# Adjudication by Ambush: Federal Prosecutors' Use of Nonscientific Experts in a System of Limited Criminal Discovery

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# ADJUDICATION BY AMBUSH: FEDERAL PROSECUTORS' USE OF NONSCIENTIFIC EXPERTS IN A SYSTEM OF LIMITED CRIMINAL DISCOVERY

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*The federal government makes extensive use of nonscientific expert witnesses in its prosecution of tax fraud and other criminal cases. A criminal defendant's defense thus turns on whether discovery is sufficient to enable him effectively to cross-examine the government expert witness. Professor Eads demonstrates that current federal rules inhibit discovery and thereby deny defendants the opportunity for full cross-examination. To eliminate this inequity without sacrificing societal interests, she suggests amending the Federal Rules of Criminal Procedure to provide for greater discovery of expert witnesses.*

The growing use of expert witnesses is well documented, as are the problems that result from this use. Commentators, however, have focused on either the use of experts generally in civil litigation or the use of scientific experts in criminal cases without noting a similar increase in the use of nonscientific experts in criminal law. This Article examines how federal criminal procedure and the rules governing expert testimony combine to work hardships on criminal defendants when the government calls nonscientific experts as witnesses. A typical version of such use of experts illustrates some of these hardships as well as the basic concepts of procedure and evidence at work in this Article.

We begin with a defendant charged by the Internal Revenue Service (IRS) with tax fraud arising out of his sales to investors of a tax shelter involving a book.[1] Because the book was never written, the IRS takes the position that the shelter lacked economic reality, was a sham and hence illegal.[2] The government, however, must go beyond proving how this shelter violated provisions of the Internal Revenue Code. It also must prove willfulness, that is, that the defendant knew the shelter was a sham and thus that the deductions taken by the

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1. For a detailed description of the case providing the basis for this hypothetical, see *infra* note 145.

2. The federal government has pursued a number of criminal cases involving tax shelters. For example, the government has attempted to convict individuals for inflating the value of a tax shelter asset. United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978). The government also has obtained convictions of individuals for the sale of nonexistent assets, United States v. Carruth, 699 F.2d 1017 (9th Cir. 1983), *cert. denied sub nom.* Reed v. United States, 464 U.S. 1038 (1984), and for using sham methods of financing such shelter investments, United States v. Crooks, 804 F.2d 1441 (9th Cir. 1986); United States v. Ingredient Technology Corp., 698 F.2d 88 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); United States v. Clardy, 612 F.2d 1139 (9th Cir. 1980).

investors were illegal.[3] The defendant is not the major promoter of the shelter but rather a salesman. Defense counsel will focus on his client's distance from the headquarters of the promotion and his client's reliance on the successful publishing history of the author who was to write the shelter's book. Before trial, defense counsel requests a number of discovery items, such as statements of government witnesses and a witness list. The judge denies these requests as outside the ambit of the federal criminal rules.[4] Hence, when the government calls a revenue agent to the stand several weeks into the trial, defense counsel has had no warning that such a witness would be called and has no idea as to the areas on which the agent's testimony will focus.[5]

The agent is qualified as an accounting expert[6] and concludes that the shelter was a sham and was without a profit motive, based substantially on the fact that the book was not written. In this testimony, however, the expert fails to emphasize that economic results are not the only test for profit motive. He ignores tax cases that tell the factfinder to evaluate all facts and circumstances, including the intent of the taxpayer to make a profit at the time of the transaction, and not just to evaluate the economic results of the transaction at a later time.[7]

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3. Unlike civil tax cases, the government must prove willfulness in every criminal tax prosecution. *See* I.R.C. §§ 7201-7207 (1982). Willfulness has been defined as a "voluntary, intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 12 (1976).

4. Specifically, the rule involved is Federal Rule of Criminal Procedure 16. While a criminal defendant has no right to a witness list, a trial court retains the discretion to order the government to produce such a list. United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981). On the other hand, the trial court has no discretion to order the government to give the defense any witness statements prior to the conclusion of the witness's direct testimony. United States v. Algie, 667 F.2d 569, 571 (6th Cir. 1982); United States v. Campagnuolo, 592 F.2d 852, 858 (5th Cir. 1979); United States v. Spagnuolo, 515 F.2d 818, 821 (9th Cir. 1975), *rev'd on other grounds*, 549 F.2d 705 (9th Cir. 1977). Thus a witness list is the most a defendant could hope to obtain from a trial judge willing to exercise his discretion. See *infra* notes 17-31 and accompanying text for a discussion of federal criminal discovery.

5. An experienced defense lawyer in criminal tax prosecutions would anticipate the government's use of an IRS agent as an expert. This is standard practice for the government in criminal tax prosecutions. Fink, *Accounting Testimony in Tax Frauds—An Overview*, in SCIENTIFIC AND EXPERT EVIDENCE 143-144 (E. Imwinkelried ed. 1981); 1 D. MCGOWEN, D. O'DAY & K. NORTH, CRIMINAL AND CIVIL TAX FRAUD 802 (1986). See *infra* note 99 and accompanying text for a discussion of the extent such experts are used in criminal tax prosecutions. The fundamental fairness of the system, however, must be evaluated for all defendants, not just those who can afford experienced criminal tax lawyers who will anticipate the government's use of such an expert.

6. In the case that provided much of the data for this hypothetical, *see infra* note 145, the IRS agent was not qualified as an expert in accounting, but rather was accepted by the court simply as an expert without designation of his area of expertise. United States v. Williams, No. TY-86-7-CR (E.D. Tex., Apr. 3, 1986), Trial Transcript at 664.

7. Profit motive is the key to many deductions permitted under the Internal Revenue Code. I.R.C. § 183 (1982) permits certain deductions only if the activity is for profit. The courts generally consider all facts and circumstances of an activity in deciding the existence of a profit motive. United States v. Frank Lyon Co., 435 U.S. 561, 582-84 (1978); King v. United States, 545 F.2d 700, 708-09 (10th Cir. 1976); Max Starr v. Comm'r, 46 T.C. 450, 451-58 (1966). While courts have stated that economic results are not determinative of the existence of a profit motive, it is not uncommon for courts to look at such results and weigh them heavily. *See* Fuchs v. Comm'r, 83 T.C. 79, 98-99 (1984). Consequently, on this issue of profit motive, an expert probably could find as many cases supporting his emphasis on economic results as the defense lawyer could find cases supporting his argument that the economic result is only one factor considered. Cross-examination of an expert in an area of such plentiful authority will net little unless pretrial discovery has established the expert's refusal to acknowledge any conflicting authority. With this pretrial discovery, the defense on cross

The expert also concludes that the shelter was illegal because the investors were not personally liable on the notes used to purchase the investment. In other words, the investors were not "at risk," and hence the deductions they took pursuant to the defendant's advice were illegal.[8] Upon hearing this, the defense counsel concludes that the expert has made a serious mistake. The defendant sold this shelter in 1978, one year before the "at risk" rule applied to this investment.[9] Therefore, even if the investors were not "at risk," they were permitted to take these deductions in 1978. Unfortunately, the defense lawyer does not know that the expert applied the "at risk" rule to this shelter because investors told him that the defendant actually sold the shelter in 1979, but backdated the documents to reflect 1978 as the year of sale.[10] The investors are not available to testify for several reasons, including illness and residency outside the government's subpoena power.[11]

Cross-examination of the expert on these points will be unsuccessful. Rather than conceding that economic results are not the only test for profit motive, the expert will cite the cases most favorable to his conclusion each time defense counsel attempts to confront him with adverse authority. It is unlikely that defense counsel will be familiar with every case cited by the agent, and thus the lawyer will be unable effectively to challenge the agent's reliance on certain items. At best, the jury will view such sparring on legal authority as a draw. Without knowledge before trial that an expert would testify and with no knowledge of the cases used by the expert in reaching his conclusion on profit motive, the defense lawyer had no opportunity to construct a cross-examination that could establish the expert's selective and biased use of legal authority.

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could paint the expert as biased in his choice of legal authority. But without such information or something similar, cross-examination on a subject having abundant authority on each side only tends to give the expert an additional opportunity to impress the jury with the range of his knowledge and thus tends to reinforce the jury's inclination to rely on such an expert.

8. I.R.C. § 465. Prior to the Tax Reform Act of 1986, when the rules regarding the losses allowed from passive investments were significantly changed, § 465 of the Internal Revenue Code allowed investors in shelters, such as the one in the hypothetical, to deduct any loss from such shelter activity only to the extent that the investor was at risk. I.R.C. § 465(a). Further, the statute provided that a taxpayer was to be considered at risk with respect to amounts borrowed for use in such activity only to the extent that the taxpayer was personally liable for the repayment of the amounts borrowed. I.R.C. § 465(b)(2). For purposes of the hypothetical, then, this Internal Revenue Code provision would permit an investor only to take a loss from the investment to the extent of cash paid plus the extent to which she was personally liable on the note signed when purchasing the interest.

9. Personal liability on notes was not always required, and prior to the 1979 amendments to § 465, it was common tax shelter practice for investors to sign only nonrecourse notes upon which they had no personal liability. Beginning in 1979, § 465(c) extended the scope of the "at risk" provision to include all activities engaged in as a trade or business or for the production of income, exclusive of real property.

10. The government has consistently established willfulness by proving a defendant backdated documents. The government argues from evidence of backdating that an individual who was innocent in pursuing a tax scheme, believing that his position was valid, would have no reason to backdate documents. Evidence of backdating under this theory shows a guilty state of mind. *See generally* United States v. Crum, 529 F.2d 1380 (9th Cir. 1976) (affirming conviction because evidence clearly supported jury's finding that defendant intentionally backdated purchase contracts while knowing that the false information would be used in preparation of tax returns).

11. The government would find it difficult to have the investors' statements admitted as substantive evidence without first showing their unavailability through no fault of the government. *See* FED. R. EVID. 804(a); *infra* note 53 and accompanying text.

While this exchange on profit motive could be a draw, the cross-examination on the applicability of the "at risk" rule will be a disaster. By questioning the expert on his apparent mistake in applying the "at risk" rule to the wrong year, the defense lawyer will fall into a trap. The expert simply will respond to these questions by discussing the evidence on backdating. Thus, defense counsel unknowingly will have opened the door to highly incriminating evidence on the issue of willfulness.[12] It is, of course, proper under the evidence rules for the expert to use these investor statements in forming his opinion,[13] and it is proper to wait until asked before revealing these investor statements as the bases for his opinion.[14]

The above illustration may appear to be a worst-case scenario, but it is the contention of this Article that, in fact, it approximates reality in far too many cases, especially those involving nonscientific experts.[15] This Article discusses the flaws of the current system and proposes a modification of the criminal procedural rules to remedy those flaws. The Article begins, in section I, by discussing the scope and application of the discovery available to criminal defendants in the federal system. Section II then discusses the evidentiary rules applicable to experts in federal courts. Discussion of these two areas—limited discovery and use of experts—will reveal the inequities that result from the combined application of the discovery and evidence rules to the nonscientific expert in criminal cases. Section III analyzes the reasons for the inadequacy of the judicial response to this problem. Section IV demonstrates the magnitude of these inequities by discussing the extent to which the federal government makes use of nonscientific experts in criminal trials. Because in some contexts the flaws of the current system implicate constitutional concerns, section V explores the extent to which constitutional arguments can or should be a vehicle for remedying the current system's inequities. Finally, section VI presents and discusses a proposal for reform: an amendment to the Federal Rules of Criminal Procedure.[16]

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12. It is subject to debate whether the expert could base his opinion on such hearsay. See *infra* note 179 and accompanying text for a discussion of the constitutional limitations on the use of such hearsay when the defendant may not have access to the same information. Arguably in the hypothetical, the defendant had the same access to this information since it came from investors with whom he had previous contact.

13. Federal Rule of Evidence 703 allows an expert to testify if the data she uses to form her opinion is of the type reasonably relied on by experts in the field. Statements from witnesses are reasonably relied on by IRS agents in conducting examinations of tax returns, and thus the hypothetical expert's reliance on these backdating statements seems reasonable. *See infra* notes 49-50 and accompanying text for a discussion of reasonable reliance.

14. Federal Rule of Evidence 705 states, "The expert may . . . give reasons . . . without prior disclosure of the underlying facts or data, unless the court requires otherwise."

15. Commentators agree that classifying expert testimony as scientific or nonscientific is difficult. *See infra* note 21. For purposes of this discussion, however, nonscientific expert testimony relates to any such testimony that does not use a natural science for its basic or core assumption. The problems addressed in this article are worse with regard to nonscientific experts for two reasons. First, the criminal procedural rules do provide for discovery of scientific reports and results but are silent as to discovery of nonscientific reports. Second, critical discussion of the abuses surrounding expert testimony seems to center on scientific evidence. *See infra* note 16. Consequently, courts have not been as sensitized to the possible abuses stemming from the government's use of nonscientific experts.

16. The inequities that flow from restrictive criminal discovery and expansive expert witness provisions have been noted by other authors. *See* Saltzburg, *Pretrial Discovery of Scientific Evidence,*

## I. DISCOVERY UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

Federal Rules of Criminal Procedure 15, 16, and 17 primarily establish the scope of federal criminal discovery.[17] Rule 16 forms the core of this discovery.[18] A casual reader of the rule could conclude that a defendant is entitled to see

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*Symposium on Science and the Rules of Legal Procedure*, 101 F.R.D. 599, 613 (Oct. 28-29, 1983) (discussing how restrictive criminal discovery hampers effective advocacy in criminal cases when experts are called); Giannelli, *Observations on Discovery of Scientific Evidence, Symposium on Science and the Rules of Legal Procedure*, 101 F.R.D. at 622 (1983) (same). See *infra* note 21 and accompanying text for a discussion of the further restrictions placed on discovery when the expert is deemed to be nonscientific. Thus the arguments made by Saltzburg and Giannelli apply with more force to the nonscientific expert. *See* Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1239-45 (1980) (discussing the notice requirements that should be instituted when novel scientific evidence is introduced).

Commentators also have noted the problems that arise when a case investigator is called by the prosecution as an expert witness or when the expert relies on inadmissible hearsay. *See* Bamberger, *The Dangerous Expert Witness*, 52 BROOKLYN L. REV. 855, 856-69 (1986) (discussing the case agent as expert as well as the inequities that flow from limited defense discovery); Carlson, *Collision Course in Expert Testimony: Limitations on Affirmative Introduction of Underlying Data*, 36 U. FLA. L. REV. 234 (1984) [hereinafter *Collision Course*] (discussing expert testimony that relies on inadmissible hearsay).

Authors also have concluded that the inequities that result from limited criminal discovery may be alleviated by certain procedures such as pretrial conference in criminal cases and pretrial disclosure of the bases of an expert's opinion. *See* Pratt, *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 39 WASH. & LEE L. REV. 313, 322, 330 (1982) (Judge Pratt requires expert testimony to be written out and given to to opposing counsel before trial); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 703[03], at 703-26, ¶ 705[01], at 705-10 (1987).

17. This Article focuses on federal procedure and federal evidence. Some state criminal procedures involving the deposition of state witnesses and the discovery of state expert witnesses that depart from federal procedure. See *infra* note 20 and accompanying text for a discussion of some of the lessons to be learned from these state procedures. For example, Arizona permits the deposition of a witness who will not grant a personal interview, ARIZ. R. CRIM. P. 15.3(a)(2), and requires the state to provide the defendant with a list of the names and addresses of all witnesses, including experts, no later than 10 days after the arraignment, ARIZ. R. CRIM. P. 15.1(a)(1), (3).

Florida requires the State to give the defense a witness list with addresses as well as witness statements within 15 days after written demand from the defense. FLA. R. CRIM. P. 3.220(a)(1)(i). The Florida criminal rules make it clear that expert witness reports discoverable by the defendant are not limited to scientific experts. FLA. R. CRIM. P. 3.220(a)(1). Florida also provides for discovery depositions that permit the defendant to take the deposition of any person who may have relevant information. FLA. R. CRIM. P. 3.220(d).

Maine has an interesting procedure that requires the state to give the defendant the name, address, and report of any expert upon request, and further permits the trial court to order the expert to prepare such a report, if none already exists, which includes the subject matter of the expert's testimony, the substance of the facts on which the expert is expected to testify, a summary of the expert's opinions, and the grounds for each opinion. ME. R. CRIM. P. 16(b)(2)(B)(C), (c)(4).

Several states also permit use of depositions by the defense for the purpose of discovery. N.H. R. CRIM. P. 517:13; TEX. R. CRIM. P. 39.02; VT. R. CRIM. P. 15.

18. Federal Rule of Criminal Procedure 16 reads:

(a) Disclosure of Evidence by the Government

(1) Information Subject to Disclosure

(A) Statement of Defendant—Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. . . .

(B) Defendant's Prior Record—Upon request of the defendant the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the posses-

much of the government's evidence prior to trial. For example, the defendant is entitled to see his own statements that are within the possession, custody, or control of the government, as well as books, papers, documents, photographs, and tangible objects that are material to the preparation of his defense or that the government intends to use as evidence at trial.[19] The defense lawyer also is permitted access to the results or reports of scientific tests and experiments,[20]

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sion, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects—Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests—Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure—Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts—Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

FED. R. CRIM. P. 16(a).

19. The government's failure to respond in a timely fashion to a proper discovery request under this rule or the government's failure to provide all material available under this rule does not result necessarily in a mistrial or a reversal. United States v. Alexander, 789 F.2d 1046, 1049 (4th Cir. 1986); United States v. Barragan, 793 F.2d 1255, 1259 (11th Cir. 1986); United States v. Roberts, 783 F.2d 767, 770 (9th Cir. 1985); United States v. Euceda-Hernandez, 768 F.2d 1307, 1312-13 (11th Cir. 1985); United States v. Elam, 678 F.2d 1234, 1253 (5th Cir. 1982); United States v. Marino, 639 F.2d 882, 889 (2d Cir.) (en banc), *cert. denied*, 454 U.S. 825 (1981); United States v. Butler, 618 F.2d 411, 421 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980); United States v. Bell, 623 F.2d 1132, 1137-38 (5th Cir. 1980); United States v. Richman, 600 F.2d 286, 291-92 (1st Cir. 1979); United States v. Bowers, 593 F.2d 376, 378-79 (10th Cir.), *cert. denied*, 444 U.S. 852 (1979).

