OFFICE OF THE FEDERAL DEFENDER
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814-2510
(916) 498.5700
Toll Free: (855) 328.8339
FAX (916) 498.5710
2300 Tulare Street, Suite 330
Fresno, CA 93721-2228
(559) 487.5561
Toll Free: (855) 656.4360
FAX (559) 487.5950
Capital Habeas Unit (CHU) (916) 498.6666
Toll Free: (855) 829.5071 Fax (916) 498.6656

HEATHER E. WILLIAMS
Federal Defender
LINDA C. ALLISON
Chief Assistant Defender
JENNIFER M.C. MANN
CHU Supervisor
CHARLES J. LEE
Fresno Branch Chief
RACHELLE BARBOUR, Editor

Federal Defender Newsletter
July 2016

CJA PANEL TRAINING

Panel training is on summer break until September!

~~~~

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to automatically receive emails when fd.org is updated.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet that provides court clothing to your clients. We are in dire need of court-appropriate clothing for women. Please consider donating any old suits, or other appropriate professional clothing to the client clothes closet.

COURTS' ADMINISTRATIVE OFFICE RECOMMENDATIONS FOR PROTECTING COOPERATING CLIENTS

Attached is the AO's Committee on Court Administration and Case Management's June 30, 2016 memo recommending to district and circuit courts procedures to help protect cooperating clients. These include ways to prepare court dockets to ensure filings don't obviously indicate cooperation.

REDUCTION OF FEES TO OBTAIN SOCIAL SECURITY RECORDS

The Social Security Administration (SSA) has implemented a pilot program that reduces fees by up to $250 per case for the production of agency information requested in matters to which SSA is not a party and has no program interest. This means that if the cost of producing documents is less than $250, the SSA will produce it at no cost. The program benefits all CJA counsel, including panel attorneys. To qualify for the fee reduction, a CJA attorney must submit a written request for information to the appropriate SSA General Counsel Regional Office. Thus requests on Eastern District litigation should go to the San Francisco SSA Regional Chief Counsel's Office. The program continues until May 1, 2018.

PODCAST TRAINING

The Federal Defender's Office for the Southern District of West Virginia has started a training podcast, "In Plain Cite." The podcast is available at http://wvs.fd.org. The podcast may be downloaded using iTunes.

The Federal Defender Training Division also provides a telephone hotline with guidance and information for all FDO staff
~~~~

and CJA panel members: 1-800-788-9908.

DAVID PORTER TO CONTINUE IN D.C. – Defender Services Office Policy & Legal Division

David Porter is extending his D.C. assignment another year, next with DSO's Policy & Legal Division. There he will be helping with CJA Panel and Defender trainings, be available for Panel and Defender criminal issue phone consultations, and be part of their Supreme Court Advocacy Program.

Miss you David, but keep fighting the good fight!

CJA REPRESENTATIVES

Scott Cameron, (916) 769-8842 or snc@snc-attorney.com, is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. David Torres of Bakersfield, (661) 326-0857 or dtorres@lawtorres.com, is the Backup CJA Representative.

NATIONAL DEFENDER SERVICES TRAININGS

MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR
NEW ORLEANS, LOUISIANA
August 11 - August 13, 2016

LAW & TECHNOLOGY SERIES: TECHNIQUES IN ELECTRONIC CASE MANAGEMENT WORKSHOP
NEW ORLEANS, LOUISIANA
September 22 - September 24, 2016

INTERESTING INFORMATION ON-LINE

***TED Talks* - Adam Foss:** A Prosecutor's Vision for a Better Justice System, http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system

TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:

Fresno – Peggy Sasso, Peggy_Sasso@fd.org, or Karen Mosher, karen_mosher@fd.org.

Sacramento: Lexi Negin, lexi_negin@fd.org or Ben Galloway, ben_d_galloway@fd.org.

IMPORTANT SUPREME COURT *CERTIORARI* GRANT

On June 27, 2016, the Supreme Court granted a writ of *certiorari* in Beckles v. United States, No. 15-8544. The case presents the question of whether Johnson v. United States, 135 S. Ct. 2551 (2015)—which deemed the residual clause definition of "crime of violence" in the ACCA unconstitutionally vague—also applies to the residual clause definition of "crime of violence" contained in U.S.S.G. § 4B1.2(a)(2). In addition, the questions presented ask whether Johnson applies retroactively to collateral review cases challenging a sentence enhanced pursuant to U.S.S.G. § 4B1.2(a)(2), and whether possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after Johnson.

Congratulations to Assistant Federal Defender Janice L. Bergmann of the Fort Lauderdale, Florida, Federal Defender's Office on this *cert*. grant in a case of potentially huge significance!

SUPREME COURT CASES

McDonnell v. US, No. 15-474 (6-27-2016): in a unanimous opinion the Court vacates the conviction of former Virginia Governor McDonnell for various offenses related to his acceptance of payments, loans, and gifts based on a theory they were exchanged in return for influence with respect to "official acts." The Court overruled the Fourth Circuit and rejected the government's argument that an "official act" under 18 U.S.C. § 201 includes nearly all activities by public officials, including setting up meetings, hosting events, and calling other officials. Instead, it held that an "official act" must be a specific act on a pending matter and "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court." Because the jury instructions did not adequately narrow the definition of "official act," the conviction was vacated.

Voisine v. US, No. 14–10154 (6-27-2016)- 18 U.S.C. § 922(g)(9) prohibits possession of firearms by persons convicted of a "misdemeanor crime of domestic violence." Section 921(a)(33)(A) defines that phrase to include a misdemeanor under federal, state, or tribal law, committed against a domestic relation that necessarily involves the "use . . . of physical force." The Court holds that domestic assaults that require a *mens rea* of only recklessness can qualify as offense that involves the "use . . . of physical force" under the statute.

Mathis v. US, No. 15-6092 (6-23-16). Court reaffirms its emphasis on the categorical approach. When a statute defines only one crime, with one set of elements, but which lists alternative means by which a defendant can satisfy those elements, and those means are broader than a qualifying offense, a sentencing court cannot explore the means to determine whether a defendant's conduct qualifies as a prior violent offense for purposes of ACCA. Specifically, Iowa's burglary law was broader than generic burglary because "structures" and "vehicles" were alternative means of fulfilling a single element, and it did not matter that the defendant's prior offense conduct involved burglarizing a structure.

