*FORT*IFYING DISCOVERY DEMANDS: MAKING LEMONADE FROM A NINTH CIRCUIT LEMON

Annual District Court Conference
October 5, 2007
District Court of Guam, Hagatna

Steven Kalar
Senior Litigator, N.D. Cal. FPD

"This is manifestly absurd."

> *United States v. Fort*, 472 F.3d 1106, 1126 (9th Cir. 2007) (W. Fletcher, J., dissenting) (describing reasoning of majority opinion).

"What's sauce for the goose is sauce for the gander."

> *United States v. Fort*, 478 F.3d 1099, 1105 (9th Cir. Mar. 8, 2007) (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting) (describing dangers that the reasoning of *Fort* will be used by defense against the government).

Introduction

Judge Susan Graber's majority decision in *Fort* is surely one of the sourest lemons in recent Ninth Circuit criminal jurisprudence. *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007). The decision misinterprets Federal Rule of Criminal Procedure 16 to retroactively deem local cops to be federal government "agents" – then exempts their police reports from disclosure under the *federal* work product rule. As Judge Wardlaw bluntly observed in her dissent from the denial of rehearing *en banc*, the "panel's majority opinion is just plain wrong." *United States v. Fort*, 478 F.3d 1099, 1108 (9th Cir. Mar. 8, 2007) (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting). Indeed, normally-temperate Judge William Fletcher described the reasoning of the *Fort* majority as "manifestly absurd." *Fort*, 472 F.3d at 1126 (W. Fletcher, J., dissenting).

The Honorable Susan Graber, Ninth Circuit Court of Appeals

Worst of all, *Fort* survived a very serious *en banc* pitch, with Federal Defenders from nine federal districts weighing-in and supporting AFPD Steve Hubachek's (superb) amicus petition for rehearing.

Now that *Fort* is controlling Ninth Circuit authority (at least until the Supreme Court and the Rules Advisory Committee get around to correcting it), it falls upon the defense bar to make lemonade out of this sour new case. Fortunately, the lousy reasoning in the *Fort* opinion spawns all sorts of inconsistencies and illogical twists: just the fodder needed to fuel novel defense challenges.

This outline discusses the background to the *Fort* decision, the panel's decision, and the order denying rehearing *en banc*. It then surveys several defense opportunities presented by the decision, and suggest strategies for further litigation.

I. *United States v. Fort*

A. Background and Procedural Posture

The origins of *Fort* begin not with that capital case, but with another huge gang prosecution in the Northern District of California: *United States v. Douglas Stepney*, *et al.*, CR 01-0344 MHP. That case swept up over thirty defendants in two waves of federal prosecutions, focused on the "Big Block" gang of Hunter's Point.

Lead prosecutor George Bevan disclosed everything but the kitchen sink in *Stepney* – thousands and thousands of pages of "historical" San Francisco Police Department gang investigations were dumped upon the defense. This mess was unredacted, unreviewed, disorganized, and often redundant. It was also very useful. The *Stepney* discovery chronicled a

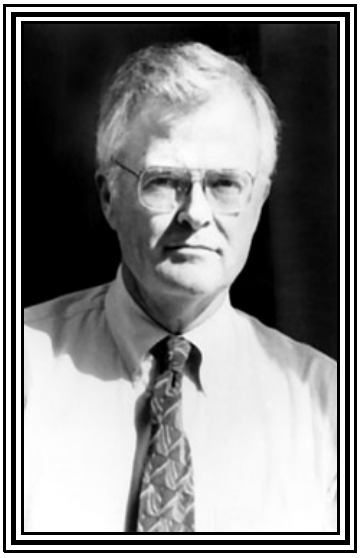
decade of law enforcement ineptitude, as dirty cops, dirty searches, dirty stops, and dirty snitches were repeatedly rejected by the appalled judges of the San Francisco Superior Court.

Predictably (given their sentencing exposure) many of the co-defendants in the federal *Stepney* case snitched. Ultimately, well-nigh a dozen cooperating co-defendants joined the government's camp.

Two of these cooperating co-defendants were then murdered in San Francisco during, the pendency of the *Stepney* case.

It is a matter of much debate whether the deaths of these two cooperating defendants had anything to do with the *Big Block* prosecution. It is even less clear whether the disclosure of the historical S.F.P.D. reports and investigations by AUSA Bevan had anything to do with the homicides. Nonetheless, the United States Attorney's Office for the Northern District of California, under the "leadership" of fired former U.S. Attorney Kevin Ryan, quickly drew the link: discovery had been disclosed, federal cooperators had been murdered, *ergo*, meaningful discovery would no longer be provided to the defense in serious gang cases.

To stiffen the resolve of the Northern District Strike Force, the United States Attorney's Office imported supervisors and line assistants from the District of Columbia. For these carpetbaggers, disclosure of *any* discovery was a bewildering novelty. To paraphrase President Kennedy's quip, these D.C. prosecutors brought a great deal of "Southern efficiency and Northern charm" to the San Francisco federal building.[1]



The Honorable William H. Alsup, Northern District of California

This, then, is the back story to the *Fort* brouhaha. After *Stepney*, the United States Attorney's office initiated several more San Francisco gang prosecutions. In the *Fort* (*Diaz*) case before the Honorable William Alsup, the government alleged capital RICO charges against members of another (alleged) gang.

