously affect her ability "to know, comprehend and relate the truth," United States v. Partin, 493 F.2d at 762. More particularly, it hints that the witness' reactions to doctors and lawyers, and thus to the proprietors of Bay Therapy, might be especially distorted. The treatment received, the observations made, and the diagnoses were all relevant to the issue of the witness' mental condition.

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When balanced against the great probative weight of the psychiatric records for the issues in this case, the district court's justifications of cumulativeness and remoteness are insubstantial. These records contrast sharply to those proffered in United States v. Diecidue, 603 F.2d 535 (5th Cir.1979), cert. denied, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980). In Diecidue, defendants sought to admit records of an isolated and nonrecurrent episode of psychiatric illness occurring twelve years prior to the events at issue in the case. The witness had been voluntarily hospitalized for four months and never subsequently treated for mental illness. On appeal, the court, citing Partin, held the evidence was inadmissible because it was temporally remote from, and therefore not probatively related to, the time period about which the witness was testifying.

By contrast, the court's exhibits in this case reveal presence and treatment of a continuing mental illness embracing the time period of the alleged conspiracy. The indictment charged a period of conspiracy and scheme to defraud from 1976 to 1981. Court's Exhibits 3 and 4 include entries dated 1979 and 1980, periods during which the witness was assisting the government *1167 to uncover and prosecute the case. The relevance of these records is brought home by the several references in them to the patient's involvement with the Bay Therapy investigation. Although some of the exhibits include events occurring four or five years prior to the witness' involvement in Bay Therapy, they suggest a continuing symptomatology, including suicide threats and attempts, beginning before and continuing during the events at issue. While Exhibit 2 and parts of Exhibit 1 repeat some of the psychiatric evidence disclosed to appellants at trial, the records of Doctors DeMinico and Rubio suggest that the mental health problems of the witness were not isolated psychiatric episodes but parts of a continuing mental illness, at times requiring confinement and treatment. The depth of the psychiatric record suggests that the witness' symptoms were not merely reactive to the stress of the investigation and trial and could help to dispel the jury's feeling that "defense counsel was engaged in a speculative and baseless attack on the credibility of an apparently blameless witness." Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974).

[13][14] The government strenuously argues that the privacy interest of a patient in the confidentiality of her medical records and the societal interest in encouraging the free flow of information between patient and psychotherapist require affirmance of the trial court's rulings. [FN9] While we recognize the general validity of those interests, they are not absolute and, in the context of this criminal trial, must "yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case." United States v. Society of Independent Gasoline Marketers of America, 624 F.2d at 469.

FN9. The government suggested at oral argument that the medical records were inadmissible based on doctor-patient privilege. The government itself answered this contention, however, in its trial brief: The Government anticipates various defendants will object to evidence or testimony on the basis of attorney-client or doctor-patient privilege. Rule 26 of the Federal Rules of Criminal Procedure states that in federal criminal trials the admissibility of evidence is to be governed by the principles of the common law, except as modified by Act of Congress. At common law there was no physician-patient privilege. There is no federal statute creating such a privilege. Therefore, testimony concerning the doctor-patient relationship is admissible in Federal Court. United States v. Harper, 450 F.2d 1032, 1035 (5th Cir.1971). In the event the court chooses to apply Florida law, the result would be identical because the Florida Supreme Court in Morrison v. Malquist [Malquist], 62 So.2d 415 [415] (Fla.1953) held that absent statutory modifications of the common law no physician-patient privilege will exist. There has been no such modification. See Also: In Re Grand Jury Proceedings United States, 626 F.2d 1051 (1St Cir.1980).

Although a trial court should seek to prevent the disclosure of embarrassing, irrelevant information concerning a witness, it is an abuse of discretion to preclude defense counsel from obtaining relevant information, and the witness' privacy must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case.

[15] Broad-brushed assertions of the societal interest in protecting the confidentiality of such information cannot justify the denial of these defendants' right to examine and use this psychiatric information to attack the credibility of a key government witness. A desire to spare a witness embarrassment which disclosure of medical records might entail is
insufficient justification for withholding such records from criminal defendants on trial for their liberty. In *Davis v. Alaska*, 415 U.S. at 319, 94 S.Ct. at 1111, the Supreme Court rejected Alaska's attempt to utilize a similar confidentiality (the anonymity of a juvenile offender) to avoid confrontation and cross-examination:

In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

*1168* The government further argued that the excluded evidence would have confused the jury. Such a notion, that juries misconstrue evidence of mental illness because of passion and prejudice, might have been appropriate in the last century. But juries nowadays regularly deal with this sort of evidence.

We "cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment ...." *Davis v. Alaska*, 415 U.S. at 317, 94 S.Ct. at 1111. We hold that the jury was denied evidence necessary for it to make an informed determination of whether the witness' testimony was based on historical facts as she perceived them or whether it was the product of a psychotic hallucination. The jury was denied any evidence on whether this key witness was a schizophrenic, what schizophrenia means and whether it affects one's perceptions of external reality. The jury was denied any evidence of whether the witness was capable of distinguishing reality from hallucinations. Such denial was reversible error.

REVERSED and REMANDED.

698 F.2d 1154, 12 Fed. R. Evid. Serv. 1006

END OF DOCUMENT
United States Court of Appeals, 
Fourth Circuit.

UNITED STATES of America, Appellee, 
v.
SOCIETY OF INDEPENDENT GASOLINE 
MARKETERS OF AMERICA, Appellant. 
UNITED STATES of America, Appellee, 
v.
AMERADA HESS CORPORATION, Appellant. 
UNITED STATES of America, Appellee, 
v.
ASHLAND OIL, INC., Appellant. 
UNITED STATES of America, Appellee, 
v.
KAYO OIL COMPANY, Appellant. 
UNITED STATES of America, Appellee, 
v.
The MEADVILLE CORPORATION, Appellant. 
UNITED STATES of America, Appellee, 
v.
PETROLEUM MARKETING CORPORATION, 
Appellant. 
UNITED STATES of America, Appellee, 
v.
Robert R. CAVIN, Appellant.
Nos. 77-2515 to 77-2521.

Decided December 26, 1979. 
Upon Rehearing June 24, 1980.