Birchfield v. North Dakota, No. 14-1468 (6-23-16): The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. Breath tests are not very intrusive or embarrassing. Blood tests, though, require piercing the skin and extracting part of the defendant's body. Blood tests also give law enforcement a sample from which they can extract more than BAC, potentially causing anxiety. A defendant's refusal to submit to a warrantless blood draw cannot be justified as a search incident to arrest or based on implied consent. Birchfield, who refused the blood draw, was threatened with an unlawful search and thus unlawfully convicted for refusing that search.

Taylor v. US, No. 14–6166 (6-20-16)- The Court holds that the he prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant commits a robbery that targets a marijuana dealer's drugs or drug proceeds. The Court reasons that even if a robber only targets locally grown marijuana, even intrastate marijuana production and sales

have an economic effect on interstate commerce.

Utah v. Strieff, No. 14-1373 (6-20-16)- In this case, a Salt Lake City detective who received an anonymous tip re drug dealing inside a home stopped the defendant when he left that home. The detective detained the individual, asked him for his identification, and, after running a warrant check, learned that the defendant had an outstanding warrant for a traffic violation. The detective then arrested the defendant, searched him, and found methamphetamine and drug paraphernalia. The question before the Court was whether the seized evidence should have been suppressed due to a Fourth Amendment violation. The Court holds that even if the stop violated the Fourth Amendment because the detective lacked reasonable suspicion, the detective's subsequent discovery of the outstanding arrest warrant attenuated the connection between the unlawful stop and the evidence seized from the defendant incident to his arrest. The Court concluded that the evidence did not have to be suppressed because the Fourth Amendment violation was not "flagrant."

NOTABLE NINTH CIRCUIT CASES

Cuero v. Cate, No. 1255911 (6-30-2016) (Wardlaw and Silverman with dissent by O'Scannlain)- the Ninth Circuit addresses specific performance of plea agreements. In this case, the state criminal defendant entered a plea agreement setting his maximum term at 14 years and 4 months. The day before sentencing, however, the prosecutor was permitted to amend the complaint to allege an additional prior strike which would result in a sentence of 64-years-to-life. The defendant was allowed to withdraw his plea and enter a new plea calling for a sentence of 25-years-to-life. The Ninth Circuit holds that by allowing the prosecution to breach the agreement, reneging on the promise that induced the plea, the state court violated clearly established Supreme Court precedent regarding the binding nature of plea agreements and the requirement that state courts interpret plea agreements under state contract law.

US v. Grovo, Nos. 15-30016, 15-30027 (Fisher with Watford and Walter (W.D. La.) --- The Ninth Circuit affirmed convictions for engaging in a child exploitation enterprise under 18 U.S.C. § 2252A(g) and conspiracy to advertise child pornography under 18 U.S.C. § 2251(d), but vacated the restitution awards and remanded with instructions to disaggregate the amounts in accordance with *Paroline v. United States*, 134 S. Ct. 1710 (2014), and *United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015). Under *Galan*, sentencing courts must try to disaggregate losses caused by the original abuser's actions and losses caused by the ongoing distribution and possession of images of that original abuse.

US v. Tyrone Davis, No. 13-30133 (6-13-16)(en banc)(Paez for majority; concurrence by Christen and others). In an *en banc* opinion, the Ninth Circuit considers the Supreme Court's fractured opinion in Freeman v. US, 564 US 522 (2011), which analyzed when a defendant is eligible for a sentence reduction under 18 USC § 3582(c)(2) for a retroactive guideline amendment. Freeman had a plurality opinion, multiple concurrences, and not a single guiding rationale. As a result, in US v. Austin, 676 F.3d 924 (9th Cir. 2012), the Ninth Circuit used the narrowest interpretation on which a majority of justices agreed. This is the approach of Marks v. US, 430 US 188 (1977),

Reconsidering the issue, the Ninth Circuit holds that where there is no rationale common to a majority of justices, the court is bound only by the result. Thus, the Ninth Circuit joins the DC Circuit in holding that when a defendant enters into an 11(c)(1)(C) plea, the court must necessarily consider the guidelines range to see if the plea should be accepted and sentence imposed. As such, this defendant should be eligible to seek a guidelines reduction under § 3582.

US v. Beecroft, No. 12-10175 (6-13-16)(O'Scannlain with M. Smith and Morris, D.J.). The Ninth Circuit holds that the forfeiture on the conspiracy count in this case was excessive and remands the amount for reconsideration.

Oroña v. United States, No. 16-70568 (6-22-16)(June 2016 screening panel; Bea, Watford and Friedland). The Ninth Circuit granted a federal prisoner's motion for authorization to leave to file a second or successive § 2255 motion to challenge his ACCA-enhanced sentence based on Johnson. This result was preordained by Welch v. United States, 136 S. Ct. 1257 (2016), which held that Johnson applied retroactively to cases that are final on collateral review. The panel published to explain that equitable tolling of the § 2255 limitations period would be applied starting on the date on which the SOS motion was filed in order to protect diligent prisoners against the running of the limitations period while their applications are pending, because they have no way of controlling how long it will take the Ninth Circuit to adjudicate them.

United States v. Cisneros, No. 13-30066 (NR Smith with Goodwin and Ikuta)(6-22-16). Following a GVR in light of Johnson, the Ninth Circuit vacated an ACCA-enhanced sentence for felon in possession and remanded with instructions to resentence the defendant without the enhancement, because his prior convictions for eluding a police officer and for first-degree burglary under Oregon law are no longer "crimes of violence."

LETTER FROM THE DEFENDER

June 13th marked the 50th anniversary of the Supreme Court's decision in *Miranda v. Arizona.* We celebrate it here.

Miranda Warnings

The Victims

Robbery

Barbara McDaniel pushed open the heavy glass door after her night class at the 1st National Bank of Arizona and waved "good night" to the other students. The Phoenix downtown air was starting to turn cool under a moonless sky. It was 8:30 p.m. the Tuesday after Thanksgiving, November 27, 1962.

As she walked across Fillmore to her car at the parking lot at 2nd Street, she saw a man crossing the street at 2nd and Taylor. Turning the ignition key, the car tried to started, but the carburetor flooded. As she waited for the gas to drain, the man she'd seen came to the driver's side window and asked McDaniel what time it was.

"I'm not sure. About 8:45?"

"Sounds like your car is flooded." With this, the man opened the driver's door, pushing his way into the driver's seat. As McDaniel screamed, the man put his hand over her mouth, growling, "Be quiet if you don't want to get hurt!"