Defense counsel in *Fort* naturally began the case by seeking discovery. The government gave it – sort of. The government provided thousands of pages of S.F.P.D. reports and memoranda. Those documents, however, had been heavily redacted to remove the names and identification information of key witnesses. *Fort,* 472 F.3d at 1108.

The defense complained, sparking months of litigation and delays in a trial date. Sensitive to the government's concerns of danger to the cooperating witnesses, Judge Alsup urged the

[1] "Washington is a city of Southern efficiency and Northern charm." John F. Kennedy, http://www.quotedb.com/quotes/1404

government – repeatedly – to help draft a protective order governing discovery. *Id.* at 1122. The government refused.[2] Finally, fed-up with the prosecutors' obstinance, Judge Alsup ordered the government to provide non-redacted copies of the S.F.P.D. reports to the defense. *Id.* This disclosure was subject to a "muscular" protective order crafted by the court (again, note that the government flatly refused to participate in drafting this order). *Id.*

As it had promised, the government flatly refused to comply with the court's disclosure order, Judge Alsup imposed sanctions on the government, and the government then took an interlocutory appeal. *Fort,* 472 F.3d at 1109.

B. *Fort*, Federal Rule of Criminal Procedure 16, and "Agents"

The legal issue before the Ninth Circuit panel[3] in *Fort* was the scope of discovery requirements mandated by Federal Rule of Criminal Procedure 16. *Id.* at 1109.[4] More specifically. the precise issue was what material is exempted from the government's Rule 16 discovery obligations. Here is how Judge Graber framed the question presented:

---

[2] "The district court made a number of highly critical findings about the conduct of the prosecutors, which the panel majority fails to address. *See United States v. Diaz*, No. 05-0167 (N.D. Cal. July 20, 2006) (Testimony-Preclusion Order as Sanction for Noncompliance with Rule 16 Order) (Docket No. 578) at 6 ("[D]efense counsel still remain in the dark- *and are intended by the government to remain in the dark*-as to the source of the potential evidence.") (emphasis in original); id. at 12 ("Despite the Court's considerable respect for government counsel herein, this order must find that they have acted willfully to abridge Rule 16 rights to gain trial advantage over the defense."). *Fort*, 478 F.3d at 1107, (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting).

[3] The *Fort* panel was Judges Graber, Tallman, and William Fletcher. Judge Graber authored the majority decision, Judge Fletcher dissented from that decision and from the denial of rehearing *en banc*.

[4] In the *Fort* majority opinion, Judge Graber assures us that the materials only involved *inculpatory* material. *Fort*, 472 F.3d at 1110. Therefore, Judge Alsup's order did not involve the constitutional right to *exculpatory* evidence (*"Brady* material.") *Id.*

Judge Wardlaw was considerably less sanguine about the constitutional aspect of the case. She said that Graber's reassurance was "simply not true:" exculpatory information *was* in the materials at issue. *See Fort*, 478 F.3d at 1101 n.2 (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting).

In any event, at its core *Fort* is primarily concerned with the scope of a statutory right to discovery: Rule 16.

> This appeal presents the question whether investigative reports prepared by a local police department prior to a federal prosecutor's involvement qualify for the **discovery exemption** created by Rule 16(a)(2) when they are turned over to the federal prosecutor for use in the federal investigation and prosecution of the same acts by the same people.

Id. (emphasis added).

To understand this "discovery exemption" – and the resulting opportunities for collateral defense litigation – one first must turn to Rule 16 itself.

Federal Rule of Criminal Procedure 16 requires disclosure of: i. documents, ii. in the possession of the (federal) government, iii. that will be used in the government's case-in-chief, or that are material to the defense. Following are relevant excerpts of the rule:

Federal Rules of Criminal Procedure, Rule 16:
Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

> (A) Defendant's Oral Statement. Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.
>
> . . . .
>
> **(E) Documents and Objects.** Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> > (i) the item is material to preparing the defense;
> >
> > (ii) the government intends to use the item in its case-in-chief at trial; or
> >
> > (iii) the item was obtained from or belongs to the defendant.

(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government **or other government agent in connection with investigating or prosecuting the case.** Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

. . . .

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

. . . .

(2) Information Not Subject to Disclosure. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney **or agent, during the case's investigation or defense;** or

(B) a statement made to the defendant, or the defendant's attorney **or agent**, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

. . . .

Fed. R. Crim. P. 16 (West 2007) (emphases added).

In *Fort*, all parties agreed that the triggers for Rule 16 disclosure were present: the S.F.P.D. reports were "documents," in the possession of the government, which certainly were material to the defense. *Fort*, 472 F.3d at 1110. The issue was thus not whether they fell into the general Rule 16 disclosure requirements, but rather whether the documents fell into an *exception* to required Rule 16 disclosure. *Id.*

Revisit Rule 16(a)(2), the subsection of the rule that exempts out material subject to government disclosure: .