20. FED. R. CRIM. P. 16(a)(1)(D). Such access to results or reports of scientific experiments is not as valuable as it seems. Rule 16 does not specify what must be included in such reports. Consequently, a scientific expert may prepare a bare bones report stating simply the tests performed and a conclusion without including any specific data on how the tests were conducted and without referring to other sources of information. Such a skimpy report is sufficient under rule 16 but provides little information to defense counsel. Maine Rule of Criminal Procedure 16(c)(4), in contrast, provides that a judge may order such a report to contain a statement of the substance of facts on which the expert is expected to testify, a summary of the expert's opinions, and grounds for each opinion. Federal Rule of Civil Procedure 26(b)(4) also requires a party to reveal the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Further, federal criminal procedure does not require that the scientific expert prepare any written report or result at all. Obviously, if no report is prepared, there can be no discovery of it. The court in United States v. Shue, 766 F.2d 1122, 1135 (7th Cir. 1985), held that the oral statements of an expert are not discoverable under rule 16. Therefore, the government always has the option of discussing the experiment or test with the expert without having the expert produce a written report. *See* United States v. Johnson, 713 F.2d 654, 659 (11th Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984). Interestingly, in Maine the trial court may order the production of such a report if none exists. ME. R. CRIM. P. 16(c)(4).

but this provision does not mandate discovery of nonscientific reports.[21]

A more critical reading of rule 16, however, reveals that important items are missing from this list. These include the identity of witnesses and discovery of the prior statements of any witnesses other than the results or reports of a scientific expert. In fact, rule 16 specifically states that the discovery of witness statements is to be governed solely by what is commonly known as the Jencks Act.[22] The Jencks Act provides for discovery of prior statements only after the witness has testified on direct at trial and thus cannot be considered a pretrial discovery procedure. Moreover, the provision making scientific reports discoverable is of limited benefit since rule 16 does not require that a scientific expert make a report and does not specify the data that must be included in such reports. Hence, in those cases in which a report is prepared, the defense lawyer facing a scientific expert will know the name of the expert and the intention of the government to call him, but may have little other information to help the lawyer prepare for cross-examination.

What is the rationale for this restraint on pretrial access to witness identity and statements? The legislative history of rule 16 makes it clear that in 1975 the Department of Justice persuaded Congress at the last hour not to expand criminal discovery to include witness names. The reason for the Department's position was the fear that witnesses would be physically harmed, bribed, coerced, or intimidated.[23]

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21. *See, e.g.*, United States v. Smyer, 596 F.2d 939, 942 (10th Cir. 1979) (land surveyor map not within purview of rule 16), *cert. denied*, 444 U.S. 843 (1980); United States v. Feola, 651 F. Supp. 1068, 1147 (S.D.N.Y. 1987) (results of photographs not within contemplation of rule concerning scientific tests or experiments); United States v. Fischbach & Moore, Inc., 576 F. Supp. 1384, 1391 (W.D. Pa. 1983) (economists' reports not the type of material to be disclosed pursuant to rule 16); United States v. Kohne, 358 F. Supp. 1053, 1060 (W.D. Pa. 1973) (gambling expert's report not discoverable under rule 16), *cert. denied*, 417 U.S. 918 (1974).

Classification of expert testimony and the underlying report as scientific or nonscientific presents problems. Giannelli, *Scientific Evidence: A Proposed Amendment to Federal Rule 702, Symposium on Rules for Admissibility of Scientific Evidence*, 115 F.R.D. 102, 106 (1986). It is clear, however, that federal prosecutors distinguish between scientific and nonscientific expert reports when making discovery decisions. Melson, *Proposed Amendments to the Federal Rules on Admissibility of Scientific Evidence: A Prosecutor's Perspective*, 115 F.R.D. 126, 127. The states that have more liberal criminal discovery provisions, such as Florida and Maine, have adopted rules requiring the government upon proper request to make available reports and results from all experts without limitation to scientific tests or experiments. *See* FLA. R. CRIM. P. 3.220 (a)(1); ME. R. CRIM. P. 16(b)(2)(C).

22. FED. R. CRIM. P. 16(a)(2); United States v. Taylor, 802 F.2d 1108, 1118 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1309 (1987); United States v. Campagnuolo, 592 F.2d 852, 858 (5th Cir. 1979); United States v. Callahan, 534 F.2d 763, 766 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976); United States v. Spagnuolo, 515 F.2d 818, 821 (9th Cir. 1975), *rev'd on other grounds*, 549 F.2d 705 (9th Cir. 1977); United States v. Litman, 547 F. Supp. 645, 652 (W.D. Pa. 1982); United States v. Penix, 516 F. Supp. 248, 252 (W.D. Okla. 1981).

23. Amendments to the Federal Rules of Criminal Procedure were promulgated by the Supreme Court on April 22, 1974, and the effective date of these amendments was postponed by Congress for one year. During that year, Congress conducted extensive hearings on the proposed changes. *Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 1 (1974) (statement of William L. Hungate) [hereinafter *House Hearings*].

As sent to Congress, the Supreme Court amendments to federal criminal procedure would have provided for defense discovery of the names, addresses, and criminal record of government witnesses. *Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., lst Sess. 75 (1975) [hereinafter *Senate Hearings*]. After exten-

The discussion of witness harm and intimidation in the legislative history does not include an analysis of whether the rationale for limiting discovery applies equally to all witnesses and all criminal cases. Consequently, no discussion indicates whether this limitation should apply to expert witness statements or identities.[24] In addition, the history does not disclose any consideration of the undesirable effects of the limitation when combined with the extensive use of experts. Hence, other than a generalized and vaguely defined concern for witness protection, the general limitation on discovery does not appear aimed at or supported by other goals. Neither does it reflect much consideration for the consequences of enacting the provision.

The concerns about witness harm, intimidation, and bribery do not apply with much force to expert witnesses. An expert witness can be replaced by another expert if something untoward happens prior to his testimony, and the newly employed expert may rely upon and quote the work done by the previous expert.[25] This transferability of expert data protects the expert witness from harm since those inclined to do the expert harm realize it will not have the desired benefit.[26] Moreover, the close working relationship between the prosecutor and expert witness prior to trial lessens the risk of bribery because an expert's change of testimony on the witness stand would invite perjury charges.

These considerations suggest that Congress' generalized concerns about witness intimidation have little force in the context of both scientific and nonscientific expert testimony. In fact, Congress' own actions point to the same conclusion: the provision for discovery of scientific reports suggests that Con-

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sive hearings, the House of Representatives altered this Supreme Court version to require the government to provide the names of witnesses, but only three days prior to trial. *Id.* at 14. This time limit of three days in the House version appears to have been in response to intense opposition by the Department of Justice to the proposal that witness names and addresses be subject to pretrial discovery. *House Hearings* at 38-52 (testimony of W. Vincent Rakestraw) and 146-50 (testimony of Richard L. Thornburgh). The House apparently thought that requiring such disclosure only three days prior to trial would protect the witnesses from harm and at the same time provide the defense with sufficient time to prepare its case. The Department of Justice also opposed this House version of the proposed amendments. *Senate Hearings* at 164-66 (statement of John C. Keeney). The Department of Justice ultimately prevailed since rule 16 as finally adopted included no provision for the discovery of witness names or addresses.

24. The language of rule 16 itself clearly shows that Congress had no difficulty in deciding that the discovery provisions should be applied differently depending on the kind of witness. Under Federal Rule of Criminal Procedure 16(a)(1)(A) a corporate defendant, unlike other defendants, may have access to the grand jury testimony of certain witnesses; under Federal Rule of Criminal Procedure 16(a)(2) a defendant cannot obtain discovery of government agent reports; and of course, Federal Rule of Criminal Procedure 16(a)(1)(D) provides for discovery of scientific tests and experiments. Thus the rule does not indicate that Congress intended to devise a discovery system that would apply equally to all witnesses and all information. Rather, the system devised evinces a recognition that different categories of witnesses may require different discovery modes.

25. United States v. 1014.16 Acres of Land, 558 F. Supp. 1238, 1242 (W.D. Mo. 1983), *aff'd*, 739 F.2d 1371 (8th Cir. 1984); United States v. Phillips, 515 F. Supp. 758, 762-63 (E.D. Ky. 1981).

26. No empirical study shows how defendants inclined to such behavior learn that it will be fruitless. Common sense tells us that a person inclined to acts of violence or bribery will focus on the essential fact witnesses to the crime, may not comprehend the importance of the expert testimony without prior consultation with a lawyer, and during this consultation may learn that the expert can be replaced by another expert. In opposing the discovery of witness identity, the Department of Justice prepared an extensive list of cases in which government witnesses had been hurt, threatened, or bribed. According to this list of cases, the witnesses in danger were fact witnesses, not expert witnesses. *Senate Hearings*, *supra* note 23, at 176-209 (statement of John C. Keeney).

gress was less concerned about witness harassment or intimidation when the expert is the witness.

Is there any existing procedural avenue[27] other than the discovery of the scientific expert's report that could help a criminal defense lawyer prepare to cross-examine an expert? Courts have held that discovery of the identity of prosecution witnesses is within the discretion of the trial judge. Therefore, in a particular case a trial court may order the government to provide the defense with the names of its witnesses if the witnesses could provide the defendant with exculpatory evidence.[28] The government may refuse to comply with such an order and may appeal in the appropriate case the sanctions imposed for its failure to comply.[29]

Further, courts occasionally do order pretrial discovery of witness statements. Such orders, however, are uniformly reversed when the government decides to contest them. Appellate courts are consistent in holding that the discovery of witness statements is governed solely by the Jencks Act, and that since that Act clearly provides for discovery of witness statements only after the witness testifies on direct, any order mandating pretrial disclosure is beyond the power of the trial judge.[30] Thus unlike the disclosure of a witness list, which is within the trial judge's power to order, the disclosure of witness statements prior to trial is not within the judge's discretion to order.[31] Hence, a defense lawyer cannot expect to obtain discovery of witness statements beyond the limits of rule 16.

Another possible procedural device available to defense counsel is a rule 17(c) subpoena seeking pretrial release of documents in the expert's possession relating to the criminal matter.[32] Such a device would at least provide the law-

27. This portion of the Article focuses on procedural relief. Constitutional relief is discussed *infra* at notes 172-220 and accompanying text.

28. United States v. Cadet, 727 F.2d 1453, 1467-68 (9th Cir. 1984); United States v. Fischel, 686 F.2d 1082, 1092-93 (5th Cir. 1982); United States v. Oliver, 570 F.2d 397, 401 (1st Cir. 1978); United States v. Cannone, 528 F.2d 296, 299-302 (2d Cir. 1975).

29. 18 U.S.C. § 3731 (1985). Because it has been held that trial judges have the discretion to order the pretrial production of such witness lists, a successful government appeal of such an order is difficult. The government often has to make a special showing that the production of a witness list will create harm to the witnesses. United States v. Harris, 542 F.2d 1283, 1291 (7th Cir. 1976), *cert. denied sub nom.*, Clay v. United States, 430 U.S. 934 (1977); Cannone, 528 F.2d at 302.

30. United States v. Liuzzo, 739 F.2d 541, 544 (11th Cir. 1984); United States v. Algie, 667 F.2d 569, 571 (6th Cir. 1982); United States v. Campagnuolo, 592 F.2d 852, 858 (5th Cir. 1979); United States v. Callahan, 534 F.2d 763, 764-66 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976); United States v. Spagnuolo, 515 F.2d 818, 821 (9th Cir. 1975), *rev'd on other grounds*, 549 F.2d 705 (9th Cir. 1977); United States v. Fischbach & Moore, 576 F. Supp. 1384, 1393 (W.D. Pa. 1983).

31. *See* United States v. Gatto, 763 F.2d 1040, 1044-46 (9th Cir. 1985) (discussion of how the principle of separation of powers limits the ability of the judiciary to use its supervisory powers to expand criminal discovery).

32. The Federal Rules of Criminal Procedure state:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

yer with the documentation used by the expert. This solution, however, has several problems. First, issuance of a rule 17(c) subpoena is at the discretion of the trial court and is not permitted if intended as a discovery device.[33] Second, the expert may have few such documents in her possession, depending on her area of expertise.[34] For example, in the initial hypothetical story, the expert may have had no documents other than the tax returns, the offering memorandum of the shelter, and copies of some of the court cases on which he based his opinion. These documents would be of marginal utility to the defense lawyer in preparing an effective cross-examination.[35] Third, the defense lawyer could not seek such a subpoena without first knowing the government's intention to call an expert and the identity of the witness. If a court interprets strictly the discovery provisions of federal criminal procedure, a lawyer will not receive a witness list and thus will have no warning that a nonscientific expert is to be called or that a rule 17(c) subpoena may net him some valuable information. Fourth, rule 17(h) states clearly that statements made by witnesses or prospective witnesses cannot be subpoenaed.[36] Therefore, rule 17 is not a method for obtaining the expert's statements and will not permit counsel to obtain before trial any statements, including hearsay statements from other witnesses, upon which the expert may rely.

Is it possible to depose the opponent's expert prior to trial under existing procedure? Federal Rule of Criminal Procedure 15 only allows a party to take the depositions of his own witnesses.[37] Thus, under federal procedure, depositions are not a pretrial discovery tool for obtaining the other side's evidence.[38]

Finally, defense counsel may seek some procedural relief by filing for a bill

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FED. R. CRIM. P. 17(c).

33. United States v. Nixon, 418 U.S. 683, 698-99 (1974); Bowman Dairy Co. v. United States, 341 U.S. 214, 219-20 (1951); United States v. Gikas, 112 F.R.D. 198, 200-01 (D. Mass. 1986); United States v. Gel Spice Co., 601 F. Supp. 1214, 1224 (E.D.N.Y. 1985).

34. Some experts would have few, if any, documents in their possession related to their testimony. *See infra* notes 101-06 and accompanying text (discussion of use of law enforcement personnel as expert witnesses on the *modus operandi* of certain alleged crimes).

35. See *supra* note 7 and accompanying text for a discussion of why a successful cross-examination of this expert would require pretrial disclosure of the actual cases upon which he relied.

36. The Federal Rules of Criminal Procedure state:

> Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

FED. R. CRIM. P. 17(h).

37. The Federal Rules of Criminal Procedure require the following:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place.

FED. R. CRIM. P. 15(a). *See* United States v. Ismaili, 828 F.2d 153, 159 (3d Cir. 1987); United States v. Fischel, 686 F.2d 1082, 1091 (5th Cir. 1982). *But cf.* United States v. Carrigan, 804 F.2d 599, 602-05 (10th Cir. 1986) (as sanction for prosecutorial misconduct, court allowed defendant to take depositions of government witnesses).

38. Ismaili, 828 F.2d at 159; United States v. Steele, 685 F.2d 793, 809 (3d Cir.), *cert. denied*, 459 U.S. 908 (1982); United States v. Rich, 580 F.2d 929, 933 (9th Cir. 1978), *cert. denied*, 439 U.S. 935 (1978).

of particulars.[39] Under this procedure, defendants are entitled to have an indictment amplified in detail sufficient to enable them to defend themselves adequately without being surprised at trial.[40] Courts, however, repeatedly state that a bill of particulars is not a discovery device, and hence have not permitted the use of a bill of particulars for discovery of witness names or statements.[41] Thus, discovery is not predictably available from this vague and highly discretionary procedure, even if some courts were to accept the bill of particulars as a method of gaining information about the identity and substance of an expert's testimony.

In sum, current discovery rules and practices, both singly and in combination, do not allow defense counsel, as a matter of right, or in any predictable fashion, to receive either: 1) the names or statements of a nonscientific expert; 2) the materials used by any expert in forming his opinion; or 3) an opportunity to question any expert, scientific or not, prior to trial.[42]

Finally, the provisions of the Speedy Trial Act[43] significantly exacerbate the problems of discovery limits because they shorten the time defense counsel has to ferret out the facts for herself. In prosecutions for what is euphemistically called "street crime" (such as bank robbery), the facts may be limited, and defense counsel could learn much by simply interviewing her client. In many complex federal prosecutions, however, the client will have little idea how the government intends to prove its case and thus will be of little assistance in the lawyer's pretrial preparations.[44] Moreover, in such complex prosecutions, the government often will have spent years developing its case and witnesses.[45]

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39. Under the Federal Rules of Criminal Procedure a defendant may request that a trial court order the filing of a bill of particulars by the government. FED. R. CRIM. P. 7(f).

40. Wong Tai v. United States, 273 U.S. 77, 82 (1927); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1567 (1987).

41. United States v. Warren, 772 F.2d 827, 837 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1214 (1986); United States v. Nakashian, 635 F. Supp. 761, 776 (S.D.N.Y. 1986), *rev'd on other grounds*, 820 F.2d 549 (2d Cir. 1987); United States v. Litman, 547 F. Supp. 645, 653-54 (W.D. Pa. 1982). Courts are reluctant to order expansive bills of particulars. Such bills freeze the government's proof at trial due to the requirement that the government's proof must conform to the particulars. *Id.* at 654.

42. Constitutionally based arguments do not routinely allow access to these important facts and documents either. *See infra* notes 172-220 and accompanying text.

43. A criminal trial must commence 70 days from the filing date of the indictment or information, or from the date the defendant appeared before a judicial officer of the court in which the charge is pending, whichever date is first. 18 U.S.C. § 3161(c)(1) (1985).

44. Section IV, part B.1 of this Article discusses how the government goes about proving tax evasion by using the net worth method of proof. This discussion shows how impossible it would be for a defendant to have sufficient information on the government's case or witnesses to provide meaningful assistance to his lawyer in preparing for trial. For example, the defendant would have no way of knowing which financial institutions the government contacted or failed to contact in making its net worth calculation. Trial courts are beginning to recognize that complex cases may require different discovery standards in order to avoid unfairness. United States v. Gallo, 654 F. Supp. 463, 480 (E.D.N.Y. 1987). Moreover, one can expect an increase in complex, federal prosecutions as the government continues to pursue illegal tax schemes, violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1963 (1984), and new crimes added by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 379 (1984), such as credit card fraud and the misuse of credit cards, 18 U.S.C. § 1029(a)(1),(2) (1984); computer fraud, 18 U.S.C. § 1030(a)(1) (1984); and embezzlement from private organizations that receive federal funds, 18 U.S.C. § 666 (1984).