"What do you want?"

"Move over," he ordered, then started the car, drove out of the parking lot, eventually pulling into an alleyway,

stopping the car, turning it and the lights off. "I'm not going to rape you," he said. "If I was, I would've done it at the other lot." He crawled across her lap to the passenger seat.

As McDaniel scooted to the steering wheel, she tried to make small talk with the man, to find out what he wanted, where he was from. He claimed he was passing through Phoenix and started touching her, running his hand about her body. She cringed and he said, "Do you want your clothes ripped off?"

"Of course not."

"Then why do you fight me?" It was then that McDaniel noticed the open switchblade, the man now using it to trace her waist.

McDaniel continued making small talk and offered to drive him where ever he wanted to go, while he made threats. Then he stopped and demanded all McDaniel's money. McDaniel took her billfold from her purse and poured all her change from it into his hand. The man grabbed the wallet and pulled all the bills from it. Taking her coat off the seat, he said, "Now, don't go away." He left the passenger side and walked to the driver's door, using the coat to wipe off the window, the armrest and eventually the steering wheel. Handing her the coat, he apologized, hoping this wouldn't happen to her again. "If it does, I hope you can talk them out of it like you did me."

And he walked away towards McKinley, having robbed McDaniel of $8.65.

Rape

"The Longest Day" is the longest movie. For 18 year old Patricia Weir, working at Phoenix's Downtown Paramount Theater, it meant her March 2, 1963, Saturday night shift ended just before midnight and she'd be leaving work later than usual. She walked the few blocks to Monroe and 7th Avenue catch the bus home, getting off several miles north at 7th Avenue and Marlette Street.

Weir walked east, past the darkened houses and apartments, pushing her hands further into her coat pockets against the chilly night air when what she described as a 1950s style Chevy or Ford parked at the curb near her. A man suddenly grabbed around her waist, putting his hand over her mouth, growling, "Don't scream and I won't hurt you." He forced her into the car's back seat, tying her hands behind her and her ankles with rope he had there; she felt the point of what she thought was a knife against her neck. Slamming the doors, he drove. Time had no meaning. All Weir remembered seeing was a rope handle dangling across the back of front seat, as if passengers could grab onto it to help themselves in or out of the car. The handle did her no good.

When the car stopped, desert and quiet surrounded them. In the back seat, as he raped her, she could only hear his heavy breathing, but tried to remember specifics as he untied her legs and removed her clothing, tearing her slip straps in the process. He raped her, then waited minutes before trying again. As he handed her a rag to clean herself (she wiped only the tears from her face) and used another to wipe himself, he told her she'd probably done "this" before. She told him she had never. He dressed and got into the driver's seat, telling Weir to get dressed as they drove away. He asked her for money and she handed over $4.00 in ones. He covered her head with a jacket.

The man drove to not far from where he'd abducted Weir, a few blocks from home. Opening the door and untying her, he told Weir, "Whether you tell your mother or not is none of my business, but pray for me."

Weir told her married sister, with whom

she lived. Yet Phoenix Police were suspicious of Weir's story given an absence of bruises, scrapes, and rope burns, and Weir's assertion she'd been a virgin, contrary to an examining doctor's diagnosis. Her described return route, from the brief time she propped herself up on her elbows after the rape, was not possible. A victim polygraph indicated lying.

Murder

On January 31, 1976, just weeks after being paroled from prison, 34 years old Ernesto Arthur Miranda went after work to the La Amapola Bar on 2nd Avenue in downtown Phoenix (where Phoenix Civic Center now stands). At 6:30 pm, Miranda got into an argument and fight over a $3.00 bet with the two Mexican field workers playing cards with him. The waitress took the cards away from them, stopping the fight, and Miranda went into the restroom to wash the blood off his hands.

One of the men, later identified as Fernando Zamora-Rodriguez, handed large folding knife to the second man, Ezequiel Moreno-Perez, saying, "Here, you can finish it." Zamora-Rodriguez left for the Nogales Bar a few blocks away (where Collier Plaza is now – it's as if Phoenix has done everything possible to erase Miranda-related sites). As Miranda came out, Moreno-Perez stabbed Miranda in the left center chest and left lower ribs, immediately then running away. The waitress called 911. Miranda was declared dead a half hour later.

Investigation, Arrest and Confession

McDaniel described her robber as 23 to 25 years old, Mexican, wearing a tan jacket and trousers (possibly khaki), and with a heavy beard.

Police located many suspects by reviewing records and reports, sex offender lists, and canvassing downtown. McDaniel affirmatively said none were the man who accosted her.

Weir described her kidnapper as Mexican, 27 to 28 years old, short black curly hair, white t-shirt, Levis, dark rimmed glasses, unshaven, with dark rimmed glasses.

On March 9, Weir's brother-in-law, Paul Henkle, walked to the bus stop to escort Weir home after work. On his way, he saw a slow moving car fitting Weir's description – an old model Packard. The second time it drove by, Henkle noted the license plate number: DFL-312. After Weir got off the bus and she and Henkle walked home, the Packard parked along their path; it sped off as they walked towards it. Police confirmed the Packard description by taking Henkle to a used car lot selling one.

Police found car fitting Henkle's description, 1953 light green Packard, but one number off – DFL-317 – registered to Twila Hoffman. Tracking the car eventually led police on March 13 to 2525 West Mariposa and Ernesto Arthur Miranda, a Mexican male.

Miranda's mother died when he was 5 years old. His father remarried, so, within this expanded family, Miranda was lost amid 4 older brothers and 2 younger half-brothers. He dropped out of school in the 9th grade at age 15. Before his 18th birthday, Miranda was adjudicated delinquent in Arizona for attempted rape and assault (1956, age 15), and for armed robbery, violating curfew, and being a peeping tom in California. As an adult, in 1958, Miranda joined the U.S. Army, but, within a year, was court-martialed for being AWOL and peeping tom. After his dishonorable discharge, the FBI arrested Miranda for driving a stolen car across state lines; he served his one year, one day sentence at USP-Lompoc, finishing in 1961.

By 1963, 23 year old Miranda lived with Twila Hoffman (8 years his senior and still married to the father of her older children), her son and daughter; together they had a daughter who was only 2 months old when McDaniels was robbed, seven months old when Weir was kidnapped. He helped support the family working in Phoenix warehouses and driving trucks. Sometime in his life, his right index finger was amputated.