Defendants, independent petroleum marketers and 
their trade association, were convicted in United 
States District Court for the District of Maryland, C. 
Stanley Blair, J., of violating Sherman Anti-Trust Act 
by engaging in a conspiracy to fix prices for retail 
sale of gasoline in unreasonable restraint of 
commerce, and they appealed. The Court of Appeals, 
Field, Senior Circuit Judge, held that: (1) evidence 
was sufficient to prove the conspiracy charged in the 
indictment; (2) trial court committed prejudicial error 
in denying defendant access to hospital records of 
major witness, which indicated that witness had been 
under treatment for mental illness which rendered 
him at the time of the alleged conspiracy delusional 
and hallucinatory with poor judgment and insight, for 
its use in cross-examination of the witness; and (3) an 
individual defendant, as a layman, acted reasonably 
in relying upon prosecutor's assurance of use 
immunity; thus, defendant's conviction would be 
reversed and his case remanded for a new trial in 
which government would not be permitted to offer 
any evidence directly or indirectly derived from 
defendant which resulted from its assurance of 
immunity to him.

Affirmed in part; reversed in part; remanded.

Widener, Circuit Judge, filed concurring opinion.

K. K. Hall, Circuit Judge, filed opinion in which he 
dissented in part.

West Headnotes

[1] Monopolies 17(1.12) 
265k17(1.12) Most Cited Cases 
(Formerly 265k17(1.7))

[1] Monopolies 17(5) 
265k17(5) Most Cited Cases

Under Sherman Anti-Trust Act, a combination 
formed for purpose and with effect of raising, 
deressing, fixing, pegging or stabilizing price of 
commodity in interstate or foreign commerce is 
illegal per se. Sherman Anti-Trust Act, § 1, 15 

[2] Monopolies 31(2.4) 
265k31(2.4) Most Cited Cases

Government offered sufficient evidence to prove that 
defendants, independent petroleum marketers and 
their trade association, conspired to fix prices for 
retail sale of gasoline in the Middle Atlantic states of 
New York, Pennsylvania, New Jersey, Delaware, 
Maryland and Virginia as well as District of 
Columbia. Sherman Anti-Trust Act, § 1, 15 

[3] Monopolies 31(1.6) 
265k31(1.6) Most Cited Cases

There was not a fatal variance of proof from original 
indictment charging defendants, independent 
petroleum marketers and their trade association, with

[4] Indictment and Information 121.2(2)
210k121.2(2) Most Cited Cases

In light of extensive disclosure by Government in prosecution of independent petroleum marketers on charges of conspiring to fix prices for retail sale of gasoline in Middle Atlantic states, trial court did not abuse its discretion in denying defendants' request for a more detailed bill of particulars.

[5] Criminal Law 627.6(6)
110k627.6(6) Most Cited Cases

In antitrust prosecution involving independent petroleum marketers, trial court committed prejudicial error in denying one corporate defendant access to hospital records of major witness, which indicated that witness had been under treatment for mental illness which rendered him at the time of the alleged conspiracy delusional and hallucinatory with poor judgment and insight, for its use in cross-examination of the witness.

[6] Criminal Law 42
110k42 Most Cited Cases

Defendant, as a layman, acted reasonably in relying upon prosecutor's assurance of use immunity; thus, defendant's conviction would be reversed and his case remanded for a new trial in which government would not be permitted to offer any evidence directly or indirectly derived from defendant which resulted from its assurance of immunity to him. 18 U.S.C.A. § 6002.

[7] Witnesses 304(3)
410k304(3) Most Cited Cases

Immunity from use and derivative use is coextensive with scope of privilege against self-incrimination and therefore sufficient to compel testimony over a claim of privilege but grant of immunity need not be broader. 18 U.S.C.A. § 6002; U.S. Const. Amend. 5.


David F. Albright, Baltimore, Md. (Richard M. Kremen, Franklin T. Caudill, Seemes, Bowen & Semmes, Baltimore, Md., on brief), for appellant Petroleum Marketing Corporation.

Philip L. Cohan, David Freeman, Ginsburg, Feldman & Bress, Washington, D. C., on brief, for appellant The Meadville Corporation.


Before FIELD, Senior Circuit Judge, and WIDENER and HALL, Circuit Judges.

FIELD, Senior Circuit Judge:

On June 1, 1976, an indictment was returned in the District of Maryland against The Society of Independent Gasoline Marketers of America ("SIGMA"), Amerada Hess Corporation ("Hess"), Ashland Oil, *463 Inc. ("Ashland"), Continental Oil Company ("Continental"), Crown Central Petroleum ("Crown"), Kayo Oil Company ("Kayo"), The
Meadville Corporation ("Meadville"), Petroleum Marketing Corporation ("PMC"), Robert R. Cavin ("Cavin"), Norman Goldberg ("Goldberg"), Charles J. Luellen ("Luellen") and W. H. Burnap ("Burnap"). The indictment, drawn in one count, charged that the defendants had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, prior to its 1974 amendments, by engaging in a conspiracy to fix prices for the retail sale of gasoline in unreasonable restraint of commerce.

After extensive pretrial proceedings, the trial commenced on May 2, 1977, and at the conclusion of the Government's case the district court granted the motions of three of the individual defendants, Luellen, Goldberg and Burnap, for judgments of acquittal. The trial continued as to the remaining defendants, and on August 30, 1977, the jury returned verdicts of not guilty with respect to Crown and Continental and guilty as to SIGMA, Hess, Ashland, Kayo, Meadville, PMC and Cavin.[FN1] Judgments of conviction were entered pursuant to the jury's verdicts and the convicted defendants have appealed.

FN1. Cavin was employed by SIGMA in January of 1972 and was appointed Executive Director of the Society in November of that year.

In an opinion filed December 26, 1979, the panel unanimously affirmed the convictions of all of the defendants except Ashland. Similarly, the panel unanimously reversed the conviction of Cavin. With respect to Ashland, a majority of the panel affirmed the conviction, Judge Widener dissenting. Petitions for rehearing and rehearing en banc were filed, and upon the suggestion that the case be reheard en banc less than a majority of the judges in regular active service voted in favor thereof. Accordingly, rehearing en banc is denied. On the petitions for rehearing, however, a majority of the panel are now of the opinion that the conviction of Ashland must be reversed. Additionally, the panel is of the opinion that our disposition of Cavin's appeal must be modified. To that effect, we withdraw our prior opinion and file the present opinion in lieu thereof.