> **(2) Information Not Subject to Disclosure.** Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government **or other government agent in connection with investigating or prosecuting the case.** Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Fed. R. Crim. P. 16(a)(2) (emphasis added). Everyone in *Fort* agreed that "government" in this subsection means, "federal government." *Fort*, 472 F.3d. at 1111. Therefore, a plain reading of this exemption to Rule 16 disclosure suggests that a *federal agent* – like an FBI or DEA agent – doesn't have to give up his report of investigation in the federal prosecution (at least, Rule 16 doesn't compel disclosure). [5]

This was, in fact, dissenting Judge Fletcher's most blunt, and powerful, criticism: the rule just flat-out doesn't say what the majority claims. On its face, Rule 16(b)(2) clearly doesn't exempt from disclosure reports of *state* cops written years *before* a federal prosecution was even conceived. *Id.* at 1124 (W. Fletcher, J., dissenting) ("The meaning of Rule 16(a)(2) is so plain that it should be unnecessary to do anything more than simply to read the text in order to conclude that it does not protect documents prepared by the San Francisco Police Department without any involvement by the federal government.")

The Honorable William Fletcher, Ninth Circuit Court of Appeals

As is too often the case, however, the *correct* judge was the *dissenting* judge: Fletcher lost. (As did Judge Wardlaw and her colleagues in the denial of rehearing *en banc*). Therefore, it is now more productive to focus on Judge Graber's interpretation of "agency" in the exemption to Rule 16 disclosure, as articulated in the majority decision.

---

[5] Bear in mind that Rule 16 isn't the only discovery obligation on the government. Material that doesn't fall within Rule 16 disclosure, or that is exempt from Rule 16 disclosure, often is still subject to the disclosure requirements of *Brady*, *Giglio*, or the *Jencks* Act.

C. Graber's Rule 16 "Agents"

Federal Rule afficionados and academics will debate Judge Graber's Rule 16 analysis *ad nauseam*. For most practitioners, however, her analysis is far less important than the rule she ultimately pronounces in the majority decision:

> In conclusion, we hold that Rule 16(a)(2) extends to the San Francisco police reports created prior to federal involvement but relinquished to federal prosecutors to support a unified prosecution of Defendants for the same criminal activity that was the subject of the local investigation.

Fort, 472 F3d at 1119. Phrased differently, the narrow holding of *Fort* is this:

> **Rule:** A document made by state or local officers before a federal prosecution, and later provided to federal prosecutors as part of a federal prosecution for the same criminal conduct, need not be disclosed as Rule 16 material. It is exempt from disclosure because the state or local officers are "federal agents" whose reports are exempt from discovery under Rule 16(a)(2).[6]

It isn't easy to explain a rule that is so conspicuously wrong. Nonetheless, it is an unavoidable fact that the *Fort* majority has somehow retroactively transformed San Francisco cops doing routine buy-busts into "federal agents" (whose reports are exempt from disclosure).[7]

How best to fight the government's withholding of evidence under *Fort* is a subject for another day.[8] Here, we instead focus on how to use the reasoning of *Fort* to the advantage of the

---

[6] Judge Wardlaw mockingly describes the majority's holding thus: "This combination of rulings transforms local police officers involved in local investigations years before any federal prosecution was even contemplated into federal 'government agents.' . . . As a result, all 'reports, memoranda, or other internal government documents' generated by the San Francisco Police Department while investigating the Down Below Gang magically became material not subject to discovery under Rule 16 at all." *Fort*, 478 F.3d at 1104 (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting).

[7] Beware: this narrow rule is very likely to be abused. If a local cop is a "federal agent," so is a local police drug chemist, or a state environmental officer, or a host of other law-enforcement affiliates that feed state cases into the federal maw.

[8] More-aggressive use of Rule 17(c) subpoenas for state law-enforcement materials is one avenue to fight *Fort*'s discovery limitations. This is a particularly interesting approach, because many district courts are angered by the Executive's arrogant usurption of Article III power to manage cases and trials. These courts may now view Rule 17(c) subpoenas in a more-favorable

defense.

II. *Fort*ifying Discovery Demands

Behind their (somewhat) restrained language, the gist of Judge Fletcher's and Wardlaw's dissents is that the majority opinion is results-driven and its reasoning is – strained. These dissenters explain that the problem with Graber's "wrong" interpretation of "agency" in Rule 16 is that it creates a host of unintended consequences.[9] Both judges warn that the defense bar will exploit the reasoning of the *Fort* majority to twist discovery and constitutional obligations in ways the majority does not anticipate.[10]

Fletcher and Wardlaw are right: there's much mischief to be made. The remainder of this outline will discuss defense opportunities presented by the *Fort* decision; opportunities for expanding government discovery obligations, imposing new constitutional burdens on the shoulders of the AUSA, and limiting the discovery that the defense has to surrender.

A. *Fort* Expands the Government's *Brady* and *Giglio* Obligations

The rationale of the *Fort* majority should expand the federal government's discovery obligations, by dramatically broadening the definition of federal "agents" to include state officers (and sundry other local and state bureaucrats who help the feds).