Officers brought Miranda to the Police Station for interrogation. Miranda denied committing any rape when questioned for his first 30 minutes there. Police then invited Weir and McDaniel to view a line-up including Miranda. Pulling Mexican males from the City Jail to stand beside Miranda for the line-up, police invited Miranda to pick his position. He picked Number 1. The line-up photo speaks volumes: from the descriptions given, Miranda is the only one with glasses, in t-shirt and khakis, looking nothing like the others.

Even with such obvious appearance disparities, Weir could not identify Miranda as her rapist, though she said he had the same build and features. "If I could hear him talk, I might recognize him?" In looking through the one-way window at the line-up, McDaniel couldn't positively identify any as the man who robbed her, but that Number 1 resembled the robber.

Carroll Cooley, the cases' lead detective, went back into Miranda's interrogation room. Miranda asked, "Well, how'd I do?"

"Not so good," lied Cooley, saying they'd identified Miranda.

Miranda then confessed to Weir's rape and kidnap, McDaniel's attempted rape and robbery, and an attempted robbery reported February 1963 where the victim later couldn't be found for follow-up. When Weir came into the interrogation room, Miranda identified her as the rape victim, then Weir positively recognized Miranda's voice as her assailant's, no doubt about it, "Yes, this is the man." McDaniel, when brought in to face Miranda, said she was positive this was the man who tried to rape her and did rob her.

Miranda described what happened with Weir to Det. Cooley, then wrote out for him his confession to Weir's rape on a preprinted lined form, typed at the top with:

> *I, _____, do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.*

Two days later, Det. Cooley questioned Miranda for an hour and fifteen minutes about the McDaniels' robbery, with Miranda confessing to all. The next day, Miranda confessed his crimes to Twila Hoffman when she visited him at the jail.

You Have the Right . . .

After almost a month in custody and after waiving his preliminary hearing, on April 23, 1963, the court appointed Alvin Moore, 73 years old, to represent Miranda in both cases. Court-appointed lawyers at the time received $70 per case . . . period. Early in his career, Moore was a criminal defense lawyer but stopped such representations because "in close association with criminals, you begin to think like criminals."

In May 1963, Moore moved to have Miranda's mental condition examined, questioning Miranda's competency and for a possible insanity defense. The one doctor diagnosed Miranda with "Sociopathic Personality Disturbance;" the other doctor said Miranda suffered from "Schizophrenic Reaction, Chronic,

Undifferentiated Type." Dr. Leo Rubinow, a clearly Freudian practitioner, had these observations:

> *Ernest never developed a proper attitude towards the Church and religion.*
>
> *He has about ten tattoos over arms and legs, including one of a nude girl extending over a large area of the external aspect of his right leg.*
>
> *He is very immature, psychologically, and somewhat inadequate. There is, emotionally, instability, and inability to control. Impulse control is lacking. His super-ego apparently has never developed and matured satisfactorily; & his ego-functioning mechanism is not very strong. Thus, at times, his id takes over and dominates him completely, especially in the sexual area, ... it is quite obvious that he is unable to control his sexual impulses and drives.*

Dr. James Kilgore described Miranda's response to proverbs "autistic and somewhat bizarre." For instance, Miranda interpreted "a rolling stone gathers no moss" as meaning "if you don't have sex with a woman, she can't get pregnant."

Judge Yale McFate found Miranda competent for trial June 18; the robbery trial started the next day. In one day, the jury was picked, McDaniels and Det. Cooley testified, Miranda testified, Detective rebutted, then arguments and jury instructions with the jury deliberating by 3:05 p.m. Forty minutes later, the jury returned a guilty verdict.

Miranda's rape/kidnap trial was June 20: 3 state witnesses testified (Weir, Williamson and Det. Cooley). The jury began deliberations at 3:40 p.m., returning guilty verdicts at 8:30 p.m. Imagine how soon they would have come back if they hadn't stopped for dinner.

On June 27, 1963, a week after Miranda's second trial, Judge McFate sentenced Miranda for rape 20 to 30 years prison, kidnap 20 to 30 years concurrent with the rape, and 20 to 25 years prison consecutive to the rape and kidnap sentences.

U.S. Supreme Court Appeal

Robert J. Corcoran, future Arizona judge and justice, but then a lawyer with the Arizona Civil Liberties Union (AzCLU), asked John Flynn and John Frank, lawyers at the large firm of Lewis & Roca, to join *pro bono* the AzCLU in Miranda's appeals. They accepted.

Frank, an Appleton, Wisconsin native, graduated the University of Wisconsin Law School before becoming U.S. Supreme Court Justice Hugo Black's law clerk. Though Frank eventually became a major biographer of Black, when the Supreme Court, during World War II, decided Japanese internment camps were constitutional, Frank told Black the decision was a "god-damned fascist outrage." Frank later taught at law schools in Bloomington and Yale, moving to Phoenix for his asthma, and later teaching at the University of Arizona Law School. He helped Thurgood Marshall in *Brown v. Board of Education*. Once in Arizona, Frank joined Lewis & Roca and did *pro bono* work for Legal Aid.

Flynn's father was a union organizer and did time for cattle rustling during Flynn's childhood. His mother died when Flynn was 10 years old (a fact which may have bonded Flynn to Miranda). A native of Tortilla Flat, Arizona, a 17 year old Flynn lied about his age to join the United States Marines to fight in World War II, where he became the equivalent of a Navy Seal. He was wounded twice: one bullet fragment, lodged in his cheek, couldn't be removed. He was one of three from his unit of 38 to survive one Pacific battle. At age 20,

Flynn was awarded the Silver Star.

After the war, Flynn attended the University of Arizona Law School, graduating in 1949. He first worked in the Maricopa County Attorney's Office, becoming its chief criminal deputy within 6 months. After losing a campaign to become **the** County Attorney in 1952, Flynn went to work at Lewis & Roca.

A well-known criminal defense trial lawyer and captivating speaker, people attended court hearings just to watch Flynn. One female lawyer recalled, when she was a young girl, seeing Flynn in trial. He asked her why she was there. She answered, "I want to be a lawyer when I grow up." Flynn snarled, "I don't like women lawyers."

The Arizona Supreme Court affirmed both convictions. Only the kidnap/rape case went to the U.S. Supreme Court. In addition to Miranda, it accepted certiorari in three other cases - from New York and California, and a federal case where Solicitor General Thurgood Marshall argued for Government.