I

During the period covered by the indictment, and for many years prior thereto, gasoline was sold to motorists through essentially two different types of retail service stations. "Major brand" stations sold the gasoline of major companies, e.g., Exxon, Texaco, Gulf, etc., and in many instances were operated by dealers who were not employees of the major companies. These stations bore brand names that were widely advertised and sold brand name products, including tires, batteries and parts. Many of them offered repair service and accepted recognized company credit cards. "Private brand" stations, on the other hand, offered gasoline under names which were not widely advertised, e.g., Redhead, Kayo, Scatt, etc., and were usually manned by individuals who worked directly for the company which owned the stations. Private brand stations ordinarily offered few products other than gasoline, and spent little money, if any, for media advertising.

With these differences in service, such stations competed with the major brands almost exclusively upon the basis of price. The private brand stations attracted customers from the majors by pricing their gasoline several cents a gallon below that of the major brand stations in the same locale, and as a result the price of major brand gasoline imposed a "ceiling" on private brand prices. In other words, to be competitive the private brand retailer was required to maintain a sufficiently attractive "differential" between his price and that of the majors. Because they were selling gasoline at less than that charged by the majors, the profit margin of the private brand stations was reduced to a marginal level, and the volume of a private brand's sales was vitally important. In the highly competitive private brand market volume was, of course, significantly related to price. As a result, the private brand company, in the operation of a local station, took into account in pricing its gasoline from day-to-day not only the price charged in that locale by the major brand stations, but the prices charged by other independents in the same market.

During the period in question the companies which operated private brand stations had available a certain amount of current and accurate data relative to pricing patterns in the major brand gasoline market from a publication known as "Platt's Oilgram". This established trade newspaper conducts price surveys of the majors and publishes such pricing data for major brand markets throughout the country, including advance announcements of upcoming wholesale price moves by the majors. Much information, however, which was vital to the private brand companies could not be gleaned from Oilgram. Oilgram carried little news of major brand retail price behavior on a station-by-station or "street-basis," and such information was highly important to the private
brand companies since their competitive vitality depended upon the ability of their individual retail outlets to undercut at all times the prices charged by neighboring major brand stations. More significantly, Oilgram carried practically no news concerning other private brand retailers' price behavior, either present or future, nor any analysis of the potential impact of major brand market behavior upon the private brand market.

In part to fill this void, the private brand retailers formed a trade association called The Society of Independent Gasoline Marketers of America ("SIGMA"). SIGMA's members were firms and individuals operating private brand stations in various parts of the country. Its board of directors and officers were elected from the membership and its day-to-day operations were managed by a full-time salaried director and his supporting staff. Ordinarily the membership met in convention on a semi-annual basis. SIGMA was characterized at trial by the defendants as an "oral Platt's Oilgram" for independents. It collected information from various sources (including telephone calls to and from private brand companies in which the companies would discuss upcoming market decisions), and it would relay such information to its members, usually by telephone. Information provided by SIGMA to its members included the behavior of independents and majors in adjoining markets, the impact of wholesale prices on retail price structures, upcoming price moves by other independents, opportunities for increased prices or the perceived need for decreases, and generally such other data which might be of assistance to the members in meeting their competition.[FN2]

FN2. SIGMA also lobbied on behalf of its members, conducted public relations programs, and informed members of adoption and interpretation of government regulations. It is, of course, conceded that none of these activities were germane to the charges in the indictment.

The indictment charged that the defendants, in effectuating the conspiracy to fix prices, "used SIGMA as a clearing house for gasoline pricing information in order to coordinate price increases and to eliminate discounting and settle pricing disputes," and that they "met at the occasion of SIGMA meetings and discussed pricing strategy, including the coordinated increase of retail gasoline prices and the curtailment and elimination of price cutting and discount practices". The indictment alleged that this use of SIGMA, supplemented by telephonic or other contact between the several defendants with respect to coordinated price increases and agreements, had resulted in the stabilization of artificial and non-competitive prices of gasoline, the effect of which was to restrain competition among the defendants and their co-conspirators.

II

In their joint brief the defendants make the prefatory charge that they "were convicted of criminal price fixing for exchanging information on prices," and assert that no conviction has ever been sustained on such evidence in a highly competitive market of which the participants had a relatively *465 minimal share. In making this contention the defendants draw heavily upon the Supreme Court's recent decision in United States v. U. S. Gypsum Co., 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Gypsum involved the practice of inter-seller price verification, a practice which is not, in itself, unlawful per se. The Government contended that such an exchange of price information was violative of Section 1 of the Sherman Act if it had either the purpose or the effect of stabilizing prices. The Court held, however, that an effect on prices, without more, would not support a criminal conviction, and that it was necessary to show that such a consequence was intended by the alleged participants.

(1) There is a marked difference between the case before us and the one considered by the Court in Gypsum. Here the indictment charged the defendants with a conspiracy to fix prices, and the "exchange of information" was merely one of the activities by which the alleged agreement was effectuated. "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). Since in a price-fixing conspiracy the conduct is illegal per se, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since "(t)he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." United States v. Trenton Potteries, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1926).
III

(2) The principal challenge of the defendants is that the Government failed to offer sufficient evidence to prove the conspiracy which was charged in the indictment. The indictment defined the geographical area of the conspiracy as the "Middle Atlantic states" of New York, Pennsylvania, New Jersey, Delaware, Maryland and Virginia, as well as the District of Columbia. The defendants maintain that it was necessary for the Government to demonstrate a single continuing conspiracy to fix gasoline prices throughout the entire Middle Atlantic region, and contend that the only evidence of the area-wide coordination of price moves related to general increases in November, 1970, July, 1971, and August of 1972. The defendants acknowledge that there were area-wide increases on those occasions, but assert that the evidence failed to show that they were the result of any price-fixing agreement. On the contrary, they suggest that the evidence clearly showed that the price moves on these three occasions were the result of economic forces at work in the market place over which the defendants had no possible control.