The cornerstones of federal discovery obligations are familiar. The government has an obligation to disclose exculpatory material in its possession to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Similarly, it is a due process violation for the government to fail to disclose impeachment material in its possession when there is a reasonable likelihood that this material could have affected the judgment of the jury. *Giglio v. United States*, 405 U.S. 150, 154

---

light.

Another challenge is an Equal Protection argument: federal defendants investigated by state officers don't get the exact same materials that they would have routinely received in state courts. *Fort* creates a real disparity between state and federal defendants who have committed identical crimes, purely by virtue of "federalization."

[9] "In bypassing the plain meaning of Rule 16(a)(2) , the panel majority . . . failed to consider the far-reaching consequences of its ruling, especially its redefinition of agency." *Fort*, 478 F.3d at 1104 (ord. denying petition for rehearing en banc) (Wardlaw, J., dissenting).

[10] Correctly predicting our abuse of the majority's reasoning, Judge Wardlaw warned, "What's sauce for the goose is sauce for the gander." *Fort*, 478 F.3d at 1105 (ord. denying petition for rehearing en banc) (Wardlaw, J., dissenting).

(1972).[11]

There's no shortage of frustrations in getting the government to honor its *Brady / Giglio* obligations: disputes over materiality, timing of disclosure, and flat-out bad faith. One frequent problem, however, is a legal dispute over the phrase, "in the possession of the [federal] government." Too often, the federal government shirks its discovery obligations by protesting that exculpatory or impeachment information isn't in its "possession," disclaiming that these materials are off in a state cop's file somewhere and that the feds have no obligation to search *state* (or local) records.

A 1992 decision illustrates this gambit well. *See United States v. Dominguez-Villa*, 954 F.2d 562 (9th Cir. 1992). In *Dominguez-Villa*, the district court ordered the federal government to review the personnel files of *state* law enforcement witnesses. *Id.* at 565. The Ninth Circuit reversed, because those files of state officers were not in their "possession, custody, or control:"

---

[11] To go beyond the basics of federal discovery, turn to an excellent article written by defense attorney Robert Mahler. *See* Robert S. Mahler, *Extracting the Gate Key: Litigating Brady Issues*, CHAMPION (May 2001), 14. Starting the analysis with a compelling analogy fiom the movie *The Princess Bride*, this article pushes for a more aggressive view of discovery obligations in the pre-trial context.

Another useful resource is the analysis of Judge Dean Pregerson in *United States v. Sudikof*, 36 F. Supp. 2d 1196 (C.D. Ca. 1999). In *Sudikof,* Judge Pregerson explained that the discovery standards in the *Brady* line of cases are of little use when considering pre-trial discovery; those appellate standards focused on what happened at trial, an "analysis [that] obviously cannot be applied by a trial court facing a pretrial discovery request.' *Id*. at 1199. The district court emphasized that *Brady* violations that do not result in reversible error are nonetheless improper in the trial court:

> Additionally, the post-trial review determines only whether the improper suppression of evidence violated the defendant's due process rights. However, that the suppression may not have been sufficient to violate due process does not mean that it was proper. . . . In this light, it is clear that *Brady*'s materiality standard determines prejudice from admittedly improper conduct. It should not be considered as approving all conduct that does not fail its test.

Id. at 1199. For the pretrial context, therefore, Judge Pregerson held that "the government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case." *Id.*

> [T]he government argues that the district court exceeded its authority by requiring review of personnel files of state law enforcement witnesses. We agree. "The prosecution is under no obligation to turn over materials not under its control." *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir.1991). In *Aichele*, the prosecution refused to produce a California Department of Corrections file of a prosecution witness. *Id*. We reasoned that because the document was under the control of state officials, the federal prosecutor was not obligated to produce it. *Id.* Similarly, we have held that a discovery request under Federal Rule of Criminal Procedure 16(a)(1)(C) "triggers the government's disclosure obligation only with respect to documents within the federal government's actual possession, custody, or control." [*United States v. Gatto*, 763 F.2d 1040, 1048 (9th Cir.1985)]; *see also United States v. Chavez-Vernaza*, 844 F.2d 1368, 1375 (9th Cir.1987) ("the federal government had no duty to obtain from state officials documents of which it was aware but over which it had no actual control").

Id. at 565-66.

Fort is an important avenue to attack this method of shirking discovery obligations, because after Judge Graber's decision, state and local cops are federal "agents." An "agent" of the federal government must necessarily have "possession, custody and control" over his or her own material, or access to it. Thus, the files and reports of local cops (these new "federal agents") are now, under *Fort*'s logic, discoverable material that triggers *Brady* and *Giglio* obligations.

In her dissent to the order denying rehearing *en banc* in *Fort*, Judge Wardlaw clearly lays out this extension of the majority's reasoning:

> We have held that "[t]he prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.1989) (discussing Rule 16(a)(1)(C), which has since been moved to Rule 16(a)(1)(E)); *see also Santiago*, 46 F.3d at 895 . . . Rule 16 discoverability analysis thus hinges on federal government agency, not on federal government possession. **If local authorities are "government agents" for the purposes of 16(a)(2) privilege, then they must also be government agents for the purposes of 16(a)(1) production.** The panel majority's broad expansion of "government agents" portends a number of deleterious downstream effects.