In prepping the briefs, Frank and Flynn argued over whether Miranda was a 6th Amendment right to counsel case, or a 5th Amendment right against incrimination case. Frank won out for arguing only 6th Amendment right to counsel – after all, he had clerked for a Supreme Court Justice, a justice who was still on the bench for their argument! There is no mention of the 5th Amendment or self-incrimination in Miranda's briefs.

Flynn, being considered the better orator, argued Miranda's case. During his argument:

> *Justice: What do you think is the result of the adversary process coming into being when this focusing takes place? What follows from that? Is there then a, what, a right to a, what, a lawyer?*
>
> *Flynn: I think that a man at that time has a right to exercise, if he knows and under the present state of the law in Arizona, if he's rich enough, if he's educated enough, to assert his **5th Amendment right**, and if he recognizes that he has a **5th Amendment right** to request counsel, I simply say that, at that stage of the proceeding, under the facts and circumstances in Miranda, of a man of limited education, of a man who is certainly is mentally abnormal, who is certainly an indigent, that when that adversary process came into being, that the police, at the very least, had an obligation to extend to this man not just his clear **5th Amendment right**, but to afford to him his right to counsel.*

In Chief Justice Earl Warren's opinion in a 5-to-4 decision (Justice Black in the majority, along with Justice Abe Fortas, Gideon's Supreme Court lawyer), the Court held the 5th Amendment's protection against self-incrimination applies in all settings, including custodial interrogation. The State can only use a suspect's custodial statements when the decision to talk is entirely the product of the suspect's own free will. The certain procedural safeguards the Court looks to as proof a suspect knew and understood his rights include:

> *You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have a lawyer present with you during questioning. If you cannot afford a lawyer, one will be appointed for you. Do you understand these*

rights? Understanding your rights, do you waive them so you can talk?

Miranda's majority opinion cites to the 5th Amendment, never the 6th. Only the dissent cites the 6th Amendment.

Reversed Doesn't Mean Acquitted

In February 1967, Flynn represented Miranda *pro bono* on the rape/kidnap retrial without Miranda's confession. Now Miranda's former girlfriend, Twila Hoffman, testified against him about his jail confession to her – the court found no marital privilege applied. After the eight day trial, a jury found Miranda guilty on both counts. At resentencing, Miranda received the same concurrent 20 to 30 year sentences for the rape and for the kidnapping, now also concurrent with the robbery sentence. Those convictions were affirmed in 1969.

Also in 1969 on a habeas petition, the United States District Court in Phoenix reversed Miranda's robbery conviction for illegal use of his confession and the unfair line-up. Flynn, now in his own firm and under court appointment, represented Miranda at his robbery retrial in 1971. This time, Miranda was tried under an alias - Juan or José Gomez, depending on the paperwork - due to the notoriety his name carried. Again, Flynn argued Twila Hoffman should not testify because the marital privilege applied between she and Miranda. Again he lost the motion and the jury found Miranda guilty after a several day trial. His 20 to 25 year robbery sentence was to run concurrent with the rape/kidnap sentence. Appeals affirmed the robbery conviction in 1973. The court paid Flynn's firm $1301.95, all the money Flynn ever earned for representing Miranda for seven plus years.

Even before that decision, Miranda was paroled from prison in 1972. In 1974, police stopped Miranda driving a friend's car. He had no valid license and a search found 3 amphetamines in his pocket and a .38 handgun under the seat. The Superior Court suppressed all evidence for an unlawful search of the car and charges were dismissed. But this didn't stop the Arizona Parole Commission from revoking Miranda's release based upon that same ill-gotten evidence.

Paroled again in 1976, 34 year old Miranda returned to warehouse work. Because of his celebrity, Miranda bought and autographed *Miranda* rights cards, adding the date the Supreme Court opinion issued, then sold them for dollars to earn extra money.

After Miranda's Death

Police arrested Zamora-Rodriguez the same night Miranda died. Around 10:00 p.m., Phoenix advised Zamora-Rodriguez of his *Miranda* rights. He did not invoke those rights and denied anything to do with Miranda's death. Police turned him over to Immigration officials who deported him for being in the United States without documents.

Around 1:30 a.m., the morning following Miranda's death, police stopped Moreno-Perez at the Hayes Hotel (where Phoenix Civic Plaza stands, across street from Chase Field where Diamondbacks play). They also advised Moreno-Perez of his *Miranda* rights. He too did not invoke and told police he was in his room all night and, oh, that gash on his nose? It was from work earlier that day. Police released him. In follow-up investigation later that day, Moreno-Perez's co-workers told police Moreno-Perez bragged to them the police let him go. And, when they questioned his Salt River Hotel roommate, he told police Moreno-Perez admitted he had been a fight at La Amapola.

The La Amapola Bar waitress saved

the 5 bottles from the table where the men drank and played cards. Prints examined well after Zamora-Rodriguez was deported and Moreno-Perez released matched both men. The same waitress readily identified Moreno-Perez as Miranda's killer from an 8 photo line-up.

A warrant issued for Moreno-Perez's arrest for the murder of Ernesto Miranda – he was never arrested.

Miranda's family buried him the following week in a Mesa cemetery. His grave marker reads *Beloved Brother and Friend, Ernesto A. Miranda, 1941 – 1976.*

Flynn married five times. His former partner, Tom Galbraith, says the Jimmy Flynn character in the musical *Chicago* is based in part upon Flynn. During one of Flynn's jury trials, a female juror sent the judge a note saying she couldn't be fair and impartial because she'd fallen in love with Flynn. In January 1980, the 55 year old Flynn died of a heart attack in Flagstaff, Arizona, getting ready to go skiing for the first time.

Frank continued teaching at the University of Arizona Law School. He served on the American Law Institute Council and wrote books on constitutional law, ethics, and Lincoln's years as a lawyer. Frank continued for over 20 years his outrage over the Japanese internment decision, eventually being vindicated with in the 9th Circuit decision in *Hirabayashi*. Frank promoted women in the legal profession, counting former 9th Circuit Chief Judge Mary Schroeder and Former United States Attorney/former Arizona Attorney General and Governor/former Secretary of the Department of Homeland Security, and current University of California system president (she clearly can't hold down a job) Janet Napolitano among his mentees. Known for his fondness of champagne, beluga caviar, and Wagnerian opera, Frank died September 2002, practicing into his 80s.