The defendants argue that other than those three occasions, the Government's evidence, at best, proved nothing but a series of "local and isolated incidents occurring within the Middle Atlantic states, involving some of the defendants and co-conspirators at different, and shorter, periods of time." Even if we were to accept the defendants' criticism of the probative quality of the evidence on the three area-wide increases, we think the Government's evidence with respect to the various local markets was proper for the consideration of the jury. Under the indictment the conspiracy embraced an agreement not only to fix prices on an area-wide basis, but also to establish prices in local markets within the region and to effectuate price changes on a coordinated basis. The Government's evidence of the single conspiracy implemented in this manner was not merely circumstantial in nature. The Government's witnesses, many of whom were employed by the corporate appellants, testified concerning the nature and intent of their pricing communications, and their testimony was augmented in many respects by the contemporaneous records of the defendants. Our review of the record persuades us that the evidence was *466 sufficient to support the conclusion of the jury that the defendants were working together for the accomplishment of their common purpose to fix prices within the geographical area described in the indictment.

We are further of the opinion that the court's instructions to the jury were consistent with the indictment. The court instructed the jury that the defendants were charged with a "single, continuing conspiracy" to fix prices of gasoline in the Middle Atlantic states and, advertising to the evidence with respect to local pricing incidents, emphasized that "if you find that a defendant engaged in isolated incidents of gasoline price fixing, but was not a party to a single overall conspiracy covering the six-state area and the District of Columbia area, you must find that defendant not guilty of the matters charged in the indictment." This language, we think, made it crystal clear to the jury that their consideration of the evidence should be addressed to the ultimate issue of a single overall conspiracy.

IV

(3) Defendants also claim that there was a fatal variance of proof from the original indictment, the bill of particulars, and the pre-trial stipulation of the parties. Much of what we have said with respect to the sufficiency of the evidence applies equally to this contention of the defendants which, in a large degree, is predicated upon their argument that the indictment required a showing of continuous area-wide price manipulation. As we have noted, there was substantial evidence to support the jury's finding of guilt and, assuredly, the defendants were not convicted upon a charge that was not specified in the indictment, nor were they uninformed of the charge against them. Additionally, the charges and specifications found within the four corners of the indictment, the bill of particulars, and the pre-trial stipulation not only informed the defendants of the charges against them, but are sufficiently clear to allow the defendants to assert double jeopardy in the event of any future prosecution for the same conduct.

V

(4) We find no merit in the defendants' charge that the trial court improperly denied their request for a more detailed bill of particulars. Pursuant to a stipulation entered into five months prior to trial, the Government supplied the defendants with copies of all grand jury testimony, access to all documents subpoenaed from non-defendants; all documents voluntarily submitted to the Government by third parties in the course of the investigation; and all available Brady material. In further compliance with the stipulation the defendants received copies of all
trial exhibits thirty days prior to trial, as well as a list of intended witnesses and Jencks Act material fourteen days prior to trial. In the light of this extensive disclosure by the Government there was no abuse of discretion by the trial court in declining to require the Government to supply the further information requested by the defendants. See United States v. Schembari, 484 F.2d 931 (4 Cir. 1973).

VI

(5) The Government's case against the defendant, Ashland, was based primarily upon the theory that Ashland exercised direct control over the retail operations of five of its subsidiary corporations, including Payless Stations, Inc. ("Payless").[FN3] One of the Government's principal witnesses on the question of Ashland's control was a former vice-president of Payless,[FN4] who was in charge of its pricing for the period from 1963 through 1973, and who was employed by the company from 1956 through December of 1973. This witness provided direct testimony of Ashland's control over its subsidiaries. His testimony also included other information regarding the participation of *467 Ashland and Payless in the conspiracy and the relationship of Payless with SIGMA.

FN3. The other subsidiaries were Hi-fy Gasoline Stations, Inc.; Bi-lo Stations, Inc.; Southern Oil Co.; and Red Head Oil Co.

FN4. This witness will be referred to from time to time as the "witness", "vice-president", "key-witness", or "former vice-president."

This key witness had been hospitalized for psychiatric problems on two separate occasions in Our Lady of Peace Hospital in Louisville, Kentucky, and counsel for Ashland subpoenaed the hospital records. They were produced by the hospital administrator who was directed to deliver them to the district judge. After examining the records in camera, the judge advised counsel that they reflected two periods of hospitalization, the first being from July 26 to August 29, 1966, and the second from November 20 until December 24, 1968 and that the hospitalizations involved "a mental disorder or illness at that time."

Concluding that the disclosure of the records was within his discretion, the district judge declined to deliver them to counsel for the reason, among others, that he did "not know to what extent the Government's examination of the witness will include questioning during the relative period" (App.Vol. 3, at 777, 778). In making this ruling, however, the district judge stated that he was not foreclosing counsel for Ashland from questioning the witness about the two periods of hospitalization, but that he would rule on the questions as the cross-examination of the witness developed.

The hospital records were sealed by the district judge and after this appeal was filed Ashland moved this court for leave to examine such records. The motion was denied with the provision that counsel for Ashland might renew the motion at the time of oral argument. Following oral argument we granted Ashland's counsel access to the records and they were jointly examined by counsel for Ashland and the Government. Based on this examination of the hospital records, with leave of the court, both Ashland and the Government filed supplemental briefs on the issue of the relevancy of these records.

Counsel for Ashland contends that in denying access to the hospital records the trial court prejudicially impaired Ashland's ability to effectively cross-examine the witness. Ashland argues, among other things, that the hospital records were significant for the purpose of evaluating the witness' perceptive ability during the period in question and suggests, for instance, that if the witness were suffering from paranoia, he might have taken an irrational view of his communications with Ashland and interpreted simple inquiries as commands or binding directives.

As we have noted, the first period of the witness' hospitalization was from July 26 to August 29 of 1966, which was prior to Ashland's acquisition of Payless and also prior to the alleged conspiracy. However, the second period of hospitalization from November 20, 1968, to December 21, 1968, fell within the period of the conspiracy which was alleged to have existed from at "at least as early as 1967 * * * and continuing thereafter until November 1974."

The record discloses that the vice-president in question was admitted to the hospital on the first occasion because of work-related problems. Significantly, the 1966 records show that a "supervisor" at work brought him to the hospital, and that he believed that "people at work were plotting against him." The official diagnosis indicated that his...
problems stemmed from his employment rather than being home-related. The 1968 records show that he was "manic depressed and admitted in psychotic state." The records also state that he "still tends to push himself," and contained observations that he was "delusional and hallucinatory with poor judgment and insight." Although the 1968 records do not specifically state that this was a continuation of his work-related problems, the jury might reasonably have drawn such an inference had the contents of the records been disclosed to them during the cross-examination of the witness. The official record incident to the 1968 visit state the final diagnosis as "Schizophrenic Reaction, Schizo-affective Type." On that occasion the "mental status examination" reflected that the patient was manic in behavior and quite talkative, and that he spoke of his experience with God.