45. Reported cases demonstrate that the government often takes years in conducting its investigations. United States v. United States Gypsum Co., 438 U.S. 422, 427 (1978) (government began its

Given the existing discovery procedure and speedy trial provisions, the defense cannot match this thorough preparation by the government.

## II. EXPERT TESTIMONY UNDER THE FEDERAL RULES OF EVIDENCE

The limited discovery provisions discussed above apply to any witness the government calls. This section explains why these limitations are most inequitable and indefensible when the witness is an expert.[46] To do so, it is first necessary to explore the expansive view of expert testimony under the Federal Rules of Evidence.

Federal Rule of Evidence 703[47] allows an expert to base his opinion on data either perceived or made known to him, in other words, he may base his opinion on hearsay. For decades, experts have based their opinions on hearsay under recognized exceptions to the hearsay rule.[48] This provision is therefore not startling. What is unusual about rule 703 is that it permits an expert's opinion to be based on inadmissible evidence (including inadmissible hearsay) so long as it is the kind of data reasonably relied upon by experts in the field.[49] This expansion of expert testimony makes sense in some contexts. As the advisory note to rule 703 states:

Thus a physician in his own practice bases his diagnosis on informa-

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antitrust investigation in 1966, referred the matter to a grand jury in 1971, and the grand jury only indicted after another 28 months of investigation); United States v. Wilson, 420 U.S. 332, 333-34 (1975) (F.B.I. conducted its investigation for two years in prosecution for converting labor union funds).

46. With a fact witness, as contrasted to an expert witness, a defendant may know the information a government witness will provide. Simply by talking to his client, a defense lawyer is able to prepare for cross-examination even without access to the witness.

47. This rule states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

48. Many of these exceptions were codified in the Federal Rules of Evidence. *See e.g.*, FED. R. EVID. 803(4) (statements for purposes of medical diagnosis); FED. R. EVID. 803(6) (records of regularly conducted activity); FED. R. EVID. 803(18) (learned treatises).

49. The adoption of the expert witness evidence rules was not without controversy. *H.R. 5463, A Bill to Establish Rules of Evidence: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 217, 250 (1974) (testimony of Paul F. Rothstein); *Proposed Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 229, 230-33 (1973) (correspondence from Malcolm T. Dungan), 353 (correspondence from William B. Miller), 299 (correspondence from Frank J. Martell) [hereinafter *Supplement Hearings*]. These criticisms focused on the rules: 1) liberalizing the admission of expert testimony; 2) failing to place any admissibility restriction on the type of data relied upon by the expert; 3) failing to require the expert to reveal the bases of her opinion prior to giving the opinion; and 4) lacking a provision for discovery and notice of the expert.

Those in favor of these expert witness rules noted that the rules would free the courts to accept expert opinion in a variety of areas without cumbersome procedures, such as the use of a hypothetical question, and thus would allow federal law to respond to the growth of technological and specialized knowledge. *Proposed Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 420, 438 (1973) (statement of Alan B. Morrison); *Supplement Hearings, supra*, at 232-33 (correspondence of Malcolm T. Dungan). The expert witness rules were adopted without modification of the proposal sent to Congress by the Supreme Court and without much discussion of the criticisms noted above.

> tion from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validations, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.[50]

Rule 703, however, allows an expert to use inadmissible evidence in all situations, not just those involving life-and-death decisions made by a doctor. To understand the impact of the use of inadmissible evidence, consider the defense lawyer in our hypothetical. Apparently, in order to reach the opinion that the "at risk" rule applied to the tax shelter, the agent relied upon out-of-court statements by investors that the shelter was actually sold to them in 1979, when the "at risk" rule became effective, rather than in 1978. Hence, the expert also concluded that the documents were backdated to make it look as if the transaction actually took place in 1978. The defense lawyer had no knowledge of the witnesses or their inadmissible hearsay statements to the agent on the subject of backdating. Recall that he had no right to see the statements of potential witnesses prior to trial and, under the Jencks Act, had access to the statements of only those witnesses who actually testified on direct at trial.[51] Because the investors who mentioned backdating did not testify—one was ill and one was out of the country—the defense lawyer had no opportunity to see their statements. After the agent testified, the defense lawyer was entitled to see any previous statements made by the agent, but unless the agent's previous statements incorporated by reference the investors' hearsay about backdating, then the lawyer would not see the investors' statements even after the agent testified.[52]

More importantly, it was perfectly proper under Federal Rule of Evidence 703 for the agent to rely on these hearsay statements in forming his opinion that the shelter was really sold in 1979, since this is the type of information reasonably relied upon by agents in audit situations. But the lawyer thought the agent had just made a mistake.[53] One may question why the lawyer did not learn of

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50. FED. R. EVID. 703 advisory committee's note.

51. *See supra* notes 22-23 and accompanying text.

52. See *supra* note 20 and accompanying text for a discussion of the failure of the criminal rules to mandate what a scientific expert's report must contain. The defense bar has long suspected that government witnesses keep to a minimum the information placed in government reports. Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. CAL. L. REV. 461, 475 n.51 (1977).

53. The statements made by the investors to the agent regarding backdating are inadmissible hearsay. While it could be argued that the statements are against the interest of the investors because they would cause the investors to pay additional tax, and thus are admissible under Federal Rule of Evidence 804(b)(3), there has been no showing that the investors are unavailable as defined in Federal Rule of Evidence 804(a). Without some kind of showing of unavailability by the proponent of the evidence, this hearsay exception would not apply. United States v. Pelton, 578 F.2d 701, 709-10 (8th Cir.), *cert. denied*, 429 U.S. 964 (1978). Further, the extent to which the statements of an unavailable witness may be used against a criminal defendant is subject to the requirements of the confrontation clause of the sixth amendment. The impact of the confrontation clause on the hearsay exceptions involving unavailable declarants is unclear. *See* Ohio v. Roberts, 448 U.S. 56 (1980); United States v. Inadi, 475 U.S. 387 (1986).

the backdating from her client. One answer may be that the client is not only a crook, but a fool and did not disclose damaging information to her lawyer. Another answer may be that the unavailable witnesses lied to the agent about the backdating, hoping to ingratiate themselves with the agent and thus obtain a reduction in civil tax penalties. A third possibility may be that the agent either is lying or misunderstood what the investors said. In any event, this hearsay evidence about backdating is not likely to have the same type of reliability as does the inadmissible hearsay used by a doctor in a life-and-death situation. Yet rule 703 does not distinguish these cases.[54]

The problems for defense counsel are apparent, and the provisions of Federal Rule of Evidence 705 compound them.[55] Rule 705 allows an expert to state an opinion without prior disclosure of the underlying facts or data upon which the opinion is based, unless the court requires otherwise.[56] Consequently, an expert such as the agent in the hypothetical may state a critical conclusion—that the shelter was sold in 1979 rather than 1978—without setting out the basis of his opinion. And a defense lawyer, unaware that the basis of the testimony is very damaging evidence against his client, could ask a question resulting in disclosure of the damaging material.

An examination of rule 705's history points even more directly to the inequity of its application in the context of limited criminal discovery. In drafting rule 705, the Supreme Court considered the apparent unfairness of allowing an expert to state a conclusion without also having the expert first state all bases underlying the conclusion. It was argued that nondisclosure of these bases would prevent meaningful cross-examination. On the issue of fairness, the advisory note to rule 705 is instructive:

> If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.[57]

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54. See *supra* note 49 for a discussion of the criticisms launched against the expert witness rules when Congress was considering their adoption. One major criticism centered on the unreliable evidence that would be admitted too often under these rules and argued that the example of the hearsay used by a doctor in a life-and-death situation was misleading. *Supplement Hearings*, *supra* note 49, at 232 (correspondence from Malcolm T. Dungan).

55. Federal Rule of Evidence 705 states: "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

56. While rule 705 grants the court discretion to order the disclosure of the bases of the expert's opinion, it does not guarantee that every judge will do so or that every criminal defendant will receive this vital information prior to the jury hearing the expert's opinion. *See* FED. R. EVID. 705.

57. FED. R. EVID. 705 advisory committee's note.

From this it can be said that the proponents of rule 705 presupposed discoverability, and thus imagined that such expert testimony would take place in a context in which able counsel would have the opportunity to discover sufficient information to cross-examine effectively. Yet, as discussed previously, federal criminal procedure contains nothing comparable to the federal civil rules that force the government to divulge the identity of an expert or the substance and specifics of his opinion.[58] Consequently, the recognized unfairness remains for criminal defendants.

Federal Evidence Rules 703 and 705 combine, therefore, to produce particularly harsh results in the context of government experts in criminal cases, especially nonscientific experts. The substantial absence of discovery in that context greatly magnifies the concern about reliability under rule 703 and undermines the conditions that even rule 705's proponents thought essential to fairness under the rule.

## III. INADEQUACY OF JUDICIAL RESPONSE

The preceding sections have demonstrated the substantial limits on discovery of experts in federal criminal cases, the absence of persuasive reasons for those limits in the expert context, and the drastic result of those limits when combined with the effects of Federal Rules of Evidence 703 and 705. This section examines the judicial response to these troublesome features of the current scheme. The examination leads to three related conclusions. First, courts are not exercising their trial authority in a way that alleviates or remedies the problems described above. Second, the judicial response has, in fact, exacerbated the problems by admitting evidence that does not satisfy the relevant tests of admissibility. Third, courts are likely to be incapable of adequately applying these tests of admissibility as long as the absence of meaningful discovery robs the litigation of necessary information. Hence, inadequate judicial response, itself the result of limited discovery, compounds the problems described earlier. This section demonstrates these conclusions by discussing three themes that courts have used to admit expert testimony that has not satisfied the requisite tests of admissibility.

### A. *Jury Instructions Cure Any Undue Reliance on an Expert's Testimony*

The first theme relates to the test of Federal Rule of Evidence 403:[59] any evidence, including expert testimony, is to be excluded if its probative value is

58. The discovery of experts in civil cases is not without its problems. Federal Rule of Civil Procedure 26(b)(4), which governs the civil discovery of experts, permits the deposition of an expert only upon order of the court. For a discussion of the history and problems surrounding the civil procedural rules regarding discovery of experts, see Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895; Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and A Proposal*, 1977 U. ILL. L.F. 169 [hereinafter Graham, *Part Two*].

59. Federal Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

substantially outweighed by its unduly prejudicial nature. Defense lawyers often object to the government's expert testimony as unduly prejudicial for a number of reasons, including a jury's tendency to give excessive credence to experts.[60] This argument gains force when the area of expertise is novel.[61] But most trial courts give too little weight to these arguments because the courts often ignore the important balancing mandated by Federal Rule of Evidence 403.

The first step in this balancing process is to evaluate probative force. The greater the probative force, the more prejudicial the testimony may be without requiring exclusion. Obviously, the probative value of any expert opinion depends on the foundation or support for the opinion, that is, data used, tests conducted, persons to whom the expert talked, and the method of gathering data. Without knowledge of these bases, one cannot determine whether the expert knows "whereof he speaks"[62] and, therefore, whether the testimony has sufficient probative value.

Unfortunately, the substantial unavailability of expert discovery in federal criminal cases impedes the court's ability to make the inquiry mandated by rule 403 and robs defense counsel of the tools necessary to encourage the courts to so inquire. If defense counsel were armed before trial with sufficient information, she could take the expert witness on *voir dire* at trial to establish the deficiencies in the expert's testimony—for example, that the putative tax accounting expert had no accounting degree, was trained only by the owner of a store-front accounting operation, or had no understanding of the facts of the case. Alternatively, defense counsel could file a motion *in limine* based on facts adduced

60. United States v. Brown, 776 F.2d 397, 401 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977). Studies on the effect of expert witnesses on jury verdicts show that experts significantly influence juries. Most of the studies focus on two areas: 1) expert testimony regarding the accuracy of eyewitness testimony, Fox & Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgment*, 10 L. & HUM. BEHAV. 215 (1986); Hosch, *A Comparison of Three Studies of the Influence of Expert Testimony on Jurors*, 4 L. & HUM. BEHAV. 297 (1980); Hosch, Beck & McIntyre, *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 L. & HUM. BEHAV. 287 (1980); Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOLOGY 9 (1980); Wells, Lindsay & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 L. & HUM. BEHAV. 275 (1980); and 2) expert testimony on the mental condition of a criminal defendant, Haney & Miller, *Definitional Factors in Mental Incompetency*, 54 SOC. & SOC. RES. 520 (1970); A. Hinkle, *The Effect of Expert Witness and Jury Size on Jury Verdicts: A Simulation Study* (August 28, 1979, Ph.D. thesis at Auburn University).

61. When an area of expertise is novel, it often causes courts to review testimony with greater scrutiny. Early on the federal courts adopted the *Frye* approach with regard to scientific evidence. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). This approach looked to the general acceptance in the scientific community of the matter presented by the expert before allowing the testimony. *Id.* at 1014. The clear trend as to scientific evidence is away from the *Frye* "general acceptance" test and toward an analysis of admissibility under the standards articulated in Federal Rules of Evidence 702 and 403.

No matter which approach is adopted, courts continue to recognize, in scientific matters at least, that expert testimony carries with it certain dangers, such as undue reliance on the expert by the jury, and that these dangers are especially strong in novel areas of expertise, thus requiring even closer judicial scrutiny.

62. For a discussion of how an improper foundation and inadequate disclosure of the bases of the expert's opinion may harm a defendant by leading to the admission of evidence of insufficient probative value, see United States v. Kozminski, 821 F.2d 1186, 1209 (6th Cir. 1987) (Krupansky, J., concurring).

during discovery to ask for a pretrial ruling that the expert's testimony, in view of the weaknesses in the bases of the opinion, is not sufficiently probative to outweigh prejudice. Without adequate discovery, however, none of these techniques for examining the bases of the opinion will produce meaningful results,[63] and thus judges are often faced with a scarcity of information with which to determine the probative value of the expert's opinion.

The courts have compounded the problem because they have not openly acknowledged that the information necessary for a meaningful evaluation of probative force is lacking. Instead, they have hidden behind the standard instruction telling the jury not to give more weight to the expert's testimony than to that of any other witness. These courts reason that the instruction cures any prejudice that flows from the expert testimony or the inadequate bases of the opinion.[64] But this is an abdication of the judge's pivotal role in deciding preliminarily all questions of relevance. If the expert has an insufficient basis for his opinion, it should not be admitted in the first place, for without sufficient bases, the opinion arguably is not relevant. Judges should require a statement of the bases of the expert's opinion whenever the circumstances are appropriate. The rules of evidence require nothing less, but the rules of discovery prevent exposure of such appropriate circumstances in many cases.

A judge always has the option of requiring an expert to disclose while testifying on direct all bases of the opinion. But to do so would ignore the mandate of rule 705 to do away with such a procedure in every trial. Thus, as suggested by the advisory committee note to rule 705, a judge must depend largely on the adversary system to inform him when he should question the probative value of the expert's opinion and when he should inquire into the bases of the opinion in order to evaluate probative value. Unfortunately, the federal criminal discovery regime prevents the adversary system from adequately assisting the courts and thus prevents Federal Rule of Evidence 403 from functioning as it should.[65]

### B. *Since The Expert Was An Effective Witness, The Testimony Was Relevant and Admissible*

An increasingly popular standard judicial response to the issue of prejudice from expert testimony is summarily to dismiss the argument of prejudice by

63. Without such discovery, we are asking the defense lawyer to conduct a *voir dire* examination or file a motion *in limine* based solely on supposition and often without the time necessary to establish proof of the inadequate bases of the expert's opinion. Our system of justice cannot expect lawyers to conduct a meaningful impromptu inquiry of an expert, and without such meaningful inquiry there is no testing of the probative value of the opinion prior to its submission to the jury.

64. United States v. Barnette, 800 F.2d 1558, 1569 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); United States v. Clardy, 612 F.2d 1139, 1153 (9th Cir. 1980); United States v. Milton, 555 F.2d 1198, 1204 (5th Cir. 1977).

65. The inadequate discovery system provides little ammunition for the defense counsel to use in convincing the court to exercise its discretion under rule 705. Further, under the present discovery regime, the defense lawyer may have no warning that an expert will be called, thereby reducing the likelihood that he will have prepared a cogent argument for why the court should ignore the standard procedure of rule 705 and opt instead for the special procedure of requiring the disclosure on direct of the bases of the expert's opinion.

concluding that the expert testimony was correct, unrebutted, or convincing.[66] This approach changes the order of the steps that traditionally are and should be used in deciding admissibility. A judge should decide admissibility not by referring to the ultimate effectiveness of the witness but by balancing the stated relevance of the evidence against the possible prejudice flowing from it.[67] Because this assessment usually should occur before the jury hears the testimony, the judge cannot properly rule on admissibility by referring to the convincing or unrebutted nature of the testimony.[68]

More importantly, because this approach focuses solely and incorrectly on the factual information or stated opinion conveyed by the expert, it fails to take into account the psychological effect of such evidence on the jury. Given the "aura of special reliability" cast by experts, the question should not be whether an expert was convincing or unrebutted, but whether the facts presented by the expert were sufficiently probative to outweigh the prejudice associated with this special kind of evidence.[69]

An example of this improper standard at work will demonstrate the harm it presents to defendants. In *United States v. Milton*,[70] the government indicted the defendant for participating in an illegal gambling operation. The statute forming the basis of the charge required that five or more people comprise such an operation.[71] In this case the government had difficulty establishing that five people participated in the business. The government, however, did have a transcript of a monitored telephone call in which a certain individual stated: "A friend of mine gave me Florida plus," and "I'll hold a couple of dollars on that myself." [72]

To interpret this gambling jargon, the government called a federal agent as a gambling expert. He translated this information to mean, in common usage, that the speaker was accepting wagers from a friend and passing them on to the gambling business for profit.[73] As the final blow to the defense and to underline the reason the government wanted the expert's testimony in the first place, the expert concluded that an individual is part of the gambling business whenever he accepts wagers, even from a friend, and passes the wagers to a business for profit.[74] The government used this expert's conclusion to establish the speaker

66. United States v. Systems Architects, Inc., 757 F.2d 373, 377 (1st Cir.), *cert. denied*, 474 U.S. 847 (1985); United States v. Milton, 555 F.2d 1198, 1204 (5th Cir. 1977); United States v. Sickles, 524 F. Supp. 506, 512 (D. Del. 1981).