~ ~ ~

After Miranda's death, a Sacramento Police Department detective asked his local District Attorney, "Now that Miranda's dead, do we have to still follow his rule?"

Yes, they do.

CITATIONS

Arizona State Library, Archives and Public Records, Miranda collection.

Liva Baker, Miranda – Crime, Law and Politics (Anthenium NY 1983).

Tom Galbraith, *Remembering John Flynn*, ARIZONA ATTORNEY, p.12 et seq. (9/2005), http://www.myazbar.org/AZAttorney/PDF_Articles/0905Flynn.pdf .

Miranda v. Arizona, 384 U.S. 436 (1966). Oral argument also found at https://www.oyez.org/cases/1965/759 .

Gary L. Stuart, Miranda – Story of America's Right to Remain Silent, (University of Arizona Press Tucson 2004).

Paul Ulrich, *What Happened in Miranda?*, THE CHAMPION, p. 18 et seq. (5/2016).

~ Heather E. Williams
Federal Defender, California Eastern

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

June 30, 2016

MEMORANDUM

To: Chief Judges, United States District Courts
District Judges, United States District Courts
District Court Executives
Clerks, United States District Courts

From: Judge Wm. Terrell Hodges, Chair
Committee on Court Administration and Case Management

Judge Roger W. Titus, Chair, Privacy Subcommittee
Committee on Court Administration and Case Management

RE: INTERIM GUIDANCE FOR COOPERATOR INFORMATION

On behalf of the Committee on Court Administration and Case Management (CACM), we would like to share interim guidance that the Committee developed concerning the treatment of cooperator information in criminal cases. This guidance is "interim" because the issue has been referred to the Committee on Rules of Practice and Procedure for formal consideration. As discussed below, however, the Committee believes this is an issue of such importance that it requests each court to consider adopting the provisions of the guidance, in a manner consistent with local practice, applicable case law, and the court's rule-making authority, pending consideration through the Rules Enabling Act process.

Background

The CACM Committee has responsibility for issues relating to court operations, including the task of helping courts maintain their records in a way that protects both the public right of access to case filings and the legitimate privacy interests of litigants. Perhaps the most challenging example of this responsibility is balancing public access to criminal cases against the potential exposure of government cooperators. Remote electronic access dramatically increased

the potential for illicit use of case information regarding cooperators, and it is largely for this reason that the Judicial Conference initially delayed public electronic access to criminal case files. This concern also prompted the Committee in 2008 to endorse practices aimed at minimizing the use of case documents to identify cooperators, and encourage all courts to consider their implementation. March 2008 Report of the CACM Committee to the Judicial Conference, pp.8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350.

Since then, the CACM Committee has continued to track the use of criminal case information to identify cooperators. Despite courts' individual efforts, the problem continues to grow. Based on increasing concerns expressed by judges about harm to cooperators, this Committee, in August 2014, asked the Federal Judicial Center (FJC) to survey judges, U.S. attorneys, federal defenders, Criminal Justice Act panel representatives, and probation and pretrial services chiefs to measure the scope and severity of the problem.

The FJC analyzed the responses to these surveys and collected its findings in a report entitled "Survey of Harm to Cooperators," which is now available on the FJC website at http://www.fjc.gov/public/pdf.nsf/lookup/Survey-of-Harm-to-Cooperators-Final-Report.pdf/$file/Survey-of-Harm-to-Cooperators-Final-Report.pdf ("FJC Report"). The FJC Report fully substantiates the concern that harm to cooperators persists as a severe problem. For example, district judge respondents reported 571 instances of harms or threats – physical or economic – to defendants and witnesses between the spring of 2012 and the spring of 2015, including 31 murders of defendant cooperators.

The Committee believes these threats and harms should be viewed in the context of a systemic problem of court records being used in the mistreatment of cooperators. The FJC Report presents 363 instances in which court records were known by judges to be used in the identification of cooperators. This is a particular problem in our prisons, where new inmates are routinely required by other inmates to produce dockets or case documents in order to prove whether or not they cooperated. If the new inmates refuse to produce the documents, they are punished. The FJC Report confirms the existence and widespread nature of this problem,[1] which is aggravated by prison culture and the prevalence of organized gangs.

The conditions cooperators face in prison also impact the sentences imposed by the judiciary. Multiple respondents in the FJC Report noted that cooperators' fear of harm is so great that some forgo the potential benefits of U.S. Sentencing Guidelines Manual § 5K1.1 out of fear that the related case documents will identify them as cooperators. If they are identified as cooperators after arriving in prison, in many cases the only effective protection available is to move the threatened inmate into a segregated housing unit or solitary confinement, with an attendant loss of the privileges that would otherwise be available to that inmate – an ironic and more onerous form of punishment not typically contemplated by the sentencing judge.

Chief Judge Ron Clark of the Eastern District of Texas recently held a hearing regarding a motion to unseal plea agreements that involved extensive factfinding on these issues.[2] The hearing involved the participation of the local United States Attorney's Office, the Office of the

[1] *See* FJC Report, Appendix I: Open-Ended Comments (discussing practices in BOP facilities).

[2] *United States v. McCraney*, 99 F. Supp. 3d 651 (E.D. Tex. 2015).

Public Defender, counsel for five defendants, and counsel for the newspaper who had requested the unsealing, as well as an amicus filing by another newspaper. At the hearing, the court heard testimony from two Bureau of Prisons (BOP) representatives and a federal prosecutor concerning the experiences of cooperators in prison. Based on its factfinding, the court concluded that the disclosure of information in plea agreements that identifies cooperating defendants "puts those defendants at risk of extortion, injury, and death." It therefore found "an overriding interest in preventing disclosure of information that states or even hints that a defendant has agreed to be an informant or cooperating witness." The court's local rules regarding criminal case management were updated as a result, so that all plea agreements from that point forward include a sealed supplement containing any discussion of cooperation. *See* E.D. Tex. L. R. CR-49(c)-(d). The court found that this new procedure – which it applied to the case at hand – "balances the public's right of access against the higher need to protect the lives and safety of defendants" and other individuals, as well as "the need to encourage accused individuals to provide the truthful information that is crucial to the successful prosecution of serious offenses."