It occurs to us that the hospital records should have indicated to the district court *468 that the witness' hospitalization in 1966 was work-related and that it was quite probable that his 1968 illness was of a similar nature. The records should also have indicated to the court that the witness' judgment during both periods of illness was seriously impaired, and that a jury could have concluded that his ability to make rational observations was highly questionable. The records would further indicate that the patient had not fully recovered when he was discharged from the hospital in 1968 since they point out that his condition required further psychiatric treatment and continued medication.

Bearing in mind that the case against Ashland was based upon its alleged direct control over the retail operations of its subsidiaries, including Payless, it is clear that the testimony of the former vice-president was vital to the Government's case. Ashland had acquired control of Payless in 1967 and the witness testified that "Ashland, from the time that they acquired the company (Payless) until the time that I left, assumed gradually more and more control." At another point, in testifying concerning Ashland's control of prices of Payless the witness stated "this was a growing thing that started in 1968, when Ashland bought it and extended up until the end, when they were saying what and where and how to price, not just because of the shortage of gasoline, but because they were taking direct control from Ashland's offices in Ashland, Kentucky." It should be noted that during at least a part of this period in 1968 about which the witness testified, he was experiencing acute mental problems with a hospital record which disclosed that he was "delusional and hallucinatory with poor judgment and insight," and was "secluded for his own welfare." Despite this fact, the court forbade Ashland from reviewing the hospital records or putting them to any effective use in the cross-examination of the witness.

Even if it is fair to assume that the hospital records had no direct bearing upon the witness' mental capacity at the time he testified, they were unquestionably relevant in regard to his perception of the events involving his work at Payless during the time of his unfortunate illness, and had a significant bearing upon his ability to testify at trial concerning his recollection of those events. United States v. Partin, 493 F.2d 750 (5 Cir. 1974), is the leading case in this field, and is quite similar to the case before us. In that case, one Rogers was a key government witness, just as the former vice-president was here. Rogers had been admitted to a Veterans Administration Hospital for treatment for mental illness. The hospital record revealed that Rogers had stated he was having auditory hallucinations and at times he thought he was some other person. The trial court rejected the admission of the hospital record either as a predicate for cross-examination or as a basis upon which another psychiatrist could have given an opinion as to the mental state of the witness Rogers as that may have had an effect on Rogers' ability to see and hear accurately during the period in which the events occurred about which he was testifying.

The court of appeals reversed the conviction because of the trial court's error in failing to admit the hospital records, reasoning at page 762:

"It is just as reasonable that a jury be informed of a witness' mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know, and correctly relate the truth."

And again on page 763 appears the following:

"Partin (the defendant) had the right to attempt to challenge Rogers' credibility with competent or relevant evidence of any mental defect or treatment at a time probatively related to the time period about which he was attempting to testify."

To the same effect are United States v. Hiss, 88 F.Supp. 559 (S.D.N.Y.1950), and statements in United States v. Konneus, 508 F.2d 556, 573 (1 Cir. 1974), cert. denied, *469 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975); Sinclair v. Turner, 447 F.2d 1158, 1163 (10 Cir. 1971), cert. denied, 405...
U.S. 1048, 92 S.Ct. 1329, 31 L.Ed.2d 590 (1972); Ramseyer v. General Motors Corp., 417 F.2d 859, 863 (8 Cir. 1969); United States v. Allegritti, 340 F.2d 254, 257 (7 Cir. 1964), cert. denied, 381 U.S. 911, 85 S.Ct. 1531, 14 L.Ed.2d 433 (1965).

In United States v. Figurski, 545 F.2d 389 (4 Cir. 1976), we had occasion to determine whether the contents of a protected report about a key prosecution witness should have been disclosed to defense counsel, and stated:

"If the report contains only material impeaching the witness, disclosure is required only when there is a reasonable likelihood of affecting the trier of the fact. Whether there is such a likelihood depends upon a number of factors such as the importance of the witness to the government's case, the extent to which the witness has already been impeached, and the significance of the new impeaching material on the witness' credibility."

Id., at 391-92. As discussed above, the former vice-president of Payless was the key government witness. Although the defense presented the testimony of two witnesses that contradicted his testimony regarding Ashland's control over its subsidiaries, the ability of defense counsel to impeach him regarding his ability to properly perceive events about which he testified was severely limited by counsel's inability to examine the hospital records. We can think of no more relevant or significant material than a hospital record indicating that a witness who is testifying against his former employer had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight. Although a trial court should seek to prevent the disclosure of embarrassing, irrelevant information concerning a witness, it is an abuse of discretion to preclude defense counsel from obtaining relevant information, and the witness' privacy must yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case. See Davis v. Alaska, 415 U.S. 308, 319, 94 S.Ct. 1105, 1111-1112, 39 L.Ed.2d 347 (1974).

Upon careful consideration, we are of the opinion that the action of the district court in denying Ashland access to the hospital records for its use in cross-examination of the former vice-president was so prejudicial that Ashland is entitled to reversal and a new trial.

VII

(6) With the exception of Ashland, we affirm the convictions of the other corporate appellants. We think, however, that assurances of immunity given to Robert Cavin during the grand jury's investigation and upon which he relied require that his conviction be set aside.

The grand jury investigation was initiated about November 18, 1974, under the direction of Rodney A. Thorson of the Anti-trust Division of the Department of Justice. On December 23, 1974, Cavin and Richard Reynolds, a fellow employee of SIGMA, were subpoenaed to testify before the grand jury and were jointly notified that they should appear in Baltimore on January 7, 1975. Reynolds and Cavin immediately contacted David A. Donohoe, who also represented SIGMA, and arranged to meet with him on January 2, 1975. Donohoe then called Thorson and inquired whether either Cavin or Reynolds were targets of the grand jury investigation. According to Donohoe, Thorson told him "not to worry" because Thorson "was obtaining immunity orders for both Mr. Cavin and Mr. Reynolds and that both would be testifying under a grant of immunity."