67. *See supra* notes 59-65 and accompanying text.

68. The question of impermissible burden-shifting arises in this context. When the court concludes that the expert's testimony was properly admitted because it was unrebutted, does this improperly shift the burden of persuasion to the defendant? *See In re* Winship, 397 U.S. 358 (1970). Or is this only a matter of the burden of production, which may be shifted? The issue of shifting burdens of persuasion and production, the distinction between the two burdens, and the validity of such distinctions is beyond the scope of this Article.

69. *See supra* note 60 and accompanying text.

70. 555 F.2d 1198 (5th Cir. 1977).

71. 18 U.S.C. § 1955 (1982).

72. United States v. Milton, 555 F.2d 1198, 1204 (5th Cir. 1977).

73. *Id.*

74. *Id.*

as the fifth participant in the gambling operation, proof vital to the prima facie case.

The defendants on appeal objected first to the use of the expert to interpret the telephone call and second to the use of the expert to conclude that the speaker on the transcript was part of the gambling business. The defendants claimed that this latter conclusion invaded the province of the jury.[75]

The United States Court of Appeals for the Fifth Circuit rejected these arguments. As to the expert's statement that the individual quoted in the transcript was part of the business, the court concluded that the expert was simply drawing from his experience in interpreting this transcript, and that "[t]here is no contention that, insofar as the agent stated the law, he stated it incorrectly."[76] Thus, the court used its perception of the correctness of the expert's opinion to conclude that the opinion was admissible.

This analysis fails to account for the effect such expert testimony has on the jury. The question is not only whether the expert is correct. The court should also inquire whether the expert's aura of special reliability would so cloud the jury's consideration that it could not reach an independent and different conclusion on the meaning of the transcript.[77] Simply responding that "the expert was correct" ignores substantial and convincing precedent holding that evidence should be excluded if unduly prejudicial no matter how correct.[78] Additionally, a jury instruction incorporating the expert's legal conclusion would be no answer to this problem. The judge's instruction would simply inform the jury what it might conclude from the evidence, but the expert's testimony would supply the actual conclusion cloaked in the aura of the expert's special reliability. The inadequacy of this judicial theme—that the expert was correct—becomes more blatant when one realizes that the defense may not be in a position to rebut the expert's testimony effectively since the defense had no notice that the government would call an expert. Moreover, even if the defense were aware (either through notice or common sense) that the government would call an expert, the inability to discover the details of the expert's testimony may prevent anticipation and thus prevent effective rebuttal of all aspects of the testimony.

The court's perception of "correctness," then, may result in part from the limited discovery available to defense counsel. The "correct expert" theme thus exacerbates rather than remedies the problem. Defendants do not have sufficient

75. For a discussion of the use of experts on the law, see Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797 (1984).

76. *Milton*, 555 F.2d at 1204.

77. The appellate court in *Milton* noted that the jury had been instructed not to give unusual deference to the expert's testimony and to take the court's instructions as the sole source of the applicable law. *Id.* This conjuring of fairness in the guise of jury instructions does not adequately replace the need for the judge to determine initially whether the expert's opinion is sufficiently probative to outweigh the prejudice that flows from the expert's "special aura of reliability." *See supra* notes 59-65 and accompanying text.

78. Courts will exclude especially gruesome photographs and other evidence that the judge decides will unduly inflame the jury or appeal to its sympathy. Such evidence is excluded not because it is incorrect but because it is unduly prejudicial. United States v. Sostarich, 684 F.2d 606, 608 (8th Cir. 1982); United States v. Anderson, 584 F.2d 849, 851 (6th Cir. 1978); Grimes v. Employers Mut. Liab. Ins. Co. of Wisconsin, 73 F.R.D. 607, 610 (D. Alaska 1977).

discovery to cross-examine or rebut expert testimony adequately. Their failure to do so allows the courts more readily to conclude that the expert is correct, and then to reject defense arguments concerning prejudice under Federal Rule of Evidence 403. In this environment, "correctness" of testimony is illusory, and the illusion should not be a reason for admitting the testimony.[79]

### C. *An Expert Is Permitted to Use Hearsay So Long As It Is the Kind of Data Usually Relied on by Experts in the Field*

One of the most controversial and expansive aspects of the Federal Rules of Evidence is the provision, discussed earlier, that allows an expert to use inadmissible evidence as the basis of an opinion so long as the evidence is of the type usually relied upon by experts in the field. In practice, hearsay is the type of inadmissible evidence most often permitted under this provision of rule 703.[80] As courts have frequently noted, it is almost impossible for an expert to testify without reference to hearsay.[81] Experts by definition are trained or educated in specialized areas and have acquired knowledge from a variety of sources, all of which could not possibly be presented as evidence in a trial. In fact, the more exposure an expert has to a variety of hearsay sources the greater the reliability of his opinion and the more likely his acceptance by the court as an expert.

While all experts use hearsay to some extent, even if only in applying the knowledge acquired from data outside the record to a certain set of facts, courts are too ready to accept expert use of hearsay in criminal cases without also applying certain constitutional standards to the decision to admit the testimony. Under standard sixth amendment analysis, hearsay may be used as substantive evidence against a criminal defendant without violating his right to confrontation only if the hearsay has indicia of reliability and trustworthiness.[82]

The Supreme Court has not set a definite standard for such reliability but

79. If the only evidence against a defendant was the expert's opinion that he was guilty, would that conviction be upheld because the expert was correct? As facetious as this sounds, consider United States v. Brown, 776 F.2d 397 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986). The defendant was convicted of distributing heroin based in large measure on the testimony of a police officer qualified as an expert on drug sales in Harlem. The officer testified that, due to frequent police activity, drug dealers were cautious and employed certain individuals to determine whether any potential buyer was a police officer. These individuals were called steerers. The expert then concluded that the defendant in this case had acted as a steerer. The defendant's role as steerer, as described by the expert, tied him to the crime. In a thoughtful opinion by Judge Friendly, the court grappled with the limits on the use of such expert testimony, and in so doing discussed a pre-Federal Rules of Evidence case, United States v. Sette, 334 F.2d 267, 269 (2d Cir. 1964). In *Sette* the court decided that such expert testimony was impermissible if it was needed to establish the government's prima facie case. It could only be used to bolster the government's prima facie case. The holding in *Sette* and the opinion of Judge Friendly in *Brown* should be reviewed more frequently by courts deciding the admissibility of expert testimony.

80. The advisory committee's note to Federal Rule of Evidence 703 suggests that the drafters of the rule also believed that hearsay would be the type of evidence most widely used in this context. FED. R. EVID. 703 advisory committee's note. As evidence of this belief, see the example in the committee's note discussing a physician who uses statements by patients, relatives, and other doctors in reaching his diagnosis. *Id.*

81. Reardon v. Manson, 806 F.2d 39, 42 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1903 (1987).

82. Ohio v. Roberts, 448 U.S. 56, 65-66 (1980).

has stated that well-rooted hearsay exceptions have such indicia.[83] Thus, for example, an expert may probably rely on a learned treatise in reaching his opinion since under the rules of evidence, such use of a learned treatise is a well-rooted exception to the hearsay rule.[84] As to hearsay not admitted under such a traditional exception, the Supreme Court has not explicitly rejected its use. Rather, the Court has formulated the test that the hearsay must have particularized guarantees of trustworthiness.[85] Thus, courts should inquire whether the hearsay relied upon by the expert is being offered as substantive evidence, and, if so, whether it has sufficient indicia of reliability to satisfy the sixth amendment. This constitutional analysis would be in addition to rule 703's requirement that the hearsay be of the kind reasonably relied upon by experts in the field.

Despite the force of this constitutional analysis, very few cases involving the use of hearsay by an expert focus on the sixth amendment requirement that such evidence be reliable if admitted substantively.[86] Rather, courts sustain the use of such hearsay solely by deciding that the evidence is the kind of data generally relied on by experts in the field.[87] At the same time as they ignore the underlying constitutional issue of reliability, courts compound the problem by allowing the expert himself to be the only proof that the hearsay was reasonably relied upon by experts in the field.[88]

The system's safeguards that are capable of preventing unreliable expert testimony—the sixth amendment's reliability test and rule 703's requirement of reasonable reliance—are not being used by the courts to protect the integrity of the fact-finding process. The courts must rely to some extent on the adversary process to trigger the system's safeguards, and once again they receive little assistance from defense counsel in providing this protection. Because in many cases defense counsel does not learn of the expert's use of inadmissible hearsay until the expert testifies, the lawyer is unprepared to argue effectively either the sixth amendment or rule 703 reliability issues. With inadequate input from the

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83. *Id.*

84. FED. R. EVID. 803(18).

85. *Roberts*, 448 U.S. at 66.

86. A fiction has been created that since the expert is relying on the hearsay only to form his opinion, the hearsay is not being admitted for substantive purposes but rather only to show the basis of the expert's opinion and to allow the jury to evaluate the caliber of his work. By using this analysis, courts avoid the pressure to perform a confrontation analysis before admitting expert testimony. There continues to be debate over this issue; should inadmissible hearsay used by the expert be more closely scrutinized under traditional constitutional and legal analysis, or should the courts forego such scrutiny so long as there is no direct assertion that the hearsay is being admitted as substantive evidence? *See* Carlson, *Collision Course*, *supra* note 16; United States v. Unruh, 827 F.2d 501, 514-15 (9th Cir. 1987); United States v. Affleck, 776 F.2d 1451, 1457 (10th Cir. 1985).

87. United States v. Kail, 804 F.2d 441, 447-48 (8th Cir. 1986). The casual treatment in *Kail* of this confrontation issue should be contrasted to the serious consideration given the issue in *Reardon*, 806 F.2d at 41-43. Although the *Reardon* court ultimately upheld the conviction and the use of hearsay by the expert, it did not ignore the confrontation issue or dismiss the use of hearsay as only a question for the jury to consider in evaluating the expert's testimony.

88. Commentators also have noted this bootstrap problem with scientific experts whose testimony becomes the only source of information to guide the judge in deciding whether the material the expert used is the kind reasonably relied on by experts in the field. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986); Moenssens, *Admissibility of Scientific Evidence—An Alternative to the* Frye *Rule*, 25 WM. & MARY L. REV. 545 (1984).

defense, it is little wonder that judges who face crowded dockets and scarce judicial resources are not eager to reverse convictions based on the unsupported conclusion that the bases of the expert's opinion could have been unreliable.

The judicial themes just discussed reveal that the courts, in the context of the expert used by the government in a criminal case, insufficiently evaluate: 1) rule 403 balancing; 2) constitutionally mandated indicia of reliability; and 3) the influence of the expert's special aura of reliability. Hence, judicial practice has not alleviated, and in fact has worsened, the problems of inadequate discovery of experts. One can attribute some of the courts' failings to the inadequate discovery regime because that regime robs courts of the information they need to make the type of inquiries that are called for and robs defense lawyers of the tools they need to interest courts in making such inquiries.[89]

## IV. USE OF NONSCIENTIFIC EXPERT TESTIMONY IN FEDERAL CRIMINAL CASES

A closer look at the types and scope of expert testimony admitted in federal criminal cases will reveal the breadth and variety of the contexts in which such nonscientific expert testimony is admissible and thus will underscore that this is not a problem of limited scope. In addition, a more detailed look at several contexts will show the severity of the problems that the current regime creates for defense counsel.

### A. *Types of Federal Criminal Cases Using Nonscientific Experts*

#### 1. Economic Crimes

Experts are being permitted to testify on a wide range of topics in the prosecution of "economic" crimes from bank fraud to tax fraud. For example, in bank fraud prosecutions involving the use of false information on loan applications,[90] experts have been permitted to conclude that certain information in a loan application had the capacity to influence the loan decision.[91] Such testimony is critical in these prosecutions because the government has to establish that the false information was material to the bank fraud.[92] If such information could not have influenced the bank in a loan decision, then it was not material and not illegal under federal law. These experts are not fact witnesses who can testify that they relied personally on such false information. Rather, they testify about the general likelihood that a bank would rely on the information.[93]

89. One can assume that the government's use of nonscientific experts in criminal cases will increase. First, as discussed *supra* at note 44, the number of complex federal prosecutions is increasing. Second, the government is becoming accustomed to relying on such expert testimony in criminal prosecutions and seeing the benefits to such use.

90. 18 U.S.C. § 1014 (1982).

91. United States v. Lueben, 812 F.2d 179, 184 (5th Cir.), *modified*, 816 F.2d 1032 (5th Cir. 1987); United States v. Kelley, 615 F.2d 378, 379-80 (5th Cir. 1980).

92. United States v. Stephens, 779 F.2d 232, 237 (5th Cir. 1985); United States v. Johnson, 585 F.2d 119, 124 (5th Cir. 1978).

93. Courts have interpreted the statute, 18 U.S.C. § 1014 (1982), to require the government to prove only that the false statement had the capacity to influence the bank in making a decision but

Experts are frequently used in other banking crimes, most notably in prosecutions under 18 U.S.C. § 656, for misapplication of bank funds. These experts usually testify that the bank failed to properly secure loans to financially incapable individuals.[94] Under the statute, a bank officer who so acts is guilty of misapplication of bank funds.[95]

Also in the area of economic crimes, economists on the staff of the Antitrust Division of the Department of Justice regularly testify in criminal antitrust matters.[96] Similarly, the government frequently uses experts in securities prosecutions.[97] These experts tend to be government employees, either lawyers or accountants, who are readily available to the government.[98]

The use of in-house experts is most apparent in tax prosecutions.[99] The government regularly calls Internal Revenue agents as experts. Interestingly, given the inevitable conclusions of the government tax expert—that a tax is owed, that a sum of money should have been declared as income, or that a deduction should not have been taken—one could easily argue that the expert must base his opinion on the Internal Revenue Code and its interpretations in virtually every tax prosecution. Yet, these sources of law are not admissible evidence at trial.[100]

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not that the statement actually influenced the bank. This is important because often bank insiders are involved in the fraudulent scheme, knew of falsity of the information, and thus did not rely on this information in making the loan. The bank insiders were part of a plan to defraud the bank. *Johnson*, 585 F.2d at 124. It is these "insider" cases that produce the greatest need for expert testimony on the materiality of the false information since the expert will testify as to what would have happened if no insiders had been involved. These insider cases are the most difficult to prove and the most complex, often involving financial transactions that may confuse a jury. Thus, the government will have the expert untangle the evidence by stating the simple conclusion that all the complicated financial dealings were false and had the capacity to influence the bank's loan decision.

94. United States v. Unruh, 827 F.2d 501, 514-15 (9th Cir. 1987); United States v. Blackwood, 735 F.2d 142, 146 (4th Cir. 1984).

95. *Blackwood*, 735 F.2d at 145.

96. United States v. Dunham Concrete Prods., 475 F.2d 1241, 1247 (5th Cir.), *cert. denied*, 414 U.S. 832 (1973).

97. United States v. Affleck, 776 F.2d 1451, 1456-58 (10th Cir. 1985); United States v. Bednar, 728 F.2d 1043, 1047-48 (8th Cir.), *cert. denied*, 469 U.S. 827 (1984); United States v. Piepgrass, 425 F.2d 194, 199-200 (9th Cir. 1970).

98. These cases cited above, *Dunham Concrete*, *Bednar*, and *Piepgrass*, as well as many cases cited *infra* notes 99-101, indicate that the expert used by the government was on staff. Using government personnel as experts, and in fact maintaining an office of such experts as the Antitrust Division of the Department of Justice does, is efficient. It reduces the time the government has to use in searching for an expert, and it reduces the cost of procuring such expert advice and testimony. This must be contrasted with the situation for most defense lawyers who have clients with limited economic resources to use in locating and employing an expert. Even when located and retained, such independent experts, unlike government personnel, will not be available at all times except at an extraordinarily high cost.

99. United States v. Blood, 806 F.2d 1218, 1222 (4th Cir. 1986); United States v. Barnette, 800 F.2d 1558, 1564 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); United States v. Marchini, 797 F.2d 759, 765-66 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); United States v. Windfelder, 790 F.2d 576, 580-82 (7th Cir. 1986); United States v. Hawley, 768 F.2d 249, 251-52 (8th Cir. 1985); United States v. Little, 753 F.2d 1420, 1445 (9th Cir. 1984); United States v. Scott, 660 F.2d 1145, 1172-73 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); United States v. Head, 641 F.2d 174, 181 (4th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983); United States v. Fogg, 652 F.2d 551, 555-57 (5th Cir. 1981); United States v. Genser, 582 F.2d 292, 298-99 (3d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979); United States v. Schafer, 580 F.2d 774, 778-80 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978).

100. The reality that tax experts must base their opinions on evidence outside the record has been ignored by some courts who have ostensibly required tax experts to use only evidence admitted

### 2. *Modus Operandi*

The government's use of law enforcement personnel as experts on the *modus operandi* of certain criminal schemes has proliferated.[101] Examples of such *modus operandi* evidence include federal officers testifying as experts to 1) the common elements of marijuana importation,[102] 2) the purposes for which a sifter-grinder is used in the cocaine business,[103] 3) the characteristics of mail-fraud schemes,[104] and 4) the operations of narcotics dealers generally.[105]

Given the byzantine nature of the illegal drug business, it is often difficult to obtain direct evidence of a particular defendant's criminal involvement. Consequently, the government often must rely on circumstantial evidence, and the testimony of law enforcement experts is necessary to weave the pieces of circumstantial evidence into a coherent picture proving that a particular defendant was involved in a particular drug transaction. This is especially necessary with respect to the more removed and insulated operatives of the trade.

This type of *modus operandi* evidence is not used solely in narcotics prosecutions, and its introduction has been attempted in other federal prosecutions, such as mail fraud. In any type of case, the need for this type of expert opinion increases as the reliance on circumstantial evidence increases. Criminal tax prosecutions, for example, are almost always based entirely on circumstantial evidence, and in such prosecutions the government routinely uses experts.[106]

### 3. Valuation Cases

The government uses experts extensively in federal criminal cases in which

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at trial to reach their conclusions. *See* United States v. Schafter, 580 F.2d 774, 778 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978); *infra* note 126 and accompanying text.