Certainly, U.S. attorneys and the BOP must continually strive to protect cooperators and ensure the safety of prisoners. The Committee believes, however, that the judiciary also has a role in finding solutions to these problems. Of particular concern for judges, apart from the need to protect the well-being of those we sentence, is the fact that our own court documents are being used to identify the cooperators who then become targets. In many instances these documents are publicly available online through PACER. Because criminal case dockets are being compared in order to identify cooperators, every criminal case is implicated.

Guidance

The CACM Committee believes a nationwide, uniform solution providing for greater control over access to cooperator information is required to address this systemic national problem. It has therefore asked the Committee on Rules of Practice and Procedure to consider the issues described in the FJC Report and determine whether changes to the criminal rules are warranted as a long-term remedy. In the interim, the CACM Committee is also asking courts to consider taking more immediate steps at the district level to address this problem. **The Committee has developed the attached guidance for protecting cooperator information found in criminal case documents and recommends that each district adopt it via local rule or standing order.** The guidance is based on practices for protecting cooperators already used in a number of courts.[3]

The guidance recommends that, in all criminal cases, courts restructure their practices so that documents or transcripts that typically contain cooperation information – if any – would include a sealed supplement. Any discussion of defendants' cooperation – or lack thereof – would then be limited to these sealed supplements. For example, any plea agreement docketed in a criminal case would be accompanied by a separate, sealed supplement containing either discussion of cooperation or a simple statement that there was no cooperation. As a result, any member of the public who reviews the docket would be unable to determine, based on the plea agreement, whether a given defendant has cooperated. By adding standardized sealed material that will appear in every case, whether or not there is a cooperator, and placing all discussion of

[3] Thirty-three district courts, or over one-third, have already adopted local rules or standing orders to make all criminal defendants appear identical in the record to obscure cooperation information. FJC Report at 26.

cooperation under seal, adoption of these practices would inhibit identification of cooperators through dockets and case documents. The public, however, would continue to have access to key criminal case files – albeit without sensitive information regarding cooperation.[4]

Importantly, the government's disclosure obligations to opposing counsel would not be affected by implementation of this guidance, and the public would still have access to much of the plea and sentencing material that is now available.

Discussion

The CACM Committee would like to emphasize that, in recommending this guidance, its members understand and embrace our duty as judges to vigilantly safeguard the public's right to access court documents and proceedings pursuant to the First Amendment and under common law. Nonetheless, the Committee finds that the harms to individuals and the administration of criminal justice in this instance are so significant and ubiquitous that immediate and effective action should be taken to halt the malevolent use of court documents in perpetuating these harms, consistent with each court's duty to exercise "supervisory power over its own records and files."[5]

The Committee is also mindful of the high burden that must be met before shielding particular case information from the public's eye,[6] but notes that this should not be seen as an absolute bar to exercising authority over court records and proceedings. Indeed, there are many well-established restrictions on access to criminal case information that address compelling government interests.[7] The CACM Committee believes that the need in this instance is as great as, if not greater than, the needs that supported adoption of restrictions in the past.

---

[4] The guidance contains other provisions, including procedures for prisoners to access sealed case materials in a secure environment, consistent with local BOP policy and court rules. The Committee is in communication with the Executive Office for U.S. Attorneys and the BOP regarding the provisions and local implementation.

[5] *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) ("[A]ccess has been denied where court files might have become a vehicle for improper purposes.").

[6] *See Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 509-13 (1984) (recognizing that, where right of public access applies, a court may close court proceedings or deny access to transcripts, but must articulate reasons for doing so in specific and reviewable findings demonstrating "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"). Several circuits also have issued decisions that may impact court efforts to implement this guidance. *See, e.g., United States v. DeJournett*, 817 F.3d 479 (6th Cir. 2016) (vacating policy-based order that sealed the entirety of a plea agreement without case-specific findings); *In re Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008) (finding a public right of access to the cooperation addendum of a plea agreement, albeit with limited analysis of whether the right should apply); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991) (acknowledging that potential threats to criminal investigations or individuals "may well be sufficient to justify sealing a plea agreement," but vacating sealing of cooperator information as unwarranted where fact of cooperation was publicly known).

[7] *See, e.g.*, 18 U.S.C. § 3153(c) (making pretrial services reports confidential); Fed. R. Crim. P. 32 & 18 U.S.C. § 3552(d) (limiting distribution of presentence investigation reports); Fed. R. Crim. P. 49.1 (requiring redaction of personally identifiable information and minors' names); Fed. R. Crim. P. 49.1, 2007 Advisory Comm. Notes & *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 340 (categorizing as non-public a number of criminal case documents, including juvenile records); 18 U.S.C. § 5038 (making names and pictures of juveniles in delinquency proceedings non-public; safeguarding records from "unauthorized persons"); JCUS-MAR 01, p. 17 (dictating that statements of reasons are not to be disclosed to the public); 18 U.S.C. § 3662(c) (mandating that conviction records maintained by the Attorney General "not be public records").

It is important to emphasize that, to the extent possible, broad adoption of the CACM guidance is key to its effectiveness at addressing the problems discussed above. If districts continue to take different approaches toward addressing this problem, there is a real risk that well-intentioned measures to protect cooperators in one court might result in criminal dockets that indicate cooperation, rightly or wrongly, when compared to those of another court. The inadequacy of a patchwork approach to sealing cooperator-related material is highlighted in Chief Judge Clark's opinion and referenced by a number of responses in the FJC Report. It is for this reason that the Committee has requested the Committee on Rules of Practice and Procedure to consider this issue for national application.

Finally, in drafting and recommending this guidance, the CACM Committee emphasizes that it has acted to the best of its ability to narrow the scope of the proposed measures. The Committee also thoroughly considered other potential options for addressing this issue in each district, such as those it recommended for potential adoption in 2008.[8] These options, however, suffer from either failing to move the judiciary toward a uniform approach or by making a greater volume of case information unavailable to the public. For example, some courts presently seal the entirety of all plea agreements in an attempt to prevent identification of and harm to cooperators. By implementing the attached guidance and sealing only cooperator information, as the CACM Committee recommends, these courts may actually increase the amount of criminal case information available to the public.[9]

The CACM Committee believes that the misuse of court documents to identify, threaten, and harm cooperators is a systemic problem, and can only be addressed through a more uniform approach toward public access to cooperator information. To that end, the Committee believes uniform implementation of the attached guidance at the local level -- pending consideration of a national rule -- would be an important, measured step toward that goal, and one which is appropriately tailored to address the significant interests involved.