Based upon Thorson's representation Donohoe concluded that he should suggest to Cavin and Reynolds that they obtain other counsel. In Thorson's recollection of the conversation with Donohoe, he denied making any "promise" that Cavin and Reynolds would receive immunity but recalled stating that he would obtain immunity orders for both if they intended to claim the Fifth Amendment. Thorson also acknowledged that he had requested immunity authorization for both witnesses *470 at about the time he issued subpoenas for their appearance. Thorson also discussed with Donohoe his possible conflict of interest since he was counsel for SIGMA and suggested that Donohoe secure other counsel for Cavin and Reynolds.

At their meeting on January 2, 1975, Donohoe told Cavin and Reynolds of Thorson's assurance that they were to receive immunity, and advised them to obtain other counsel in order to avoid any possible conflict of interest. After some discussion, Donohoe recommended that Cavin and Reynolds consider retaining Donald T. Bucklin. Bucklin met with Cavin and Reynolds at Donohoe's office on that same day and was retained by them. Donohoe repeated to Bucklin the representations concerning immunity that Thorson had made to him. In the light of this information Bucklin discussed with Cavin and Reynolds their rights under a grant of immunity and they were specifically advised of the importance of testifying fully and honestly in order to obtain the maximum protection under 18 U.S.C. s 6001, et seq.
Shortly after the start of a joint briefing session with Cavin and Reynolds on the afternoon of January 2nd, Bucklin called Thorson to advise him of his representation of the two witnesses and to set up a meeting on January 3rd. During this conversation Thorson confirmed the assurance that both Cavin and Reynolds would receive immunity, and was advised by Bucklin that based upon this assurance he perceived no conflict in his joint representation. Thorson agreed that no conflict existed. While Thorson later denied discussing the question of conflict with Bucklin, he did acknowledge that he had repeated his earlier assurance that he would obtain immunity orders if the witnesses intended to claim the Fifth Amendment. On this point Thorson testified before the district court as follows:

THE COURT: Did you state that he would get immunity; he would testify pursuant to an immunity order?

MR. THORSON: Yes; yes, I did state that.

THE COURT: Can you restate that to me to the best of your recollection as to when it occurred and what was said and to whom.

MR. THORSON: I stated that initially in the telephone conversation preceding the January 3rd meeting in the context that if it is their intention to claim the Fifth Amendment I will obtain an immunity order. And I explained, expressly, that I had no intentions of having the Government go to the expense of having these people come to Baltimore from St. Louis, and then claim the Fifth Amendment and then I'd send them home. That's why I wanted to know what their intention was, and I did not find that out until the meeting on Friday. (January 3).

(App.Vol. 18, at 15,225 and 15,226.)

During the initial joint interview with Bucklin on January 3rd Cavin and Reynolds refreshed each others recollections, supplemented their respective comments and responses, and corrected each others memory of events, dates and names of people with respect to incriminating evidence. On January 3, 1975, Donohoe and Bucklin, together with another attorney, met with Thorson and other prosecutors in the Department of Justice. At this meeting Thorson agreed to obtain immunity orders prior to the grand jury appearances of Cavin and Reynolds based upon the representations that both witnesses would claim their Fifth Amendment privilege.

Subsequent to the meeting on January 3rd, a conflict developed in Bucklin's schedule for January 7th, and Terry F. Lenzner was brought into the case to represent Cavin and Reynolds. On January 6th Thorson called Lenzner and advised him that the appearance of the two witnesses was postponed until January 8th. During that conversation Thorson again confirmed that both witnesses would receive immunity, and it was agreed that the attorneys would meet on the morning of January 8th and proceed to the supervisory judge's chambers for the signing of the immunity orders. At about 7:30 p. m. on that evening Thorson *471 called Lenzner at his home and advised him that the subpoena for Cavin was being cancelled. The reason given by Thorson for the cancellation was a scheduling problem and Lenzner was told that he would be advised if and when Cavin's appearance was rescheduled.

Under date of January 7, 1975, Lenzner advised Thorson by letter that his representation of Cavin and Reynolds was based upon Thorson's assurance that both individuals were to testify under a grant of immunity on the same day, and that because of a possible conflict of interest resulting from the cancellation of Cavin's subpoena, Lenzner was withdrawing from further representation of Cavin. Lenzner was unable to advise Cavin of these developments since both Cavin and Reynolds were en route to Washington. Cavin expressed some concern about the postponement but was assured by Lenzner that Thorson had indicated it was due only to a scheduling problem.

At the grand jury session on January 8th Thorson commenced his examination of Reynolds concerning SIGMA documents without an immunity order, whereupon Reynolds refused to answer "on the grounds that it violates the agreement between the Government and my counsel that I would be questioned only after receiving immunity and that I would be granted immunity today before testifying." Thorson then called upon Donohoe to produce someone to identify the SIGMA records, and the following exchange took place:

MR. THORSON: Well, do I understand that you, as counsel for SIGMA are refusing on behalf of SIGMA to produce someone

MR. DONOHOE: No, I'm not.

MR. THORSON: From that association to come here and testify, take an oath and testify as to the documents production?

MR. DONOHOE: I think you know perfectly well what I'm saying. I brought two people to this City pursuant to subpoenas that you had directed, so I had two people who could have testified with respect to these documents, but because the
commitments that you had made to these two individuals have not been kept, I'm no longer able to go get a third or fourth or fifth person. That's a situation which is not of my making.

MR. THORSON: Do I understand that you are refusing at this juncture to provide a person to make that production?

MR. DONOHOE: All I'm saying is that there are two people that have that I have brought that are capable to do that, but I'm willing to assure you that it won't do you any good because you failed to keep your commitment to obtain a proper order from the Court. You can take Mr. Reynolds or Mr. Cavin in here, but it's not going to do any good.

MR. THORSON: Mr. Donohoe, I think you can take SIGMA's documents with you now and would you so instruct, if he is your client, would you instruct Mr. Reynolds to appear before the Grand Jury now?

(App. Vol. 8, at M86 and M87.)