101. United States v. Rivera Rodriguez, 808 F.2d 886, 888 (1st. Cir. 1986); United States v. McCollum, 802 F.2d 344, 346 (9th Cir. 1986); United States v. Cruz, 797 F.2d 90, 96 (2d Cir. 1986); United States v. Wright-Barker, 784 F.2d 161, 169 (3d Cir. 1986); United States v. Monu, 782 F.2d 1209, 1210-11 (4th Cir. 1986); United States v. Brown, 776 F.2d 397, 399-400 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); United States v. Rogers, 769 F.2d 1418, 1425 (9th Cir. 1985); United States v. Ginsberg, 758 F.2d 823, 830 (2d Cir. 1985); United States v. Young, 745 F.2d 733, 760-61 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984); United States v. Hensel, 699 F.2d 18, 38 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983).

Once again these experts in the *modus operandi* area are usually law enforcement personnel who are on staff and readily available to the prosecution. The ease of procuring such expert testimony may account, in part, for its proliferation.

102. United States v. Wright-Barker, 784 F.2d 161, 169 (3d Cir. 1986); United States v. Hensel, 699 F.2d 18, 38 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983).

103. United States v. Rivera Rodriguez, 808 F.2d 886, 888 (1st Cir. 1986).

104. United States v. McCollum, 802 F.2d 344, 345 (9th Cir. 1986); United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984).

105. United States v. Cruz, 797 F.2d 90, 94-95 (2d Cir. 1986); United States v. Khan, 787 F.2d 28, 34 (2d Cir. 1986); United States v. Brown, 776 F.2d 397, 399-400 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986); United States v. Ginsberg, 758 F.2d 823, 830 (2d Cir. 1985); United States v. Young, 745 F.2d 733, 760-61 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

106. Those familiar with federal criminal prosecutions will realize that such prosecutions are often complex and involve only circumstantial evidence. The federal prosecution that involves eyewitness testimony, such as a bank robbery case, is not as common as one may think. Even in drug prosecutions, the government often is forced to rely on circumstantial evidence to link an alleged drug dealer with the charged crime. This need to link pieces of evidence together in complex cases will result in an increased use of government experts.

the prosecution must establish the value of an item or service. Such cases include those in which the government must prove the value of stolen property as an element of the offense[107] or must prove fraud through the overvaluation of the property sold or service rendered.[108]

Establishing value in these criminal cases is very similar to establishing value in condemnation or civil tax cases. Experts testify as to the market value of an item or service, because market value usually determines the value under the relevant statutory scheme. Obviously, the government must use circumstantial and opinion evidence to prove market value. However, in contrast to condemnation or civil tax cases, the criminal defendant has no opportunity to depose the government's expert about the factors that the expert used to determine market value, or even to learn through interrogatories about the bases of the expert's opinion.

### 4. Other Cases

While experts are used most extensively in the nonscientific settings described above, federal prosecutors display remarkable creativity in enlisting the aid of experts generally. The following is only a partial list of the areas in which the government has used expert testimony in criminal cases: to establish the harmful effects of certain chemicals on grain;[109] to interpret transcripts of conversations in order to establish the existence of a gambling operation;[110] to establish that a shipment of quaaludes originated in Columbia;[111] to establish medicare fraud;[112] to show that a weapon was shipped in interstate commerce;[113] to prove that stolen items related to national defense;[114] to identify shoes as belonging to a defendant;[115] to interpret three words on a piece of paper in order to prove a smuggling operation;[116] to show bankruptcy fraud;[117] to establish the ultimate aims of the Communist Party and the meaning of the terminology used by the Communist Party;[118] to establish the meaning of cer-

107. *See* United States v. Laughlin, 804 F.2d 1336, 1339 (5th Cir. 1986); United States v. Wallace, 800 F.2d 1509, 1511 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1901 (1987). Both cases involved prosecutions under 18 U.S.C. § 2314 (1982), which makes it a federal crime to transport stolen goods in interstate commerce if the goods have a value of at least $5,000.

108. United States v. Kail, 804 F.2d 441, 443-44 (8th Cir. 1986); United States v. Systems Architects, Inc., 757 F.2d 373, 377 (1st Cir. 1985), *cert. denied*, 474 U.S. 847 (1985).

109. United States v. Barnett, 587 F.2d 252, 256 (5th Cir.), *cert. denied*, 441 U.S. 923 (1979).

110. United States v. Milton, 555 F.2d 1198, 1203-05 (5th Cir. 1977); United States v. Morrison, 531 F.2d 1089, 1094 (1st Cir.), *cert. denied*, 429 U.S. 837 (1976).

111. United States v. Arias, 678 F.2d 1202, 1206-07 (4th Cir.), *cert. denied*, 459 U.S. 910 (1982).

112. United States v. Gold, 743 F.2d 800, 817 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985).

113. United States v. Sickles, 524 F. Supp. 506, 511-12 (D. Del. 1981).

114. United States v. Lee, 589 F.2d 980, 990 (9th Cir.), *cert. denied*, 444 U.S. 969 (1979).

115. United States v. Ferri, 778 F.2d 985, 988 (3d Cir. 1985), *cert. denied*, 479 U.S. 869 (1986).

116. United States v. Merritt, 736 F.2d 223, 228 (5th Cir. 1984), *cert. denied*, 476 U.S. 1142 (1986).

117. United States v. August, 745 F.2d 400, 406 (6th Cir. 1984); United States v. Dioguardi, 428 F.2d 1033, 1038 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970); Somberg v. United States, 71 F.2d 637, 640 (7th Cir. 1934).

118. Bary v. United States, 248 F.2d 201, 209 (10th Cir. 1957); United States v. Dennis, 183 F.2d 201, 229 (2d Cir. 1950).

tain labor law terms;[119] to show that a listening device was useful primarily for surreptitious listening;[120] to establish the length of a corpse's arm solely based on body build and ethnic type without any actual measurement;[121] and to describe heroin customs in Pakistan.[122]

### B. *Use of Experts in Tax and* Modus Operandi *Cases: A Detailed Look*

#### 1. Tax Cases

To understand why the government uses experts so frequently in tax prosecutions, one must understand the government's tactical considerations in such cases. Numerous statutes form the core of criminal tax prosecutions. But only if the government charges a citizen with the statutory crime of tax evasion[123] must the government prove that a taxpayer did not pay an actual tax due.[124] Nevertheless, the government's practice is to prove, if possible, that a tax was owed in every tax prosecution. This practice is employed because a jury is more likely to convict if the government can establish that the particular crime charged resulted in financial harm to the public due to the loss of this revenue.[125]

Because the government has a perceived need to prove this bottom-line figure of a tax due and owing, it follows that the government also has a tactical reason for calling an expert in most criminal tax prosecutions. This expert explains to the jury the tax harm that a particular defendant has caused. Additionally, the expert testimony is the vehicle by which the government assembles its evidence into a comprehensible package. Tax prosecutions usually involve voluminous documents that establish the tax issue; for example, how much tax was evaded or why a certain entry on a tax return is false. Because the relevance of these documents is not readily apparent to the jury, the government welcomes the chance to use experts to explain what this evidence proves. If, for example, the government puts into evidence hundreds of checks payable to the defendant from the corporation in which she serves as president, the agent-expert might testify that these checks to the defendant were income to her, rather than expense reimbursements. Quite possibly, the jury will not understand the fact that

119. United States v. Kapau, 781 F.2d 740, 745 (9th Cir.), *cert. denied*, 107 S. Ct. 93 (1986).

120. United States v. Wynn, 633 F. Supp. 595, 602 (C.D. Ill. 1986).

121. United States v. Wanoskia, 800 F.2d 235, 237 (10th Cir. 1986).

122. United States v. Kahn, 787 F.2d 28, 34 (2d Cir. 1986).

123. I.R.C. § 7201 (1982) provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment therof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 . . . or imprisoned not more than 5 years, or both, together with the costs of prosecution.

124. For example, two of the most frequently used criminal tax statutes, I.R.C. § 7203 (1986)—involving the crime of willfully failing to file a timely return—and I.R.C. § 7206(1) (1986)—involving willfully making a false or fraudulent statement under the penalties of perjury—do not require that the government establish a tax was due as a result of the crime.

125. Individuals charged with tax crimes are often average citizens who are sympathetic defendants. The government thus perceives that a de minimus tax amount will increase the natural inclination of the jury to feel sorry for such a defendant. *See* 1 D. MCGOWEN, D. O'DAY & K. NORTH, *supra* note 5, at 56.

these corporate checks were income to the defendant until this point of the agent-expert's testimony.

Courts have not always felt comfortable with this kind of tax prosecution witness. Hence, for many years several circuits limited such expert testimony to summaries of the evidence admitted in trial and required that the expert's testimony not go beyond the record for any conclusions.[126] Even then, however, the expert still referred to the Internal Revenue Code and interpretations of it to conclude, for example, that a certain financial transaction was income or that a deduction was improper.[127] Recent cases suggest that this limitation on the expert's use of data no longer exists, and that tax experts can do much more than just summarize evidence.[128] In any event, the agent-expert is always opining on the application of the Internal Revenue Code, and thus is always to some extent an expert on the law,[129] referring to data outside the record.

A discussion of several tax prosecutions will demonstrate the devastating impact of these agent-experts and the inadequacies, discussed earlier, of the judicial approaches to such testimony. One common scenario occurs when the government claims tax evasion but has no direct evidence against the defendant. Consequently the government proves evasion by what has been termed the "net worth" method of proof.[130] Under this method, the government establishes the increase in the defendant's net worth in each prosecution year, compares this increase to the amount of income declared on a tax return for that year, and claims that the difference between the increase in net worth in any year and the amount of income declared on the tax return equals the amount of underreported (or evaded) income. To prove increases in net worth, the government calculates the basis[131] of all the defendant's assets and the amount of all liabili-

126. United States v. Johnson, 319 U.S. 503, 519-20 (1943). While appellate courts cite *Johnson* for the proposition that expert tax testimony is permitted only if it is based on facts in evidence, United States v. Schafer, 580 F.2d 774, 778 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978), in reality these appellate courts have permitted tax experts to give opinions based on their knowledge of the Internal Revenue Code, which was not in evidence. *See* United States v. Marchini, 797 F.2d 759, 765-66 (9th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); United States v. Fogg, 652 F.2d 551, 556-57 (5th Cir. 1981); *Schafer*, 580 F.2d at 778-79. Other courts have never agreed with the proposition that a tax expert is confined to the evidence admitted at trial. Rather, these courts view tax experts as they would any expert and allow opinions based on material reasonably relied upon by experts in the field. United States v. Genser, 582 F.2d 292, 298-99 (3d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979).

127. *Fogg*, 625 F.2d at 555-56.

128. United States v. Barnette, 800 F.2d 1558, 1565 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); United States v. Hawley, 768 F.2d 249, 251 (8th Cir. 1985); United States v. Clardy, 612 F.2d 1139, 1153 (9th Cir. 1980).

129. These experts usually are not offered by the government as "experts on the law." Rather the government asks that the courts accept them as accounting experts. *Fogg*, 652 F.2d at 556-57. It appears that the government is aware of the black-letter adage forbidding expert legal testimony, because the law, as a field of expertise in any particular case, is supposedly within the province of the judge. Note, *supra* note 75, at 797. Consequently, the government attempts to avoid the issue by qualifying the agent-expert as an accountant and avoiding the issue that the agent-expert is also opining on the law.

130. *See* Holland v. United States, 348 U.S. 121 (1954); United States v. Mastropieri, 685 F.2d 776 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982); United States v. Scott, 660 F.2d 1145 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

131. On a very simplified level, the Internal Revenue Code defines basis of property to be its cost, unless otherwise provided. 26 U.S.C. § 1012 (1982).

ties. After subtracting liabilities from assets, the result is net worth.

For example, if a person's only asset is a house which has a basis of $100,000, and that person has only one liability, a $50,000 mortgage on the home, the individual has a net worth of $50,000. If in the next year the individual's assets grow to $200,000, with no increase in liabilities, then his net worth for this new year is $150,000 ($200,000 - 50,000 (mortgage)). His increase in net worth from the first to the second year was $100,000. If in the second year, he reported only $20,000 in income, the government may question how he could increase his net worth by $100,000 on only a $20,000 income. This net worth calculation might then form the core of a prosecution.

Obviously, the tax basis figure given to each asset is critical to this method of proof. To establish these basis figures, the government often has to check documents such as mortgage records, vehicle records, bank accounts, and financial statements.[132] At trial, the government agent-expert's job is to weave this financial evidence into a coherent picture of the defendant's net worth and alleged understated income. The expert typically prepares a net worth schedule to show his calculations.[133]

*United States v. Terrell*[134] is an example of such a case. In *Terrell*, the government failed to include as an asset on its net worth schedule a cattle herd owned by defendant.[135] Essentially, the government's schedule was inaccurate because the government found sales of part of this herd but did not include on the schedule this asset or the sales from it.[136] Defendant appealed his conviction and argued that the absence of an accurate list of assets rendered any net worth calculation unreliable and hence eliminated any proof of evasion. In response, the Fifth Circuit noted that even if the government had included in the schedule all appropriate cattle sales, the defendant would still owe over $100,000 in tax for all of the prosecution years.

This response is incorrect. It misconceives the nature of the net worth method of proof. Under this method, the government must establish increases in net worth for each year charged in the indictment. Proof for each year separately is required.[137] Thus it is wrong to add tax deficiencies for all years charged and decide that, because a tax was due if all years are considered together, the government's error made no difference. The government must prove a deficiency in each year. In *Terrell*, any sales of cattle had to occur in a specific

132. *Mastropieri*, 685 F.2d at 780.

133. This is an abbreviated discussion of the net worth method of proof. For a more detailed discussion, see 1 D. MCGOWEN, D. O'DAY & K. NORTH, *supra* note 5, at 817-70.

134. 754 F.2d 1139 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985).

135. *Id.* at 1145-46.

136. The defendant's acts to conceal the sale of cattle and the government's problems in discovering this sale are documented in the reported opinion. *Id.* While these acts of concealment certainly go to the proof of the taxpayer's willfulness, there seems little doubt that prior to the start of trial, the government was aware of the cattle sales and failed to report them on its net worth schedule.

137. The crime charged is a crime related to a certain tax year, not a crime related to a series of tax years. The defendant in *Terrell* was accused of evading taxes in four separate years, and thus the government had to prove that income tax was evaded for each year separately and not just that there was a tax due if all years were combined. *See* 26 U.S.C. § 7201 (1982).

year and thus had to affect the government's net worth computations for that specific year. If this error resulted in no tax deficiency for that year, then the government failed in its proof, and the defendant was entitled to a directed verdict for that year. In addition, the failure of proof in one year possibly would affect the jury's view of the entire government case.[138]

The facts of *Terrell* illustrate this Article's thesis. Consider what might have transpired on these facts had skilled defense counsel been afforded the kind of discovery given his civil counterparts. Had this been a civil tax case rather than a criminal one, Terrell's lawyer would have had an opportunity to discover the identity of the government's expert and perhaps to depose him.[139] In a carefully constructed deposition, the attorney would have gone through the net worth schedule with the agent, asking the agent to detail the tax basis of all figures on the schedule, to discuss the thoroughness of the government's search for all assets and liabilities, and to profess belief that the schedule was accurate. Little conflict would have resulted from such questions because they ask the agent only to recount the course of his investigation in reaching his conclusion on net worth. After this deposition, the civil litigator would have weeks and perhaps months to prepare his cross-examination. By the time of trial, he would be ready to establish the errors in the agent's calculations and might even have decided to use his own expert, perhaps for the limited purpose of establishing the government's mistakes in handling the cattle sales.

The lawyer would begin cross-examination by having the agent repeat his deposition statements as to the thoroughness of his preparation and investigation of all assets. Then the defense lawyer could have the agent reaffirm the accuracy of the schedule. Once the foundation was laid, the lawyer could point out the error in omitting the cattle herd as an asset and could show to the jury the error's effect on the net worth schedule—that is, that it may reduce significantly any tax due for a particular year. More importantly, the lawyer could use this error to establish the weakness in the government's assumptions as a whole.

By contrast, Terrell's criminal defense lawyer had no guarantee of seeing the agent's net worth schedule prior to the agent's testimony.[140] If it was provided prior to the testimony, this was the result of a discretionary act on the part of the court or government, and the production likely did not take place much before trial. If Terrell's attorney was unfortunate and saw the schedule for the first time at trial, he could have asked for a continuance to prepare a cross-

138. Inadvertence or mistake are defenses to tax crimes, which are specific intent crimes. Consequently, if the government makes a mistake in one year that results in the court dismissing the count for that year, the government's mistake bolsters the defense argument that the defendant also made a mistake in determining his complicated tax situation, refuting the idea that the defendant acted willfully even for the remaining years. In addition, if a defendant has been charged with only two years of evasion and one of the two years is dismissed because of the failure of the government to account for certain assets in the net worth schedule, then the government will have more difficulty arguing willfulness based on this remaining single count.

139. FED. R. CIV. P. 26(b)(4).

140. See *supra* notes 22-23 and accompanying text for a discussion of the Jencks Act and its provision stating that witness statements must be made available to the other side only after the witness has testified on direct.

examination.[141] If the court granted this request, it is unlikely the attorney would have had the weeks or months afforded his civil counterpart. Even if days were offered to him in this continuance, no trial lawyer would risk the jury's wrath by accepting such an offer and thus extending the jury's service by that amount of time.[142]

The government also has made successful use of expert testimony in numerous cases concerning allegedly abusive sham tax shelters.[143] In these cases the agent-expert often testifies as to the economic reality of the shelter, concluding that the shelter had no economic purpose, no profit motive, and was a sham formed to defraud the government of taxes.[144] Meaningful cross-examination of such testimony on profit motive or economic reality is often impossible when the defendant has been denied thorough discovery of the bases of the agent's opinion.[145]

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141. *See infra* notes 216-20 and accompanying text for a discussion of a defendant's constitutional right to such a continuance.

142. One court, recognizing that a jury may react against a defendant whose lawyer sought or received a continuance, held that the right to such a continuance did not "present a viable alternative to pretrial discovery." Barnard v. Henderson, 514 F.2d 744, 746-47 (5th Cir. 1975).