Fort, 478 F.3d at 1105 (9th Cir. Mar. 8, 2007) (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting) (emphasis added) (footnote omitted).[12] It is our job as the defense bar to stir up these "deleterious downstream effects."[13]

Practice Point: Preserve *Brady / Giglio* error in your case by demanding in a discovery letter or motion that the AUSA reviews his state agents' (or local cops') files for exculpatory and impeachment information. Sharpen this demand by identifying these cops as "federal agents" under *Fort*. As Judge Wardlaw explained, "The panel majority asserts that 'nothing in this opinion should be interpreted to diminish or dilute the government's *Brady* obligations.' . . . Indeed, the panel majority's opinion has the exact opposite effect: it enhances the scope of the federal government's *Brady* obligations.' . . . If a local agency is a 'government agent' for Rule 16 purposes, it should also be deemed an agent for *Brady* purposes. This extends the federal government's *Brady* duties to include information in the control of local agencies that participated in the 'case." *Id.* at 1105-06.

The *Fort* opportunity extends past *Brady* and **exculpatory** information, to encompass **impeachment** information. Any experienced federal practitioner has encountered a state

---

[12] One prediction: this battle over the interplay of *Fort, Brady,* and *Giglio* will swing on whether the constitutional obligations are triggered by an AUSA's *possession* of state cop material, or *access* to that material. Judge Wardlaw anticipates this, and leads the charge:

> In the Ninth Circuit, federal prosecutors are deemed to have 'possession and control' over material in the possession of other federal agencies as long as they have 'knowledge' of and 'access' to that material. *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir.1995). Thus, for the purposes of Rule 16, possession can be imputed to federal prosecutors even if they do not physically possess the materials.

Fort, 478 F.3d at 1102 (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting).

[13] Preserving a *Brady* / *Fort* demand helps to salt the appellate record – another danger flagged by Judge Wardlaw:

> [The majority's approach] is a recipe for mistrial or reversal on appeal – a result that delays justice, and wastes prosecutorial resources, judicial resources, and jury time, particularly in complex criminal cases (the very cases most affected by the panel majority's opinion). These expanded *Brady* obligations exacerbate the potential for error, since federal prosecutors must also disclose *Brady* material in the possession of local authorities now deemed "government agents."

Fort, 478 F.3d at 1107 (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting).

investigation that has "gone federal." A frustrating aspect of those cases is that an AUSA will refuse to obtain and disclose **impeachment** information from the state agents' (or local cops') personnel files – again, on the theory that this dirt isn't in the federal government's "possession, custody, or control."

The familiar lead Ninth Circuit case on disclosure of federal agent impeachment information is *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1990). In *Henthorn*, the defendant had been convicted of a cocaine conspiracy. 931 F.2d at 30. Before trial, the defense moved the district court to order the government to produce "the personnel files of all law enforcement witnesses whom it intends to call at trial . . . for evidence of perjurious conduct or other like dishonesty, in camera, to determine if those portions of the officers' personnel files ought to be made available to defense counsel for impeachment purposes." *Id.* The government resisted the order, and argued that it had no obligation to examine the personnel files absent a showing of materiality by the defense. *Id.* The district court denied the motion on the ground that the defendant had not made a showing of materiality. *Id.*

The Ninth Circuit reversed, relying on a procedure that it had earlier set forth in *United States v. Cadet*, 727 F.2d 1453 (9th Cir. 1984):

> [The government must] disclose information favorable to the defense that meets the appropriate standard of materiality . . . If the prosecution is uncertain about the materiality of the information within its possession, it may submit the information to the trial court for an *in camera* inspection and evaluation . . .

Id. at 31.

The Court in *Henthorn* observed that "the *government* has a duty to examine personnel files upon a defendant's request for their production." *Id.* (emphasis added). As the Court explained, "Absent such examination, it cannot ordinarily determine whether it is obligated to turn over the files." *Id.* The Court in *Henthorn* thus concluded that, "The government is incorrect in its assertion that it is the defendant's burden to make an initial showing of materiality. The obligation to examine the files arise by virtue of the making of a demand for their production." *Id.*

Henthorn thus stands for three main propositions:

- The government must examine the personnel files of its ***agents*** upon defense request, and the defense need make no initial showing of materiality;
- The government must produce the files to the defense if the files meet the appropriate standard of materiality;
- If the government is uncertain about an item's materiality, it *may* submit it to the district court for *in camera* inspection.

The value of *Fort* in expanding *Henthorn*'s reach is obvious. Now that a state cop is deemed a "federal agent," under *Henthorn* the federal government has an obligation to review the personnel files of state and local officers for impeaching information.

Practice Point: Demand of the AUSA, in a letter or motion, that he or she personally examine all personnel files of state or local law enforcement officers involved in the federal prosecution. Again, sharpen the demand by explaining how *Fort* had transformed cops into federal agents. To "help" a recalcitrant AUSA accomplish this task suggest several places where the files are kept – call your friendly city or county Public Defender and ask for a tutorial on the location of these personnel files. (For example, it was recently discovered that the S.F.P.D. keeps records of dirt on its cops in local station houses, and that those records were not replicated in the main Office of Citizen Complaint ("O.C.C.") files).