Reynolds was formally granted immunity later that day and testified before the grand jury. In his affidavit, Reynolds stated that during his grand jury appearances he was questioned and testified about matters he had earlier discussed with Cavin and that his testimony, at least in part, was based upon information Cavin had given him after they were told that both would receive immunity. In the process of obtaining an immunity order for Reynolds, Thorson showed Lenzner a document which reflected an authorization of immunity for both Cavin and Reynolds, and Lenzner concluded that Cavin was to be called later to testify under a grant of immunity. Under these circumstances, he perceived no conflict of interest, and debriefed Reynolds fully in the presence of Cavin. Some fourteen months later, in March of 1976, Reynolds was recalled as a witness before the grand jury and again discussed his testimony with Cavin, acting under the belief that neither he nor Cavin would be indicted. On June 1, 1976, Cavin was named as a defendant in the indictment.

*472 These facts were largely undisputed and Cavin filed a motion in the district court alleging that the Government's conduct warranted dismissal of the indictment as to him. The court denied this motion, and Cavin filed an appeal. We dismissed the appeal, holding that the denial of the dismissal motion was not an appealable final decision within the meaning of section 1291. United States v. Cavin, 553 F.2d 871 (1977).

Our review of the record persuades us that the conduct of the Government cannot withstand the scrutiny of Cooper v. United States, 594 F.2d 12 (4 Cir. 1979), and United States v. Carter, 454 F.2d 426 (4 Cir. 1972). In Carter, the defendant alleged that incident to a plea bargain with the United States Attorney's office in the District of Columbia, involving certain stolen checks, he was promised that he would not be prosecuted elsewhere for anything having to do with the checks. We held that if such a promise was made as alleged and the defendant relied upon it, it was binding upon the Government and barred any subsequent prosecution for the stolen checks in the Eastern District of Virginia. We approved and applied the holding of United States v. Paiva, 294 F. Supp. 742 (D.D.C. 1969), that

"if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid those arrangements by using the courts, its decision so to do will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed."

294 F. Supp. at 747.

In considering Cavin's dismissal motion, the district judge recognized that the principles of Carter were controlling, but concluded there was no promise of immunity by the Government, and "that Cavin (1) did not rely on the alleged promise and (2) to the extent such reliance is claimed it was not reasonable." In our opinion, the record does not support either of these conclusions. In reaching this conclusion, we hasten to point out that this is not a case of subjective wishful thinking on the part of either Cavin or his counsel. It is undisputed that the assurance of immunity was first given to Donohoe by Thorson in their telephone conversation on December 23, 1974, and was communicated to Cavin and Reynolds at that time. In the light of such assurance, from that date on Cavin's conduct and especially his interchange of information with Reynolds was influenced by the anticipated immunity. Donohoe recognized the validity of the promise when he resigned as counsel for Reynolds and Cavin due to the apparent conflict between them and SIGMA. As successor counsel for the witnesses, Bucklin had been advised of the immunity by Donohoe and received direct assurance to that effect from Thorson on the afternoon of January 2nd. Assuredly, Bucklin considered the promise to be viable when he conducted his joint conferences and briefings of Cavin and Reynolds in reliance thereon. Finally, on January 6th Thorson
confirmed to Lenzner that both witnesses would receive immunity.

In giving these successive assurances to Cavin's attorneys, Thorson knew or certainly should have known, that both Cavin and his counsel would rely upon them and govern their conduct accordingly. The constitutional overtones of such a situation were recognized by Judge Phillips in Cooper v. United States, supra;

"To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. (Footnote omitted)

At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas."

594 F.2d at 18, 19.

In concluding that Cavin's reliance upon the promise of immunity was unreasonable the district judge, drawing upon the law of *473 promissory estoppel, observed that Thorson's assurance of immunity was a statement "of present intention subject to change for numerous reasons." Focusing upon Bucklin as an experienced attorney, the court charged him "with knowledge of the many variables involved in the immunity process," and concluded that "given these considerations and the facts of this case, reliance upon a purported promise of immunity before an immunity order has been signed and one has actually testified before the grand jury is manifestly risky and hence unreasonable." In our opinion the fallacy of this conclusion is that we are not primarily concerned with the gauge of Bucklin's professional caution or responsibility. The question is whether Cavin, as a layman, acted reasonably in relying upon Thorson's assurances of immunity, and our appraisal of such reliance should not be made on the basis of any fine-fingered legal analysis. As we observed in Cooper:

"constitutional decisions cannot be made to turn in favor of the government on the fortuities of communications or on a refusal to accord any substantive value to reasonably induced expectations that government will honor its firmly advanced proposals."

594 F.2d at 17. In our opinion the record in this case clearly required a finding that Cavin acted reasonably in relying upon the Government's promise of immunity.

Although he had found that there was no promise of immunity, nor any reasonable reliance by Cavin upon any such alleged promise, the district judge recognized the existence of a serious question with respect to Reynolds' testimony at trial. When counsel for the Government advised the court that he intended to use Reynolds to incriminate Cavin the court observed: "To the extent that Mr. Reynolds does not have an independent recollection of any statement that Mr. Cavin made to him and acquired that recollection through the so-called briefing, if that is what it was, it seems to me that that statement might well be suppressed." In discussing the procedure to carry out this ruling, the court advised counsel that he would "take it on a line by line basis" as the trial progressed. An examination of the record discloses that Reynolds' recollection covering several years was inextricably intertwined with the information which he had received from Cavin concerning SIGMA's operations either in the joint briefing sessions or otherwise. This was illustrated when, during the course of his testimony, he stated: "My own independent recollection I have been briefed and debriefed, before the Grand Jury and quizzed and requizzed, and I am not sure what is my own independent recollection." (App.Vol. 5 at 1477).

In our opinion, the Government's use of Reynolds as its principal witness against Cavin after the two of them, acting pursuant to the assurances of immunity, had worked together so closely in their review of SIGMA's operations was violative of the basic concept of fundamental fairness. The lodestar of Carter was stated by Judge Winter as follows:

"There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government."

454 F.2d, supra, at 428.

In our original opinion we concluded that the fair administration of justice required not only that Cavin's conviction be reversed but that the case be remanded with instructions to dismiss the charges against him. Upon reconsideration, however, we are of the opinion that this relief was too broad and was at variance with the observations made by us in United States v. Cavin, supra. In the course of our consideration of Cavin's abortive appeal we stated:

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"In contrast to the Double Jeopardy Clause's prohibition against retrial, the remedy to vindicate the Fifth Amendment's protection against self-incrimination is much more circumscribed. One who claims that his confession or other incriminatory statements have been illegally obtained by promises of leniency, deception, or coercion is not entitled to avoid trial by securing dismissal of his *474 indictment. His remedy is suppression of his statement."