143. United States v. Crooks, 804 F.2d 1441 (9th Cir. 1986); United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978); United States v. Crum, 529 F.2d 1380 (9th Cir. 1976).

144. United States v. Barnette, 800 F.2d 1558, 1564 n.8 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987).

145. The transcript from a recent tax shelter prosecution shows clearly the difficulty in conducting the cross-examination of such an expert. United States v. Williams, No. TY-86-7-CR (E.D. Tex. Apr. 3, 1986). This prosecution involved the defendants' participation in the sale of a shelter involving a book to be written by Robin Moore, author of THE HAPPY HOOKER and THE FRENCH CONNECTION. The defendants did not create the shelter, write the prospectus, or arrange any of the terms of the shelter. They were salesmen solicited by the promoters of the investment to sell the shelter.

The prosecutor's theory was that the shelter was a sham transaction entered into only for tax purposes, without any other economic motive, and that the defendants, as salesmen, knew this at the time of the sales to their customers. Hence, the government contended that the defendants knew the investors were not entitled to certain deductions which flowed from the shelter, such as depreciation, because such deductions accrued only if the activity was a "for profit" venture. The defendants argued a number of items, but emphasized the profitability of Robin Moore's other books as proof that the defendants believed this investment had good profit potential.

The issue of possible profit and the profit motive of the investors was, therefore, a central point of contention. Under established case law, profit motive is a question of intent, judged subjectively under all the circumstances of the case. It is not a "reasonable investor" standard. A venture's eventual lack of profit is only one relevant factor, and courts have recognized that an individual may have a profit motive even in a very risky venture. See *supra* note 7 and accompanying text for a discussion of profit motive. Thus, even if the prospect for profit is negligible, a profit motive may still exist.

The government qualified Revenue Agent Jordan "as an expert pursuant to Rule 702" without any other specification as to his area of expertise. Trial Transcript at 664. Jordan then was permitted to explain to the jury the four factors considered in determining whether a depreciation deduction is proper in a book shelter, one of which was the requirement that the transaction be entered into for profit. Trial Transcript at 665. The agent-expert naturally concluded that the particular shelter involved in the prosecution was a sham, and the depreciation deduction was improper. Trial Transcript at 676. Next, he calculated the harm to the government by multiplying the number of investors involved in the shelter by the amount of tax they saved in taking the allegedly improper depreciation deduction. Defense counsel objected to this exhibit on tax harm because "it was never provided to me in pre-trial discovery." Trial Transcript at 677.

With this lack of pretrial discovery the defense lawyer began his cross-examination with a discussion of the profit motive of the investors:

> Atty: In other words in evaluating whether depreciation is proper or not, the profit motive must be correct; is that correct?

To conclude and to show the extensive use of such experts, the following is

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Agent: Yes sir.

Atty: And in evaluating that, profit motive is necessarily an attempt to determine the state of mind of the person entering into the transaction; is that correct?

Agent: Yes, it is.

Atty: And your reading of the Court decisions state that, don't they, sir?

Agent: Yes, but you have to view the full transaction.

Atty: But you view the entire circumstances surrounding the transaction in an attempt to try to determine the state of mind of the parties as to whether or not they entered into it with a profit motive; is that correct?

Agent: Yes.

Atty: And so in this case, and you have reviewed, prior to coming here today, the evidence that has been introduced in this case, haven't you, sir?

Agent: The information, yes.

Atty: Yes. In other words, the documentary evidence that has been introduced; is that correct?

Agent: Yes.

Atty: So then, you have reviewed the prospectus that was presented to my client . . . have you not?

Agent: I don't recall that document, no, sir.

Trial Transcript at 687-88.

The prospectus to which this last question refers was the pivotal document for showing the profitability of the venture. Obviously, the defense lawyer tried to highlight the prospectus' emphasis on Robin Moore's prior profitability and the defendants' reliance on this part of the prospectus as evidence of their good faith belief in profitability. The expert's failure to read the prospectus, however, foreclosed this line of inquiry. And his failure to read this important piece of documentation called into question the relevancy and the helpfulness of his entire expert opinion.

If the defense lawyer had had prior knowledge of the inadequate bases of this expert opinion, he could have attempted in a pretrial motion to disqualify the agent as an expert. He also would have been better prepared to cross-examine on this critical deficiency. Even if the lawyer had not deposed the expert, interrogatories would have helped him inquire about the materials reviewed by the expert in reaching his conclusion. Because the defense did not have these litigation tools, a poorly prepared and perhaps unqualified expert escaped accounting for his lack of knowledge.

The cross-examination in this case concerning the "at risk" provisions of the Internal Revenue Code, I.R.C. § 465, similarly illustrates the near impossibility of preparing a cross-examination of an accounting/tax expert without fuller discovery than that presently afforded. The "at risk" concept requires that if any note is to be considered part of the basis of an investment, the maker of the note must be personally liable or "at risk" on the note. If the maker-investor is not personally liable, the note may not be counted toward the basis in the investment, and this exclusion affects the amount of certain deductions to which the investor would be entitled. See *supra* notes 8-9 and accompanying text for further discussion of the "at risk" provisions of the tax code.

In his cross-examination of this expert, the defense attorney tried to emphasize that in 1978, the year in which the defendants first became involved in the shelter, the "at risk" rule did not apply to the shelter. This date was important because the agent-expert's opinion that the shelter lacked economic reality relied heavily on the absence of personal risk to the investors.

In response to this effective line of inquiry, the expert stated that, even if the "at risk" rule did not apply in 1978, the notes signed by the investors were void because the notes were contingent; that is, payable out of the proceeds of the book. When asked what his authority was on this point, the agent cited a court decision with which defense counsel was unfamiliar:

Agent: The contingency element, separate and apart from 465 still applied in 1978.

Atty: And so you are saying then that under the law that if a note was payable out of proceeds from the sale of a literary work in 1978, that made it contingent and that wasn't proper?

Agent: It wouldn't be proper to include it in the basis if it was based upon the contingency, that being the satisfaction upon the sale.

Atty: What statute tells us that, sir?

Agent: There are several court decisions and one of them was Gibson Products.

Atty: What is the citation on that, sir?

Agent: Sir, I can't give you that off the top of my head.

a partial list of tax prosecutions in which experts have been called and in which the defense objected, without success, to the substance of the expert's testimony. *United States v. Clardy*—expert on the deductibility of interest;[146] *United States v. Genser*—expert on unreported income in a nominee account;[147] *United States v. Fogg*—expert on corporate diversions as income;[148] *United States v. Little*—expert on partnership tax law;[149] *United States v. Scott*—net worth expert;[150] *United States v. Barnette*—expert on the economic reality of a transaction;[151] *United States v. Windfelder*—expert on the donative intent of the defendant's aunt;[152] *United States v. Garber*—expert on the tax consequences of selling rare blood.[153]

### 2. *Modus Operandi* and Syndrome Cases

*Modus operandi* expert evidence is used most typically in narcotics cases. This is true, not because the facts of a narcotics sale are complicated but because linking an individual defendant with an operation may be difficult without some evidence of how a narcotics sale works.[154] The expert details the activities of the typical drug dealer, and then concludes that the actual defendant at trial behaved identically and had the *modus operandi* of a typical drug dealer.

Similar to this traditional *modus operandi* evidence is the growing use of experts to prove syndromes such as rape trauma syndrome,[155] the abused child syndrome,[156] and the captivity syndrome.[157] Proof of these syndromes is analogous to *modus operandi* proof because it establishes typical behavioral responses. The difference is that *modus operandi* focuses on the response of the defend-

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Trial transcript at 694-95.

At this point the defense lawyer dropped this line of inquiry and went into other areas. Clearly, there was little else he could do. A lawyer cannot be familiar with every tax court or federal court decision on the subject of how notes should be included in the basis of an asset. More importantly, an agent-expert on cross-examination on any tax subject is free to quote any case, no matter how obscure. A jury may not understand that the lawyer just does not know every case in the library, and in this situation the jury probably saw the exchange between the attorney and the expert as a draw or even as a win for the expert because the expert could appear to have "out-lawyered the lawyer" by knowing a legal point unfamiliar to counsel.

146. 612 F.2d 1139, 1153 (9th Cir. 1980).

147. 582 F.2d 292, 298 (3d Cir. 1978), *cert. denied*, 444 U.S. 928 (1979).

148. 652 F.2d 551, 555 (5th Cir. 1981).

149. 753 F.2d 1420, 1445 (9th Cir. 1984).

150. 660 F.2d 1145, 1172 (7th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

151. 800 F.2d 1558, 1564, n.8 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 1578 (1987).

152. 790 F.2d 576, 580-81 (7th Cir. 1986).

153. 607 F.2d 92, 94 (5th Cir. 1979). The fifth circuit reversed Mrs. Garber's conviction because the trial court had excluded her expert on the tax consequences of selling rare blood. *Id.* at 100. Other courts do not always seem so willing to reverse a conviction when the trial court does not permit the defendant's tax expert to testify fully. *See* United States v. Hawley, 768 F.2d 249, 251 (8th Cir. 1985); United States v. Samara, 643 F.2d 701, 705 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981); United States v. Gay, 576 F.2d 1134, 1137 (5th Cir. 1978).

154. *See supra* notes 101-06 and accompanying text.

155. State v. Marks, 231 Kan. 645, 653, 647 P.2d 1292, 1299 (1982).

156. United States v. Cree, 778 F.2d 474, 476 (8th Cir. 1985); United States v. Bowers, 660 F.2d 527, 529 (5th Cir. 1981).

157. United States v. Kozminski, 821 F.2d 1186, 1193-94 (6th Cir. 1987).

ants,[158] and some syndrome cases focus on the response of the victim.

The government's intended use of experts to establish such syndromes is probably not discoverable as a scientific report.[159] Without having had adequate discovery, defense lawyers face damaging expert testimony in fields that are on the cutting edge of human understanding. Excerpts from a transcript of one such trial will illustrate how the problems discussed in this Article appear in the context of such cases.

In *United States v. St. Pierre*[160] the Eighth Circuit upheld the government's use of an expert on the subject of a child's response to sexual abuse. The child was eleven years old, had testified completely at trial, and had never recanted her testimony. Because the crime occurred on an Indian reservation the trial was held in federal court. After hearing a limited offer of proof through the testimony of the expert, the trial court allowed the expert to testify that same day and to list for the jury the usual characteristics of a child who had been sexually abused: low self-esteem; self-destructive behavior such as use of drugs or alcohol; eating disorders; lack of trust in people; manifestations of guilt; mature behavior much beyond chronological age; fear of the dark; nightmares; precocious knowledge of sex; and recounting of the sexual abuse episodes without emotion. The court then allowed the expert to compare the characteristics of this particular child to the general list of attributes.[161] This was not offered as the testimony of a treating psychologist, because the expert had seen the child for only one session.[162] Neither was it offered as evidence of the child's specific psychological profile. Rather, the witness testified about the syndrome created by sexual abuse of any child and how evidence of that syndrome could be found in the child in this case. The defense had had no pretrial discovery of the bases of the expert's opinion, had been furnished in pretrial discovery only a one-page summary of the expert's interview with the child, and of course had had no opportunity to depose the expert or send interrogatories.[163]

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158. United States v. Khan, 787 F.2d 28, 34 (2d Cir. 1986).

159. See *supra* note 21 for a discussion of what is considered a scientific report under Federal Rule of Criminal Procedure 16(a)(l)(D). In addition, Federal Rule of Criminal Procedure 12.2, which requires the defense to notify the government when it intends to offer a mental condition defense, would not apply when it is the government offering such syndrome evidence against the defense. Parenthetically, it is interesting that in the one area of expert testimony used frequently by criminal defendants, mental incompetency, Congress has amended the rules of criminal procedure to provide for pretrial discovery of the defense experts by the government. *See* FED. R. CRIM. P. 12.2.

160. 812 F.2d 417 (8th Cir. 1987).

161. Trial Transcript at 147-49, United States v. St. Pierre, 812 F.2d 417 (8th Cir. 1987).

162. *Id.* at 155, 172.

163. *Id.* at 129. The defense received only a one-page summary of the expert's work, and this summary stated no conclusions. Telephone interview with defense lawyer Robert B. Anderson (June 16, 1987). The defense also had no warning that the government intended to call this expert as a government witness. Indeed, the one-page report was so brief and lacking in specifics that it indicated the expert would not be useful. Moreover, since the catalyst for procuring an expert on child abuse had been a defense motion and since the one-page summary was the result of this motion, the defense could have reasonably assumed that the expert who prepared the report was a defense witness, if needed. *See* Trial Transcript at 128. Thus the appellate decision's reference to the government's pretrial disclosure of the expert's report is somewhat surprising. *St. Pierre*, 812 F.2d at 419. This bare-bones, one-page summary neither warned the defense that this expert would be a government witness nor gave the defense sufficient information to prepare a meaningful cross-examination.

In cross-examination, which defense counsel had to prepare as he heard the testimony for the first time, he attempted to establish that the qualities listed by the expert as manifestations of the syndrome also were qualities often exhibited by children who were not sexually abused. For example, the witness was asked:

> Atty: On these traits you discussed that may be consistent with children that have undergone some type of sexual abuse, those particular traits obviously can be caused by a lot of other things, can't they, other than this type of action? . . . .
>
> Expert: Yes, and I think that all of these traits may in some way be characteristic of other things. But, the pattern, the combination of them that, as you begin to get three, four, five of these you get a pattern, you know, depression in and of itself can come from anything. Sexual knowledge can come from other places. But, as you begin to put the pieces together it is like putting a puzzle together and as you begin to go you reach a point at which you cross over the midpoint.[164]

Had the defense received advance notice of the substance of the expert's testimony, the defense might have hired its own expert to disagree that the "midpoint" had been crossed or to assert that the pattern was not sufficiently probative of the existence of sexual abuse.[165] Moreover, answers gained in a deposition of the expert might have warned the lawyer that the witness' "pattern theory" answer was too persuasive to risk this line of inquiry.

The defense lawyer also tried to establish that the child's unemotional responses and lack of eye contact might be a result of her Native American ethnic heritage rather than of sexual abuse. The exchange went like this:

> Atty: You mentioned one thing about your observation of Tarace when you talked to her was lack of eye contact?
>
> Expert: Yes.
>
> Atty: Have you worked with various people and groups of people where that is a characteristic?
>
> Expert: Yes. It's very typical of the Native Americans. . . .
>
> Atty: But as you mentioned in your experience it is typical of the Native Americans in the same manner in which you saw exhibited in Tarace, isn't that right?
>
> Expert: No. It's a little different in Tarace. It was interesting that when we talked about other issues she is capable and she does have eye contact in another setting. It (avoidance of eye contact) really was much more pronounced in relationship to the abuse and the reminding her of that issue so that there was some significant embarrassment,

164. Trial Transcript at 173-74, *St. Pierre*, 812 F.2d 417.

165. It is interesting that in a case like United States v. Kozminski, 821 F.2d 1186 (6th Cir. 1987), when the defense had warning that the government would call an expert on the captivity syndrome, the defense was able to procure its own experts to refute the conclusion of the government witness in this novel area of expertise. Further, the defense produced sufficient countervailing evidence for the appellate court to conclude that the government expert's opinion was of insufficient probative value. *Id.* at 1194-95. See *supra* notes 59-65 and accompanying text in order to contrast this result in *Kozminski* with the usual situation in which the criminal discovery rules rob the trial judge of the necessary information to make a decision on the probative value of expert testimony.

some low self-esteem that was directly related to that.[166]

Not surprisingly, the defense lawyer hurriedly retreated from that subject and went into other areas. The expert had won that battle. The lawyer had conceived a fairly cogent issue, the ethnic habit of Native Americans to avoid much eye contact. However, having had no prior opportunity to ask the expert about this, he took the risk of pursuing this line of inquiry without knowing the answer the witness would give. Indeed, he had little choice but to take the risk because with the lack of discovery, he had no knowledge of what the expert would say to any question. He took the risk and lost, or rather his client lost, because it is clear from the transcript that the expert was convincing.[167]

If the defense lawyer had heard this response first in a deposition, he would have had several options. First, he could avoid the subject altogether at trial so as not to give the expert a chance to restate this opinion. A second option would be available if the expert was mistaken in testifying that the child's avoidance of eye contact was largely limited to discussions of sexual abuse. The defense lawyer could have constructed his cross-examination of the child in a way that would require her to discuss other subjects, such as school, family, or other activities. When the child avoided eye contact in answering these questions, the lawyer could emphasize this by asking the child to look up in order to be heard and seen better. As a last option, the lawyer could hire his own expert to rebut this contention. The defense in *St. Pierre* had none of these options.

The expert's opinion in *St. Pierre* is troublesome on other grounds. The pattern that the expert found in sexually abused children is one that could be caused by a number of other problems. The expert admitted this to be so but claimed that precocious sexual knowledge normally could not come from other sources. Unfortunately, because the defense lawyer did not want to open the door to the admission of damaging evidence, he could not explore fully the expert's concept of precocious sexual knowledge.[168]

How could greater discovery have changed this result? If the defense had learned that the expert would use precocious sexual knowledge as the most powerful proof of abuse, the lawyer could have tried to have the expert state in a deposition the parameters of what is precocious. If these parameters were unrealistic, then the validity of the entire opinion would be subject to question

166. Trial Transcript at 172-73, *St. Pierre*, 812 F.2d 417 (8th Cir. 1987).

167. The argument here is not that the jury was wrong and convicted an innocent man. The jury heard the testimony, evaluated the demeanor of the witnesses, and reached its decision based on more data than that analyzed in this Article. But the argument does focus on and criticize the limited information and opportunity the defense had to test the conclusions of this critical government witness.