Fort should prove an invaluable sword for expanding federal discovery. As Judges Fletcher and Wardlaw warned, it may also be equally useful as a shield, allowing the defense to limit its own reciprocal discovery obligations.

B. Using *Fort* to Limit "Reciprocal" Defense Rule 16 Discovery

The government isn't the only party who gets a "work product" exemption to its discovery obligations. Rule 16 has a very similar exemption for the defense, carving out material that the defense isn't required to disclose.[14] *Fort* helps by arguably broadening this defense exemption.

First, recall *our* discovery obligations under Rule 16, "the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

---

[14] The Supreme Court has expressly endorsed the word-product privilege for criminal defense counsel:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

United States v. Nobles, 422 U.S. 225, 238-39 (1975). For a very useful explanation of the defense work-product privilege, see *United States v. Johnson*, 378 F. Supp. 2d 1041, 1045-46 (D. Iowa 2005)

(i) the item is within the defendant's possession, custody, or control; and (ii) the defendant intends to use the item in the defendant's case-in-chief at trial." Fed. R. Crim. P. 16(b)(1).

This rule has bite: district courts haven't hesitated in ordering the defense to disclose such materials. *See, e.g., United States v. Burger*, 773 F. Supp.1419 (D. Kan. 1991) (ordering disclosure of documents to be offered in support of an advice-of-counsel defense); *see also Tavlor v. Illinois*, 484 U.S. 400 (1988) (holding preclusion of testimony to be appropriate sanction for defense counse1's failure to disclose the names of alibi witnesses until second day of trial when counsel knew about the witnesses one week earlier and had been permitted to amend the witness list on the day of trial); *United States v. Rodriguez-Cortes*, 949 F.2d 532 (1st Cir. 1991) (holding district court did not abuse its discretion in precluding admission of defense documents as sanction for reciprocal discovery violation).

Like the government, however, the defense enjoys a work-product exemption to these Rule 16 reciprocal discovery requirements:

> **(2) Information Not Subject to Disclosure.** Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:
>
> > (A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney **or agent, during the case's investigation or defense;** or
> >
> > (B) a statement made to the defendant, or the defendant's attorney **or agent**, by:
> >
> > > (i) the defendant;
> > >
> > > (ii) a government or defense witness; or
> > >
> > > (iii) a prospective government or defense witness.

Fed. R. Crim. P. 16(b)(2) (West 2007) (emphases added).

The impact of the *Fort* majority decision on this defense exemption is obvious. If local cops are "agents" of the federal government whose reports are exempt from Rule 16 disclosure, then the universe of defense "agents" whose documents are exempt from disclosure has expanded dramatically.[15]

Judge Fletcher caught this angle right away, and warned of it in his dissent to the majority decision: "Symmetry demands that if the government is allowed, under Rule 16(a)(2), to refuse

---

[15] "The Court has recognized, further, that the reality of litigation is that the work-product privilege must extend to "material **prepared by agents for the attorney** as well as those prepared by the attorney himself." *United States v. Johnson*, 378 F. Supp. 2d 1041, 1045-46 (D. Iowa 2005), quoting *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (emphasis added).

to disclose any document that comes into its possession, custody, or control, regardless whether it was 'made by' a federal 'agent,' defendants should be afforded comparable protection from disclosure by Rule 16(b)(2). *Fort*, 472 F.3d at 1130 (W. Fletcher, J., dissenting). Judge Wardlaw echoed Fletcher's concern in her dissent from the denial for rehearing *en banc*:

The Honorable Kim Wardlaw, Ninth Circuit Court of Appeals

> What's sauce for the goose is sauce for the gander. Put another way, the panel majority's opinion means that *a defendant may invoke the retroactive agency holding to make any individual who has material relevant to the defense case an after-the-fact agent, and similarly lock up "reports, memoranda, or other documents made by . . . the defendant's . . . agent, during the case's investigation or defense" as privileged work product under Rule 16(b)(2)*. The symmetrical structure of Rules 16(a) and 16(b) demands that the panel majority's novel interpretation of agency applies for defendants as well as for the government. This will lead to broad invocations of privilege designed by defendants to thwart criminal prosecution by locking up as much potentially relevant material as possible.

Fort, 478 F.3d at 1105 (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting) (emphasis added).

This "sauce for the [government] gander" needs more attention, and more thought, from the defense bar.[16] Does the broadened definition of agent in *Fort* mean that previous *civil* counsel are defense "agents" for an advice-of-counsel defense? (Thus exempting disclosure of attorney-client documents – and effectively, the defense itself – by the defendant?) How about accountants or consultants brought in at the first whiff of a corporate scandal, before federal charges are filed and criminal defense counsel is retained? What about a psych evaluation that long preceded federal charges, when the defense now relies upon the shrink as an "agent" of their case in chief? Can a defendant's friends and family members be "deputized" by defense counsel as "agents" to help with investigation, and thereby escape disclosure requirements?