(7) Unlike the situation in Carter, supra, the Government made no promise to Cavin that he would not be prosecuted. The record indicates only that the Government assured Cavin of immunity, and the only type of immunity which could have been offered to him was that prescribed by 18 U.S.C. s 6002. The statute authorizes only use immunity, not transactional immunity, and the grant of use immunity does not justify dismissal of the indictment. If it elects to do so, the Government can still proceed with the prosecution but cannot use any evidence or the derivative of any evidence which it has obtained through the grant of immunity. *(S)uch immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." Kastigar v. United States, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972).

Accordingly, Cavin's conviction is reversed and his case is remanded to the district court for a new trial if the Government so elects. In the event of a new trial the district court should not permit the Government to offer any evidence directly or indirectly derived from Cavin which resulted from its assurance of immunity to him and Reynolds.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

While I concur in the opinion, I would add a word.

At trial, the prosecution played to the jury a tape recording of an alleged telephone conversation between one Joseph Painter, a government witness and former employee of Hess, and Norman Goldberg, former marketing coordinator for defendant Amerada Hess Corporation. The government contended that this conversation was evidence of the price-fixing conspiracy. Although numerous parts of the tape were inaudible,[FN1] the government was not only allowed to introduce into evidence the tape but was also allowed to give to the jury, not as evidence but as an "aid," a transcript of the tape, the origin of which transcript was not certain and which in plain terms was merely a statement of what someone (apparently the transcriber) thought the tape said.


The prosecution was also allowed to introduce a controversial tape of a speech made at a SIGMA meeting by one Teak, the Executive Director of SIGMA, who was deceased at the time of trial, and a transcript of the tape, the origin of which transcript was also not definitely determined. This Teak tape, only parts of which were played to the jury, was extremely damaging to the defendants' case.

Where a tape recording has been made of an admissible conversation, even if the tape may be admissible, I feel that a transcript of the tape should not be. Neither should it go to the jury as an "aid." Although our decision in this case, while not in terms, follows the circuit rule that such transcripts are admissible, United States v. Hall, 342 F.2d 849 (4th Cir. 1965), I think it is quite unfair and prejudicial to the party against whom the evidence contained on the tape is offered. It is known by all that a paper writing adds a kind of authenticity to any statement. In addition, the jury has access to that testimony while in the jury room, if admitted into evidence. All of this leads me to the conclusion that by permitting a *475 transcript of a recorded tape to be introduced into evidence or by permitting its use as an aid, undue emphasis is placed on the testimony represented by the tape recording, and amounts to nothing more than the transcription for the jury of the testimony of one witness to the exclusion of that of others. I think our
rule on this question is incorrect and would have
granted rehearing en banc, changed the rule, and
awarded a new trial on this account.

Having received not near enough support to prevail
on the proposition voiced just above, I have not
dissented, and make no attempt to detract from the
opinion except to voice my disagreement with the
established circuit rule.

K. K. HALL, Circuit Judge, dissenting in part:

The majority has concluded that Ashland Oil was
entitled to reversal and a new trial because the
hospital records of a key government witness were
not made available for use in cross examination. I
respectfully dissent. In my opinion, the district court
acted within its discretion to protect the rights of all
parties involved.

As the majority observes, the trial judge reviewed
the records in camera and advised counsel that they
revealed two periods of hospitalization, the first
being from July 26 to August 29, 1966, and the
second from November 20 until December 24, 1968.
The judge correctly advised counsel that the
hospitalizations involved a "mental disorder or
illness." Acknowledging that the government's
examination might enter the periods of
hospitalization, the judge clearly gave Ashland the
option to cross examine the witness about his
hospitalizations. The judge also gave the following
assurance:

"If it appears to me that the witness answers any
questions in a manner which the records contradict,
then I will consider, of course, making that
particularly bit of information from the psychiatric
records available to you; not giving you the
records, but advising you in that respect what it is.
In the event the witness answers in ways that I
would believe to be contradicted by the records in
any way, I would call that to your attention, "**""


Having reviewed the witness' testimony and the
hospital records, I discern no reversible error. The
hospital records had no bearing upon the witness'
competency to testify at the time of trial. At best,
they would only show that his judgment at the very
beginning of the conspiracy period might have been
impaired a matter which was adequately revealed to
the jury on cross-examination. Two periods of
psychiatric hospitalization necessarily indicate that a
patient's judgment at that time and possibly for some
period thereafter would be somewhat impaired, and
the jury was well aware of this fact and its
implications. Additionally, and significantly, I think,
counsel for Ashland failed to avail themselves of the
offer of Judge Blair to cross-examine the witness on
the possible effect his illness had on his perceptive
abilities and his attitude toward his colleagues in
Payless and Ashland during the operative period.
The failure to make such an exploration cannot be
attributed to the lack of the hospital records for
counsel vigorously questioned the former officer
concerning his hostility toward his colleagues and
Ashland indicated in argument to the district court its
awareness that paranoia might have colored the
witness' perception.

I think that the district judge acted appropriately and
discretely in declining to open up the hospital records
in their entirety. These are typical hospital records,
with some of the entries being handwritten and others
typed; some legible and other illegible; they include
nurses' notes, tentative diagnoses and comments by
the physician, as well as notations of medication and
treatment. To place all of this material in an
intelligent perspective, both as it related to the period
of the conspiracy and the time of the witness'
appearance in court, would have required expert
testimony. At the time of trial the attending
physician was deceased, and the introduction of this
material *476 would merely have led the jury into a
confusing collateral thicket. Whether such an
excursion should be permitted rested in the sound
discretion of the trial judge and in my opinion, he
properly declined to countenance it. Based upon my
examination of the record, I perceive no "reasonable
likelihood" that the hospital records would have had
any material effect upon the jury's determination of
the issues in this case. See United States v. Figurski,
545 F.2d 389, 391 (4th Cir. 1976).

I concur in the remaining parts of Judge Field's
opinion.

Trade Cases P 63,408, 5 Fed. R. Evid. Serv. 628, 6
Fed. R. Evid. Serv. 371

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