Thank you for the thoughtful consideration we know you and your colleagues will give to this issue.

---

[8] *See* March 2008 Rep. of the CACM Committee to the Judicial Conf., pp. 8-9; *Guide to Judiciary Policy*, Vol. 10, Ch. 3, § 350 (listing as potential measures (1) shifting cooperation information into non-case file documents, (2) sealing plea agreements, (3) restricting access to plea agreements, (4) redacting all cooperation information, (5) restructuring case records so that all criminal cases appear identical, and (6) delaying publication of plea agreements referencing cooperation).

[9] The CACM Committee recognizes that there is no complete or perfect solution. If a cooperator testifies during a trial, for example, or is sentenced below a statutory mandatory minimum where the "safety valve" does not apply (18 U.S.C. § 3553(f)), his cooperation is apparent. This obviously does not mean, however, that solutions should not be adopted for those cases in which they are available and can be effectively applied.

If you have any questions or concerns, please feel free to contact either of us, Judge Terry Hodges (Chair, CACM Committee) or Judge Roger Titus (Chair, CACM Committee's Privacy Subcommittee). You can also contact Sean Marlaire, Administrative Office Policy Staff, Court Services Office, at 202-502-3522 or by email at Sean_Marlaire@ao.uscourts.gov.

Attachment

cc: Honorable Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure
Chief Probation Officers
Federal Public and Community Defenders
CJA Panel Attorney District Representatives

Guidance on Access to Plea Agreements and Other Documents That May Reveal Cooperation

A. On the basis of the following findings of the Court Administration and Case Management Committee, arrived at in consultation with the Criminal Law Committee and Defender Services Committee (which takes no position on the proposed guidance), the Committee recommends prompt local adoption of the guidance set forth in subsection (b) by each district court via local rule or standing order.

1. As indicated by the Survey of Harm to Cooperators: Final Report prepared by the Federal Judicial Center in June 2015, and the findings contained in the memorandum order of Chief Judge Clark of the Eastern District of Texas dated April 13, 2015 (Case No. 14-CR-80), there is a pervasive, nationwide problem regarding the use of criminal case information to identify and harm cooperators and their families.

2. The problem has been exacerbated by widespread use of PACER and other systems that provide ready public access to case information, including documents containing cooperation information and criminal dockets indicating whether cooperation did or did not occur in a case.

3. The problem threatens public safety. It also interferes with the gathering of evidence, the presentation of witnesses, and the sentencing and incarceration of cooperating defendants, and therefore poses a substantial threat to the underpinnings of the criminal justice system as a whole. The Court Administration and Case Management Committee agreed that there is a compelling government interest in addressing these issues.

4. Other possible less-restrictive alternatives have been considered before selecting this guidance and, to the greatest extent possible, the guidance has been narrowly tailored. To be effective, any action intended to address these issues must be implemented universally across all criminal cases; any rules, standing orders, or policies that provide for case-to-case variation in the treatment of criminal documents for cooperators and non-cooperators are ineffective and may compound the problem.

5. Uniform nationwide measures regarding access to particular criminal court documents and transcripts are necessary in order to prevent the improper use of those documents to harm or threaten government cooperators in the long term. As a result, the Committee will continue to work with other committees of the Judicial Conference, and in particular the Committee on Rules of Practice and Procedure, along with the Department of Justice and the Bureau of Prisons, in

order to investigate and establish nationwide measures that are most effective at protecting cooperators while avoiding unnecessary restrictions on legitimate public access.

B. Recommended Document Standards to Protect Cooperation Information

1. In every case, all plea agreements shall have a public portion and a sealed supplement, and the sealed supplement shall either be a document containing any discussion of or references to the defendant's cooperation or a statement that there is no cooperation agreement. There shall be no public access to the sealed supplement unless ordered by the court.

2. In every case, sentencing memoranda shall have a public portion and a sealed supplement. Only the sealed supplement shall contain (a) any discussion of or references to the defendant's cooperation including any motion by the United States under 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1; or (b) a statement that there has been no cooperation. There shall be no public access to the sealed supplement unless ordered by the court.

3. All transcripts of guilty pleas shall contain a sealed portion containing a conference at the bench that will either contain any discussion of or references to the defendant's cooperation, or simply state that there is no agreement for cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.

4. All sentencing transcripts shall include a sealed portion containing a conference at the bench, which reflects either (a) any discussion of or references to the defendant's cooperation, including the court's ruling on any sentencing motion relating to the defendant's cooperation; or (b) a statement that there has been no cooperation. There shall be no public access to the text of the conference at the bench provided under this paragraph unless ordered by the court.

5. All motions under Rule 35 of the Federal Rules of Criminal Procedure based on the cooperation with the government shall be sealed and there shall be no public access to the motion unless ordered by the court.

6. Copies of presentence reports and any other sealed documents, if requested by an inmate, shall be forwarded by the Chief Probation Officer or the Clerk of the Court to the warden of the appropriate institution for review by the inmate in an area designated by the warden and may neither be retained by the inmate, nor reviewed in the presence of another inmate, consistent with the institutional policies of the Bureau of Prisons. Federal court officers or employees (including probation officers and federal public defender staff), community defender staff, retained counsel, appointed CJA panel attorneys, and any other

person in an attorney-client relationship with the inmate may, consistent with any applicable local rules or standing orders, review with him or her any sealed portion of the file in his or her case, but may not leave a copy of a document sealed pursuant to this guidance with an inmate.

7. Clerks of the United States district courts, when requested to provide a copy of docket entries in criminal matters to an inmate or any other requesting party, shall include in a letter transmitting the docket entries, a statement that, pursuant to this guidance, all plea agreements and sentencing memoranda contain a sealed supplement which is either a statement that there is cooperation, including the terms thereof, or a statement that there is no cooperation, and, as a result, it is not possible to determine from examination of docket entries whether a defendant did or did not cooperate with the government.

8. All documents, or portions thereof, sealed pursuant to this guidance shall remain under seal indefinitely until otherwise ordered by the court on a case-by-case basis.

9. Nothing contained herein shall be construed to relieve the government in any case of its disclosure obligations, such as those under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Jencks v. United States*, 353 U.S. 657 (1957) (as codified at 18 U.S.C. § 3500).

10. Judicial opinions involving defendants or witnesses that have agreed to cooperate with the government, where reasonably practicable, should avoid discussing or making any reference to the fact of a defendant's or witness's cooperation.