If S.F.P.D. cops working on a projects drug bust ten years before *Fort* are "federal agents," why aren't the above examples defense "agents" as well?

[16] There is little authority or legal analysis on what constitutes a defense "agent" for purposes of the Rule 16(b)(2) exemption from disclosure.

Practice Point: Beware of waiver when disclosing Rule 16 material. "The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *Nobles,* 422 U.S. at 239. *Before disclosing anything* under Rule 16, apply the *Fort* analysis to the creator of the document and determine if he or she is now arguably a defense "agent." If so, you may want to fight disclosure (in an *ex parte*, under seal brief, to avoiding waiving the privilege).

C. *Fort* Broadens the Application of Federal Rule of Criminal Procedure 41, Which Imposes Limitations on Searches

Rule 16 is not the only rule to use the term "agent" in the Rules of Criminal Procedure. Another example is Federal Rule of Criminal Procedure 41, which establishes federal limitations on the execution of search warrants.[17] Among other things, Rule 41 establishes:

- Limitations on night searches;
- Required procedures for preserving testimony in support of a warrant;
- Limitations on the timing and placement of tracking devices;
- Rules for the execution of warrants, search warrant returns, and materials provided to the subject of the search.

See Fed. R. Crim. P. 41 (West 2007).

Rule 41 has traditionally been interpreted to apply only to federal agents, and not to state or local officials, or private parties. *See, e.g., United States v. Palmer*, 3 F.3d 300, 303 (9th Cir.1993) (applying limitations of Rule 41 to local officials only when they perform a search that is "federal in character;" "from the beginning is was assumed a federal prosecution would result."); *see also United States v. Crawford*, 657 F.2d 1041, 1046 (9th Cir. 1981) (same).

Yet again, the reasoning of the majority in *Fort* upsets well-settled (bad) law. Judge Wardlaw leads us through the analysis in her dissent from the order denying rehearing *en banc*:

> The conduct of federal agents is constrained by laws and rules that do not apply to local officials or private parties. To ensure that federal agents cannot avoid those rules by using straw men, we have applied agency concepts to extend their applicability. For example, Federal Rule of Criminal Procedure 41 governs search and seizure by federal agents, and imposes various restrictions related to warrants. We have extended the strictures of Rule

[17] Federal Rule of Criminal Procedure 41 is produced in its entirety in the Appendix.

> 41 to local officials only when they perform a search that is "federal in character," that is, "from the beginning it was assumed a federal prosecution would result." *United States v. Palmer*, 3 F.3d 300, 303(9th Cir.1993). This interpretation of who is a federal agent sensibly takes into consideration the temporal aspect of the relation between the investigating official and the prosecution. Thus, only if there is some reason at the time of the search to deem it a federal search does Rule 41 apply to searches performed by local officials.
>
> The panel majority's definition of a "government agent" ignores examples like Rule 41 and runs roughshod over the traditional tenet of agency that a principal-agent relationship must exist at the time of the agent's actions in order to ascribe culpability to the principal.

Fort, 478 F.3d at 1106 (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting).

Practice Point: Unfortunately, the Supreme Court (and when driven to it, the Ninth Circuit) have significantly diluted the remedies for a Rule 41 violation, of late. *See, e.g., United States v. Williamson*, 439 F.3d 1125, 1132-33 (9th Cir. 2006) (discussing disfavored remedy of suppression for Rule 41 violations). Nonetheless, there's little harm in dusting off the federal Rule 41 search challenges and throwing them at state searches that produce evidence later used in a federal prosecution. At minimum, such a challenge may earn an evidentiary hearing or create bargaining leverage.

Conclusion

The majority in *Fort* was "plain wrong, . . . wrong, . . wrong." *Fort*, 478 F.3d at 1107 (ord. denying petition for rehearing *en banc*) (Wardlaw, J., dissenting). To try to spark *en banc* interest, dissenting Judges Fletcher and Wardlaw trotted out a parade of horribles: wonderful defense tricks that will undermine well-established Ninth Circuit law and generally throw sand in the gears of justice.

We can't make liars out of these two judicial allies. Pushing hard to expand *Brady*, *Giglio*, and *Henthorn* obligations, hiding under the broad "agency" theory of *Fort* to shield against Rule 16 defense discovery, and extending Rule 41 search limitations to state officers will help our clients. Happily, this mischief will also prove the *Fort* dissenters right in their dire predictions. Perhaps some day the Federal Rules Advisory Committee will cite our litigation – wreaking havoc in the wake of *Fort* – when it clarifies its true meaning of Rule 16 "agents" and effectively overrules this lemon of a case.

–oOo–

Appendix

Federal Rule of Criminal Procedure 41

Federal Rules of Criminal Procedure, Rule 41

Rule 41. Search and Seizure

(a) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions. The following definitions apply under this rule:

(A) "Property" includes documents, books, papers, any other tangible objects, and information.

(B) "Daytime" means the hours between 6:00 a.m. and 10:00 p.m. according to local time.

(C) "Federal law enforcement officer" means a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant.

(D) "Domestic terrorism" and "international terrorism" have the meanings set out in 18 U.S.C. § 2331.