168. Before the expert took the witness stand, the court had ruled that the expert could not quote what the child said in her one consultation session with the expert unless the child had already testified at trial as to the matter being quoted. Apparently the child had told the expert of a certain sexual position she had been forced to assume by the defendant. The child did not, however, include this in her trial testimony. Hence, the court ruled the expert could not testify about this position since the child had not. Trial Transcript at 120-36, *St. Pierre*, 812 F.2d 417 (8th Cir. 1987). Consequently, when the expert replied to the defense lawyer that precocious sexual knowledge was not a trait normally associated with other psychological disorders, the defense lawyer was forced to stop this line of questioning for fear that going further would open the door and allow the expert to testify about the additional evidence of sexual abuse.

because so much of it was based on the child's precocious sexual knowledge.[169] Perhaps the lawyer also could find other sources for the child's precocious knowledge.[170]

This all becomes especially dangerous when the expert is used to tip the balance of evidence at trial. Because the child had not recanted or refused to testify at trial, the government did not need to establish the psychological factors of why an abused child may recant.[171] The purpose of the expert's testimony was to show that the child had a pattern of behavior that other abused children have exhibited, just as alleged drug dealers behave as other convicted drug dealers. The probative value of such testimony is very small, especially considering the fact that the expert had seen the child for only one hour prior to testifying. Yet the prejudice of such testimony is especially great. In essence, this expert was called to vouch for the truthfulness of the child. We long ago eliminated the custom of "vouch-sayers" in the courtroom. It should not be resurrected in the form of the expert witness, especially in criminal cases with the limited discovery provided by current federal procedures.

## V. CONSTITUTIONALLY BASED REMEDIES

Thus far, this Article has discussed the inadequacies of the existing limited discovery scheme from a procedural and evidentiary perspective. The existing scheme lacks the justification that its creators envisioned and creates serious distortions in the evidentiary rules' balance relating to the admission of expert testimony. Hence, even if the inadequate discovery scheme did not have constitutional flaws, its lack of justification and troublesome effects would call for remedial action. Nonetheless, the problems that the scheme creates rise, in some contexts, to constitutional dimensions. Hence, consideration of the current scheme would be incomplete without examining these constitutional concerns.

This section examines the constitutional concerns and arrives at several conclusions regarding constitutionally based remedies. The first is that constitutional arguments are at times available to defendants who are denied adequate discovery in federal criminal cases. Second, these constitutionally based argu-

169. Defense counsel told this author that the expert was a nun who was in her sixties. These facts are intriguing because they raise the question whether the expert had a realistic view of what really is precocious sexual knowledge in late twentieth-century America.

170. A lawyer could inquire of the child's friends and teachers about other sources of this precocious knowledge. It is, in fact, exactly this kind of action by a defense lawyer—action that could expose a child to the ridicule of her peers—that justifies limiting criminal discovery in many contexts. This type of harassment was on the minds of the drafters of Federal Rule of Criminal Procedure 16. *See supra* note 23 and accompanying text. Victims of crime have suffered enough and should not be forced to suffer more without good reason. Fundamental fairness in the administration of criminal justice is such a good reason. But fundamental fairness does not require exposing every victim or every witness in every case to ridicule or harassment. Fundamental fairness does require, however, that a trial judge have the discretion to expand criminal discovery in the appropriate context, such as when the government uses nonscientific experts to obtain an unfair advantage.

171. *See* State v. Middleton, 294 Or. 427, 438, 657 P.2d 1215, 1221 (1983); Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429, 443-48 (1985).

ments are not available in every context in which inadequate discovery is unjustified. This is because procedural and evidentiary contours are not and should not be coextensive with constitutional ones; the results of the limited discovery scheme are frequently unjustified even when they are not constitutionally flawed. Third, and as a result of the second conclusion, remedying the current scheme's inadequacy by constitutionalizing discovery rights is not only unlikely to occur as a doctrinal matter, but is unwise. The proper remedy, instead, is the one for which this Article argues: amendment of the discovery rules themselves.

This section demonstrates these conclusions by reviewing several different constitutional arguments and showing, as to each one, its limitations and the reasons why its expansion would not be the desirable solution to the problem. At the outset, it is important to realize that, currently, courts do not recognize a constitutional right to discovery of the government's files in a criminal prosecution.[172] Certain constitutional provisions, however, might form the basis for reversing particular convictions in which the government used an expert witness. Such reversals would be based on the facts of the case rather than on the broader principle that a defendant is constitutionally entitled to discovery of the government's evidence or expert. Therefore, while a defendant may obtain a reversal if the process afforded him had a certain degree of inadequacy, this remedy does not equate with adequate discovery for each defendant who faces the possibility of having to respond to the testimony of a government expert. Moreover, even assuming that to some defendants a reversal is a sufficient remedy, the following discussion establishes that the likelihood of reversal in such cases is so small as to be virtually hopeless.

### A. *The Sixth Amendment: Confrontation*

The sixth amendment's guarantee that a defendant has the right to confront the witnesses against him raises the question whether denying the defendant's lawyer knowledge of witness identity or witness statements results in a denial of this right to confrontation. The Supreme Court's 1987 plurality opinion in *Pennsylvania v. Ritchie*[173] is instructive on this point. In *Ritchie* a defendant charged with child abuse had sought access to the child welfare files compiled by the county's social/juvenile division. The defendant wanted access to the files to determine what the child or other witnesses might have said in a previously reported episode of abuse that had been investigated but not resolved. In rejecting the defendant's argument that denial of access to the file had violated the confrontation clause, the plurality opinion stated:

> [T]he right of confrontation is [only] a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. . . . The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contra-

172. Pennsylvania v. Ritchie, 480 U.S. 39, 52-53 (1987).
173. 480 U.S. 39 (1987).

dicting unfavorable testimony.[174]

Thus, it is unlikely the plurality would find that defense counsel's inability to contradict a government expert witness (either because the lawyer is surprised by the government's calling the witness or because he has no data about the basis of the expert's opinion) violates the confrontation clause. Under the plurality's approach, as long as the defendant has the right to cross-examine the expert without improper restriction on the types of questions asked, the confrontation clause will be satisfied.

That the guarantees of the confrontation clause do not reach pretrial disclosure is not as free from doubt as the plurality in *Ritchie* indicates. As Justice Blackmun stated in his concurring opinion, the right to confrontation might be violated if the lack of discovery violates the right of a defendant to an effective cross-examination.[175] Justice Blackmun reasoned persuasively that a state cannot avoid the application of the confrontation clause and its underlying assumption that a defendant is entitled to effective cross-examination simply by denying to the defendant the necessary materials for this cross-examination.[176] Such a result would make the right to confrontation a hollow right.

As Justice Blackmun noted, the assumption that a defendant is entitled to an effective cross-examination has formed the basis of Court decisions finding a violation of the confrontation clause even when a defendant has had an opportunity to cross-examine a witness.[177] These decisions, however, deal with limitations on the questions asked the witness and do not deal with the issue of pretrial discovery. Thus, it seems unlikely that courts will create a general right of pretrial discovery based on the right to an effective cross-examination. In fact, persuasive policy reasons argue against the creation of such a constitutionally based right of discovery.

First, other constitutional provisions give defendants some protection from the constitutionally most egregious cases of denial of pretrial discovery.[178] Therefore, the confrontation clause is not the only tool to protect against constitutional violations. Second, the confrontation clause standard that currently exists—effective cross-examination—should allow the courts to correct any constitutional errors in denial of pretrial discovery. For example, a number of courts have indicated that serious confrontation clause issues would arise if an expert's opinion were based solely on hearsay and if the defense had no adequate opportunity to cross-examine the expert (either because the hearsay was not available to the defense through its own sources or given to the defense in sufficient time to prepare an adequate cross-examination).[179] Third, extending the

174. *Id.*

175. *Id.* at 64.

176. *Id.* at 64-65.

177. *See* Davis v. Alaska, 415 U.S. 308, 319-20 (1974); Chambers v. Mississippi, 410 U.S. 284, 295-98 (1973); Smith v. Illinois, 390 U.S. 129, 131 (1968); Douglas v. Alabama, 380 U.S. 415, 418-20 (1965).

178. *See infra* notes 205-15 and accompanying text (discussing some remedies available under the due process clause for the egregious cases).

179. Reardon v. Manson, 806 F.2d 39, 42-43 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1903 (1987); United States v. Affleck, 776 F.2d 1451, 1458 (10th Cir. 1985); United States v. Downing, 753 F.2d

confrontation clause to pretrial discovery would require a new constitutional inquiry in enormous numbers of appeals.

The *Ritchie* case is an illustration of another problem that would result from constitutionalizing a right of discovery. The discovery items in dispute in *Ritchie* were the child welfare files relating to the investigation of an allegedly abused child. Absent the creation of some type of balancing test, a constitutional right to pretrial discovery would make access to child welfare files mandatory in every alleged child abuse case. As the dissent by the Pennsylvania Supreme Court noted, such a right would destroy the confidentiality of such files and thus undermine the guarantee of privacy essential to the reporting of child abuse claims.[180] The same concern would be implicated in other criminal law enforcement areas in which authorities need to provide such guarantees of privacy.[181]

Constitutionalizing a right to discovery seems not only unlikely, but undesirable; an amendment of the procedural rules will more effectively address the evidentiary and procedural distortions created by the current system without sacrificing privacy concerns, and existing constitutional doctrine seems available to correct those distortions when they rise to constitutional levels.

### B. *The Sixth Amendment: Compulsory Process*

A defendant might argue that a denial of discovery or a lack of access to government files violates her right to compulsory process under the sixth amendment.[182] Some commentators conclude that this provision, rather than the due process provision, is defendants' most logical basis for claiming a right to pretrial discovery of facts in the government's file.[183] While this may be true textually and logically, only a few decisions have relied on compulsory process to afford defendants discovery beyond that traditionally provided.[184] Several reasons explain why courts have failed to base pretrial discovery decisions on the compulsory process clause.

First, the scope of the clause is unsettled. The literal wording of the clause indicates that it only provides for the right of a defendant to use the subpoena

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1224, 1241 (3d Cir. 1985); United States v. Lawson, 653 F.2d 299, 302-03 (7th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982).

180. Commonwealth v. Ritchie, 509 Pa. 357, 383, 502 A.2d 148, 161 (1985) (Larsen, J., dissenting), *modified*, 107 S. Ct. 989 (1987).

181. Undermining confidentiality also could result from any rule amendment enhancing criminal discovery. Thus, any such amendment must provide for some judicial discretion in order to protect these legitimate confidentiality concerns. On the other hand, unless a cumbersome balancing test were imposed, constitutionalizing such discovery would not allow for the same degree of flexibility in judicial response as would a procedural amendment.

182. The sixth amendment to the Constitution guarantees all criminal defendants certain rights. These include the right to confront witnesses, the right to have compulsory process in obtaining witnesses, and the right to have effective assistance of counsel. U.S. CONST. amend. VI.

183. Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 123 (1974).

184. Washington v. Texas, 388 U.S. 14, 23 (1967); *cf.* Chambers v. Mississippi, 410 U.S. 284 (1973) (ability to impeach witnesses necessary to take full advantage of compulsory process); Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam) (same).

power of the state to compel the attendance of defense witnesses.[185] However, the historical development of compulsory process in seventeenth century British jurisprudence and in the American colonies, as well as the existing provisions in state constitutions at the time James Madison wrote the Bill of Rights, indicate that the scope and reach of the compulsory process clause was intended to extend well beyond the right to have defense witnesses subpoenaed.[186] Historical data indicates that the framers intended to place a defendant on equal footing with the government in criminal cases with respect to the right "to present a defense through witnesses," including the right to discover potential witnesses.[187]

During the treason trial of Aaron Burr, over which Chief Justice Marshall presided as trial judge, it became clear that the reach of the compulsory process clause extended well beyond the defendant's mere use of the state's subpoena powers.[188] Burr had moved for production of letters possessed by President Jefferson and written by a key witness against him in the trial. Justice Marshall implied that the compulsory process clause was intended to assist the defendant in preparing a defense and that accordingly a defendant must have the time and information to prepare for trial.[189]

Although *Burr* demonstrates that compulsory process means more than the literal language of the sixth amendment, the Supreme Court's recent opinion in *Pennsylvania v. Ritchie*[190] makes clear that the reach of the compulsory process clause is still undefined and that the Court is not anxious to settle this issue. The Pennsylvania Supreme Court reversed defendant's conviction for child abuse, in part, on the ground that the denial of access to child welfare files violated defendant's rights under the compulsory process clause.[191] In response to this aspect of the Pennsylvania court's decision, the Supreme Court noted that it "has had little occasion to discuss the contours of the Compulsory Process Clause."[192] It then went on to discuss *Burr*, stating:

> This Court has never squarely held that the Compulsory Process Clause guarantees the right to discover the identity of witnesses, or to require the Government to produce exculpatory evidence. Instead, the Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the

185. This portion of the sixth amendment reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

186. Westen, *supra* note 183, at 95-101.

187. Westen, *supra* note 183, at 120.

188. *See, e.g.*, United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692); United States v. Burr, 25 F. Cas. 187, 191-92 (C.C.D. Va. 1807) (No. 14,694).

189. *Burr*, 25 F. Cas. at 33 (Marshall concluded that this material should be given to Burr well before trial).

190. 107 S. Ct. 989, 1000-01 (1987). While the Court's decision in *Ritchie* on the application of the confrontation clause was a plurality opinion, the Court's decision on the inapplicability of the compulsory process clause to the facts of the case was a majority opinion.

191. *Id.* at 1001.

192. *Id.* at 1000.

Fourteenth Amendment.[193]

Hence, the Court declined to analyze the case under the compulsory process clause, opting instead for a due process analysis under the standard of fundamental fairness. Further, the Court held that even if it were to apply the compulsory process clause, that clause would afford the defendant no greater protection in this context than would the due process clause.[194]

Given the Court's characterization of the clause as unsettled and the Court's reluctance to engage in a compulsory process analysis—particularly in a case so well-suited to form the basis of such an analysis—compulsory process is not a reliable remedy to the problem of expert witness identification or discovery of the bases of the expert witness opinion. In addition, for the reasons described in connection with the confrontation clause, constitutionalizing a right of discovery through compulsory process is an equally undesirable solution to evidentiary and procedural problems.

### C. *Sixth Amendment: Ineffective Assistance of Counsel*

The sixth amendment's ineffective assistance of counsel provision provides another possible route to discovery of government expert witnesses.[195] One argument based on this provision would be similar to that advanced in *Powell v. Alabama*.[196] Under certain circumstances "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair."[197] Under this standard, a defendant could argue that the government's failure to give notice of its intention to call an expert and limited federal discovery combined to make adequate performance by counsel so remote as to render the trial unfair. Importantly, the *Powell* standard presumes prejudice from the ineffective assistance of counsel and does not require the defendant to establish it.[198] However, the Court has applied the standard of presumed prejudice in a very limited number of cases,[199] and it is unclear whether a failure

193. *Id.* at 1001 (citation omitted).

194. *Id.* In *Ritchie* the defendant was seeking access to information deemed material to his ability to prepare and present a viable defense. Thus, the Court had the perfect vehicle by which to define the parameters of compulsory process, especially in light of the Pennsylvania Supreme Court's implication that the right to compulsory process had been violated. Commonwealth v. Ritchie, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985) (right to confront and cross-examine witnesses was violated), *modified*, 107 S. Ct. 989 (1987). In fact, after its due process analysis, the Court remanded the case for a finding as to the materiality of the requested information, indicating that the defendant's claim of need was not specious. *Ritchie*, 107 S. Ct. at 1001-02. This case obviously is analogous to the situation in *Burr*, in which Chief Justice Marshall held that defendant was entitled to such access if there was any reason to suppose that the requested matter may be material. U.S. v. Burr, 25 F. Cas. at 37 (C.C.D.Va. 1807) (No. 14,692b). Thus, it is significant that the Court in *Ritchie* refused to discuss compulsory process in this context.

195. This portion of the sixth amendment reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

196. 287 U.S. 45 (1932).

197. United States v. Cronic, 466 U.S. 648, 660-61 (1984) (discussing *Powell*, 287 U.S. at 52).

198. *Cronic*, 466 U.S. at 661. The standard presumes from the nature of the circumstances which infringed so severely on a concept of ordered liberty that effective representation was impossible.

199. Chambers v. Maroney, 399 U.S. 42 (1970); *see* White v. Ragen, 324 U.S. 760 (1945) (per curiam) (petitioner's allegations of sixth amendment violations were sufficient to warrant review by

to provide adequate discovery could ever be deemed to result in presumed prejudice, thus making a showing of actual prejudice unnecessary.[200]

Another ineffective assistance argument would be based on the standard articulated in *Strickland v. Washington*.[201] Under the *Strickland* standard a defendant must first show that his lawyer's performance was deficient, and then that this performance prejudiced the defendant so as to deprive him of a fair trial.[202] Further, "prejudice" means there is a reasonable probability that, but for the lawyer's inadequate performance, "the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[203] This quite stringent standard for reversing convictions requires the defendant to make some difficult showings. Probably few cases involving the issue of limited discovery of government expert witnesses would contain facts satisfying the second prong of this standard—that the prejudice was sufficient to undermine confidence in the outcome. In addition, the defendant would have difficulty in establishing the first prong of the test—that the lawyer's performance was deficient in the first place—because the court would not likely find that the lawyer did an inadequate job under the circumstances.

As in the discussion of the confrontation and compulsory process clauses, one must be reticent in suggesting that the Court use this provision to constitutionalize a right of discovery. Such an expansion of constitutional rights into the area of criminal discovery has implications for the entire criminal justice system that may not be in the best interest of society as a whole.[204] The better solution is to address the deficiencies in the procedural rules themselves rather than to expand constitutional protections into the area of criminal discovery generally.

### D. *The Fourteenth Amendment: Due Process*

In *Brady v. Maryland*[205] the Supreme Court articulated a standard for deciding when the due process clause requires government disclosures of evidence to the defense. As stated by the Supreme Court twenty-five years ago, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punish-

federal district court); House v. Mayo, 324 U.S. 42, 46 (1945) (per curiam); *Ex parte* Hawk, 321 U.S. 114, 115-16 (1944) (per curiam).

200. There is, however, language in *Powell* from which one could argue in the right case that prejudice can be presumed from inadequate discovery. The Court states:

> It is not enough to assume that counsel thus precipitated into the case thought there was no defense and exercised their best judgment.... Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given.

287 U.S. at 58.

201. 466 U.S. 668 (1984).

202. *Id.* at 687.

203. *Id.* at 694.

204. *See supra* notes 180-81 and accompanying text.

205. 373 U.S. 83 (1963).

ment."[206] The *Brady* doctrine has been the subject of much judicial interpretation. Courts have explained it as a limited departure from our adversary system of justice because it requires the government to find and deliver to the defense exculpatory material so as to ensure that a miscarriage of justice does not occur.[207] The due process analysis under *Brady* always turns on whether the material that remained undisclosed deprived the defendant of a fair trial.

From 1963, the year of the *Brady* decision, until 1985, it was thought that the specificity of the defense request for *Brady* materials would affect a court's decision as to whether a violation of the defendant's due process rights had occurred. Lawyers believed that the failure to provide such exculpatory information was less material when the defense either made no request or made a general request for all *Brady* material. If, however, the defense request was specific, such as a request for all payments of money by the government to any witness, and if the government failed to disclose such information, then such failure was more material.

The Supreme Court's 1985 decision in *United States v. Bagley*[208] changed this sliding scale approach to materiality. In *Bagley* the Supreme Court considered a specific defense request that the government disclose all payments made to government witnesses.[209] The government failed to do so despite two witnesses' receipt of such payments.[210] The Court decided that the specificity of the request did not make a difference, that the test for materiality was the same whether the request had been a general or specific request, and that the test remained the same even if the defense had made no request at all.[211] The Court stated, "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[212]

This standard is clearly a difficult hurdle in any case and will result in a reversal of a conviction only in the most egregious circumstances.[213] It is not a consistent remedy upon which defendants can rely in attempting to redress the inequities associated with the government's use of expert witnesses. Further, nothing in the *Bagley* decision or any other due process analysis supplies any prophylactic relief to defendants when facing a government expert. The entire thrust of these decisions is to redress errors that have already occurred rather

206. *Id.* at 87.

207. United States v. Bagley, 473 U.S. 667, 675 (1985).

208. *Id.*

209. *Id.* at 669-70.

210. *Id.* at 671.

211. *Id.* at 682.

212. *Id.*

213. For example, even before *Bagley* made the test for reversal more difficult, the trial court in *Bagley* denied the defense motion for a new trial despite the clear showing that the government failed to disclose payments to witnesses. *Id.* at 672. The trial court simply found that the failure to disclose was not material despite the specific request by the defense for this information. *See id.* at 673. Such examples demonstrate why the defense bar has not relied extensively on the *Brady* doctrine.

than to provide for a uniform and systematic manner of pretrial discovery.[214] Thus, the *Brady-Bagley* doctrine does not afford the necessary discovery for the fair administration of criminal justice in every case in which the government will call an expert. It does, however, provide some relief in the most egregious cases, and defense counsel should remember it when framing discovery requests.[215]

### E. *Adequate Time for Preparation of Cross-Examination*

The government's use of *scientific* experts in criminal prosecutions has resulted in a line of cases that may also provide some relief when the government uses a *nonscientific* expert. In *United States v. Kelly* the United States Court of Appeals for the Second Circuit held that in certain circumstances the requirement of fundamental fairness under the concept of due process "requires that adequate notice be given the defense to check the findings and conclusions of the government's experts."[216] Under this doctrine, the government's failure to provide such adequate notice at the pretrial stage does not necessitate a mistrial. Rather, it may require that the defense receive a continuance, if requested, in order to prepare a cross-examination of the expert.[217]

The cases point to three conclusions. First, they do provide some remedy for a defendant who is surprised by expert testimony. Second, the remedy of a continuance is available only if specifically requested. Third, the issue in every case is whether the requirements of fundamental fairness under the concept of due process necessitate the continuance. Therefore, not every type of expert and not every expert's testimony will create the need for a continuance. The decision

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214. Two members of the majority in *Bagley*, however, noted that a due process violation might occur when the government's failure to respond to a specific *Brady* request leads to inadequate defense preparation as a result of defense reliance on the absence of a government response. *Bagley*, 473 U.S. at 682-83. While this recognition by two members of the majority is not a panacea for most defendants, it should not be ignored. Defense counsel as a matter of course should make a *Brady* request in every case for all exculpatory evidence the government has related specifically to the testimony of any government expert, including but not limited to: hearsay to be used by the expert; the bases of the expert's opinion, the authorities and witnesses used by the expert in forming his opinion, and the qualifications of the expert.

Thus, if it develops during trial that the expert had an insufficient basis for his opinion and that the probative value of the opinion was small, then the defense, after making the above *Brady* request, will have a stronger claim that the government's failure to disclose the inadequate bases of the expert opinion changed the direction of the defense preparation of its case. From this, the defense may argue that the failure to disclose exculpatory material impaired the conduct of the defense case to such a degree as to undermine confidence in the outcome.

215. A question comes in the wake of *Bagley*. Prior to *Bagley*, the assumption was that a specific request for exculpatory material that was ignored by the government increased the chance that a conviction would be reversed for such failure to disclose. Thus, it was assumed that the government paid greater attention to specific requests. These assumptions were in full force when Congress considered the 1975 amendments to the Federal Rules of Criminal Procedure. To what extent did these assumptions play a part in the Congressional decision not to expand criminal discovery? *Bagley* has changed many of the assumptions that flowed from *Brady*; for example, that specific requests would encourage the government to take more care in looking for the requested materials. The question becomes whether Congress would have adopted the same discovery rule if *Bagley* had been the definitive case in effect in 1975 rather than *Brady*.

216. 420 F.2d 26, 29 (2d Cir. 1969).

217. *See, e.g.*, United States v. Barrett, 703 F.2d 1076, 1080-81 (9th Cir. 1983); United States v. Boney, 572 F.2d 397, 403 (2d Cir. 1978); United States v. Bockius, 564 F.2d 1193, 1196-97 (5th Cir. 1977).

to grant a continuance is one for the trial judge's discretionary evaluation of fundamental fairness. Because these cases create no right to such a continuance, defendants cannot be certain to have sufficient time and information in every case to prepare an effective cross-examination. Fourth, only in cases involving scientific or psychiatric experts has the trial court's denial of a continuance constituted reversible error.[218] Possibly, in cases involving nonscientific experts, defense counsels are not asking for such continuances for several reasons: they may misjudge the effect of such experts on the jury; they may overestimate their ability to cross-examine a nonscientific expert; or they may not be aware of their right to a continuance in the appropriate circumstance.

Another reason might explain why defense lawyers may not ask for a continuance in cases involving nonscientific experts. Perhaps they fear how the jury will view this request. Any reasonable lawyer would fear the impression created by such a request in the middle of a trial. Will the jury see this as a recognition by the defense that testimony was devastating to the defense? Will the jury see the request as an attempt by the defense to delay the proceeding and keep the defendant out of jail for a while longer? Will the jurors see the defense lawyer as simply unprepared and thus wasting their time because of his inadequacy?[219] The reality of these questions has prompted one court to view the remedy of seeking a mid-trial continuance as so prejudicial as to be a nonviable alternative.[220] Additionally, there is no reason to force a defendant to choose between alienating the jury and conducting an effective cross-examination. Pretrial procedures that provide adequate discovery of government expert witnesses should be constructed and adopted.

## VI. PROPOSAL

The foregoing has demonstrated the inequities that result from the limited criminal discovery offered defendants when the government uses nonscientific experts. These inequities are best redressed by an amendment to the Federal Rules of Criminal Procedure patterned substantially after the expert witness discovery provisions of the Federal Rules of Civil Procedure.

This proposal expands criminal discovery to cover all experts, scientific as well as nonscientific. This Article has focused on nonscientific experts because of 1) the growing use of such experts by the government, 2) the failure of the federal criminal rules to provide for discovery even of the reports of nonscientific experts, and 3) the emphasis in other research on the problems posed by scientific experts with little attention given to the expanding role and problems of nonscientific experts in criminal prosecutions. This Article's proposal to amend the federal criminal rules, however, is equally applicable to scientific experts. With the exception of the narrow provision in Federal Rule of Criminal Proce-

218. Research for this Article has revealed no case in which failure to grant a continuance involving a nonscientific or nonpsychiatric expert constituted reversible error.

219. *See generally* United States v. John Bernard Indus., 589 F.2d 1353, 1358 (8th Cir. 1979) (answering "no").

220. Barnard v. Henderson, 514 F.2d 744, 746-47 (5th Cir. 1975).

dure 16(a)(1)(D), providing for the discovery of scientific expert reports or results, the problems for criminal defendants are the same when the government calls either a scientific or nonscientific expert. Hence, this proposal applies to the discovery of all expert witnesses.

This Article proposes that Federal Rule of Criminal Procedure 16(a)(1)(D) be amended as follows:

> *Expert Witnesses.* Upon request of a defendant the government shall provide the defendant with the name and address of any witness the government expects to call as an expert at trial along with a statement of the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, including other experts upon whom the trial expert expects to rely. Upon motion, the court may order further discovery by other means, including the deposition of experts, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.[221]

This proposal is modeled substantially after Federal Rule of Civil Procedure 26(b)(4)(A)(i)(ii) with some important differences. First, it mandates that the government provide to the defense certain information—the name and address of the expert along with a statement of the subject matter of the testimony, the substance of facts and opinions as well as a summary of grounds—merely if requested by the defense. The defense does not have to file interrogatories in order to obtain this information. This differs from civil procedure, which mandates production of such information only if so requested by interrogatory. Second, the use of interrogatories is permitted only by court order—another difference from the civil rule, which allows interrogatories as of right. This different approach to the use of interrogatories balances the need in criminal procedure to protect witnesses and confidentiality in certain circumstances against the need for greater information by the defense. The balance is struck by allowing the use of interrogatories only when the court permits this discovery tool rather than making interrogatories a matter of right as in civil procedure. Third, the proposed rule specifically states that the grounds for the opinion should include other experts upon whom the trial expert expects to rely. This provision is added to avoid the problem noted in civil cases of a trial expert relying on absent experts and the opposing lawyer only learning of this reliance for the first time at

221. Under the principles of reciprocal discovery, the same provision should be added to Federal Rule of Criminal Procedure 16(b)(1)(B) so that provision would read:

> (B) *Reports of Examinations and Tests.* If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall provide the government with the name and address of any witness the defendant expects to call as an expert at trial along with a statement of the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, including other experts upon whom the trial expert expects to rely. Upon motion, the court may order further discovery by other means, including the deposition of experts, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

trial.[222] By this addition, the opposing lawyer will know of other experts used by the testifying expert in forming his opinion and thus may ask the court's permission to depose or send interrogatories concerning such nontestifying experts.

This proposal, however, is substantially similar to its civil counterpart in 1) permitting depositions of experts only upon court order, 2) giving the court authority to limit the scope of such discovery, and 3) stating that the requesting party may be ordered to pay reasonable fees for discovery of the opponent's expert.[223]

This proposal is not without precedent in criminal procedure. The Maine criminal rules provide similarly for a statement of the expert's opinion to be given to a defendant upon request. Florida provides for the use of discovery depositions in criminal matters, as do Texas, Vermont, and New Hampshire.[224]

As stated previously, however, the civil procedure model for discovery of experts has been criticized.[225] So why adopt it for criminal procedure? First, there is a certain logic to using the same system of discovery in both civil and criminal matters whenever possible. The same rationale supports applying the Federal Rules of Evidence to both civil and criminal cases. Trial judges and appointed lawyers will be more comfortable with, and thus will make better use of, a procedure they have seen on the civil side. Second, the major problems noted with the civil rule are not particularly applicable when the rule is transferred to criminal procedure. For example, one problem discussed frequently focuses on the inequities caused by the civil rule's failure to make depositions of experts available as of right. A party may depose an expert under the civil rule only by order of court, and it is argued that this prevents a party from obtaining necessary information in some civil cases. While this procedure of court-ordered depositions may be questionable when applied to civil cases, such a procedure is very sound in the context of criminal adjudications. As discussed previously, protection of witnesses and privacy interests requires that in criminal matters the judge retain the discretion to refuse a deposition or to limit its scope. Thus, the major problem with expert discovery under the civil rules—judicial discretion in ordering depositions—is a benefit when this civil procedure is applied to the criminal arena.

Given the obvious inequities caused by the current system of federal criminal discovery, what then would be the possible policy arguments advanced for

222. *See* Graham, *Part Two*, *supra* note 58, at 196-202.

223. The provision regarding the payment of fees for expert discovery in the appropriate case was adopted from the civil rules despite some clear differences between civil and criminal law in this regard. Because most government experts appear to be government employees, there will be little expense to the government in providing for additional discovery of these experts, and defendants should not be required to pay for the expenses of deposing these government employees. There will be cases, however, in which the government will procure the services of an outside expert, who will charge the government an hourly fee. If that is the case and if the defendant is financially able to pay the fees of the expert, then it seems that the same notions of fairness used in the civil rules to justify the other side paying for an expert's discovery also should apply in the criminal context. The proposed rule was drafted to accommodate this situation.

224. *See supra* notes 17 & 20 (discussing various state criminal procedures).

225. Graham, *Part Two*, *supra* note 58.

refusing to adopt the proposed expansion of criminal discovery? These arguments seem to be: 1) protecting witnesses from harm and harassment, 2) maintaining a level of privacy necessary for effective law enforcement, 3) speeding the adjudication of criminal matters, and 4) keeping down the cost of such litigation.

First, the protection of witnesses from harm and harassment is a laudatory goal and was the Congressional rationale for not expanding criminal discovery in 1975. As discussed earlier, however, this rationale loses its force when applied to expert witnesses. In fact, by providing for the discovery of scientific expert reports, even Congress indicated that it did not accept the application of this reasoning to expert witnesses.[226]

Second, the maintenance of certain privacy interests necessary for effective law enforcement is also an important goal. The proposed procedural amendment, however, gives the courts broad discretion to limit discovery of experts in the appropriate cases. For example, if the discovery of an expert would lead necessarily to the discovery of information in child welfare files such as those at issue in *Pennsylvania v. Ritchie*,[227] a court could tailor the discovery of the expert to avoid breaching the confidentiality of those files unless other law required discovery of the information.[228] This tailoring could be accomplished by refusing to order the deposition of an expert or by limiting the subject matter of any deposition. There is no limit to the number of ways meaningful discovery could be afforded while at the same time protecting privacy interests. This argument against reform is not persuasive.

Third, allowing defense counsel to file interrogatories or to depose an expert will take time, and thus will implicate speedy trial considerations. The Speedy Trial Act basically requires that a defendant be brought to trial within seventy days of indictment. There are provisions within the Act, however, that permit the court to extend this time period when necessary for the interests of justice, as, for example, when the complexity of the matter requires that more time be allowed for trial preparation.[229] Thus the Act itself recognizes a need for flexibility in the appropriate case. Moreover, since the proposal gives complete discretion to the court to order interrogatories or depositions, the court can control the timing of the procedure and can require the taking of a deposition or the filing of interrogatories in short order. Further, the government should have no complaint if discovery is ordered to be accomplished quickly. Unlike civil cases in which actions are filed before the facts are established with any certainty, the federal government, by its own guidelines, will not seek an indictment unless there is both a prima facie case and a reasonable probability of conviction.[230] Therefore, in order to follow its own guidelines on the probability of conviction, the government will know before indictment that it needs an expert if it is to

226. FED. R. CRIM. P. 16(b)(1)(A).

227. 107 S. Ct. 989 (1987).

228. *Id.* at 1003. For example, a court could decide to order the discovery of such files under the due process clause. *See supra* notes 205-15 and accompanying text (discussing the due process clause in this situation).

229. 18 U.S.C. §§ 3161(h)(8)(A)-(B) (1982).

230. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL tit. 9, § 27.220.

have a reasonable probability of prevailing on the merits. Hence, complying with a court order to make discovery of the government's already identified expert available to the defendant shortly after indictment should pose only limited problems for the government.

A final concern is that expanding discovery in this fashion will be expensive for both the government and defendants. There are a number of answers to this issue. First, fair procedure and process are important to our concept of ordered liberty regardless of cost. If this were not true, we would not appoint lawyers for indigents or reject torture as a means of discovering facts. Second, a defendant does not have to request such discovery. If a defendant decides to forego the expense of a deposition or would rather not reveal his expert evidence to the government in reciprocal discovery, he simply will not make a request for discovery of the government's expert. Third, any additional expense to the government would be small in many cases. As we have seen, many government experts are in-house, and this should add to the government's efficiency and reduce its cost in responding to discovery requests. Also, to the extent such requests are financially onerous, the parties always may appeal to the court's discretion. Hence, the money argument also is unconvincing.

What alternatives are there other than the one proposed? First, after an expert has testified, courts could grant continuances as of right to defense counsel for preparation of a cross-examination. The efficacy of this procedure has been discussed, and on that basis it must be rejected. First, it is a waste of juror resources. The jurors must be paid for the time the defense lawyer takes to prepare the cross-examination. This is wasteful especially since pretrial discovery could provide the same relief at less cost to the judicial system. Second, jurors, who want to go home, would react negatively to the lawyer who requested such a continuance. Third, jurors might give undue weight to this continuance if they conclude from it that the expert's opinion was so powerful the defense lawyer needed time to think about it. For all these reasons, the use of continuances is no cure to the unfairness in the current system.

Amending Federal Rule of Evidence 705 to require disclosure in direct testimony of all bases of an expert's opinion is another alternative. While this would eliminate any surprises, it would not lead to meaningful cross-examination in most cases. Even if all bases for the expert's opinion were revealed on direct, a defense lawyer would have just as much difficulty constructing a meaningful cross-examination immediately after hearing the testimony without some pretrial warning that an expert would testify and without some pretrial indication of the substance of this testimony. This alternative does not address all the inequities at work in this matter.

Severely limiting the use of experts and the kind of data upon which they may base their opinions under Federal Rule of Evidence 703 is another alternative. Again, this would not eliminate the problems of surprise and limited preparation time associated with limited discovery in those remaining cases using expert testimony. In addition, this alternative would tend to freeze the law's acceptance of new areas of expertise. One of the benefits of the current expert

witness evidence rules is the rules' flexibility in accepting new kinds of experts—a benefit greatly needed in an age of expanding technology. It would be unfortunate to lose this benefit in an attempt to cure the problems noted in this Article because this loss would not solve the problems caused for defense lawyers by limited criminal discovery.

The extensive use of expert witnesses by the federal government in criminal prosecutions, the liberalized admission of expert testimony under the rules of evidence, and the limited discovery afforded criminal defendants in the federal system all combine to create inequities that can and should be redressed by reforming federal criminal discovery as it applies to government experts. This reform should be sufficiently broad to accomplish the purpose of affording defendants the opportunity to meaningfully test the conclusions of the experts.