(E) "Tracking device" has the meaning set out in 18 U.S.C. § 3117(b).

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

(1) a magistrate judge with authority in the district -- or if none is reasonably available, a judge of a state court of record in the district -- has authority to issue a warrant to search for and seize a person or property located within the district;

(2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;

(3) a magistrate judge--in an investigation of domestic terrorism or international

terrorism--with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district; and

(4) a magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.

(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other items illegally possessed;

(3) property designed for use, intended for use, or used in committing a crime; or

(4) a person to be arrested or a person who is unlawfully restrained.

(d) Obtaining a Warrant.

(1) In General. After receiving an affidavit or other information, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--must issue the warrant if there is probable cause to search for and seize a person or property or to install and use a tracking device.

(2) Requesting a Warrant in the Presence of a Judge.

(A) Warrant on an Affidavit. When a federal law enforcement officer or an attorney for the government presents an affidavit in support of a warrant, the judge may require the affiant to appear personally and may examine under oath the affiant and any witness the affiant produces.

(B) Warrant on Sworn Testimony. The judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.

(C) Recording Testimony. Testimony taken in support of a warrant must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit.

(3) Requesting a Warrant by Telephonic or Other Means.

(A) In General. A magistrate judge may issue a warrant based on information

communicated by telephone or other reliable electronic means.

(B) Recording Testimony. Upon learning that an applicant is requesting a warrant under Rule 41(d)(3)(A), a magistrate judge must:

(i) place under oath the applicant and any person on whose testimony the application is based;

and

(ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.

(C) Certifying Testimony. The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

(D) Suppression Limited. Absent a finding of bad faith, evidence obtained from a warrant issued under Rule 41(d)(3)(A) is not subject to suppression on the ground that issuing the warrant in that manner was unreasonable under the circumstances.

(e) Issuing the Warrant.

(1) In General. The magistrate judge or a judge of a state court of record must issue the warrant to an officer authorized to execute it.

(2) Contents of the Warrant.

(A) Warrant to Search for and Seize a Person or Property. Except for a tracking-device warrant, the warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 10 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

(B) Warrant for a Tracking Device. A tracking-device warrant must identify the person or property to be tracked, designate the magistrate judge to whom it must be returned, and specify a reasonable length of time that the device may be used.

The time must not exceed 45 days from the date the warrant was issued. The court may, for good cause, grant one or more extensions for a reasonable period not to exceed 45 days each. The warrant must command the officer to:

(i) complete any installation authorized by the warrant within a specified time no longer than 10 calendar days;

(ii) perform any installation authorized by the warrant during the daytime, unless the judge for good cause expressly authorizes installation at another time; and

(iii) return the warrant to the judge designated in the warrant.

(3) Warrant by Telephonic or Other Means. If a magistrate judge decides to proceed under Rule 41(d)(3)(A), the following additional procedures apply:

(A) Preparing a Proposed Duplicate Original Warrant. The applicant must prepare a "proposed duplicate original warrant" and must read or otherwise transmit the contents of that document verbatim to the magistrate judge.

(B) Preparing an Original Warrant. If the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant. If the applicant transmits the contents by reliable electronic means, that transmission may serve as the original warrant.

(C) Modification. The magistrate judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means under Rule 41(e)(3)(D) or direct the applicant to modify the proposed duplicate original warrant accordingly.

(D) Signing the Warrant. Upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant.

(f) Executing and Returning the Warrant.

(1) Warrant to Search for and Seize a Person or Property.

(A) Noting the Time. The officer executing the warrant must enter on it the exact date and time it was executed.

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises,

the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

(C) Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.

(D) Return. The officer executing the warrant must promptly return it-- together with a copy of the inventory--to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(2) Warrant for a Tracking Device.

(A) Noting the Time. The officer executing a tracking-device warrant must enter on it the exact date and time the device was installed and the period during which it was used.

(B) Return. Within 10 calendar days after the use of the tracking device has ended, the officer executing the warrant must return it to the judge designated in the warrant.

(C) Service. Within 10 calendar days after the use of the tracking device has ended, the officer executing a tracking-device warrant must serve a copy of the warrant on the person who was tracked or whose property was tracked. Service may be accomplished by delivering a copy to the person who, or whose property, was tracked; or by leaving a copy at the person's residence or usual place of abode with an individual of suitable age and discretion who resides at that location and by mailing a copy to the person's last known address. Upon request of the government, the judge may delay notice as provided in Rule 41(f)(3).

(3) Delayed Notice. Upon the government's request, a magistrate judge--or if authorized by Rule 41(b), a judge of a state court of record--may delay any notice required by this rule if the delay is authorized by statute.

(g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

(h) Motion to Suppress. A defendant may move to suppress evidence in the court where the trial

will occur, as Rule 12 provides.

(i) Forwarding Papers to the Clerk. The magistrate judge to whom the warrant is returned must attach to the warrant a copy of the return, of the inventory, and of all other related papers and must deliver them to the clerk in the district where the property was seized.

Fed. R. Crim. P. 41 (West 2007).

Table of Contents

Table of Authorities

Federal Cases

Table of Authorities (cont.)

Federal Rules