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### An Ounce of Pretrial Prevention Is Worth More Than a Pound of Post-Conviction Cure: Untethering Federal Pretrial Criminal Procedure from Due Process Standards of Review

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# **An Ounce of Pretrial Prevention Is Worth More Than a Pound of Post-Conviction Cure: Untethering Federal Pretrial Criminal Procedure From Due Process Standards of Review**

Jordan Gross\*

## **ABSTRACT**

Some Federal Rules of Criminal Procedure cover purely technical matters. Some Rules, however, cover procedures with constitutional dimensions. When a federal court is interpreting a Rule that has a companion constitutional doctrine, an issue arises as to whether the Rule's requirements are co-extensive with the constitutional protections defined by federal case law, or whether the Rule provides federal defendants a higher level of pretrial procedural protection than a post-conviction due process standard. Federal courts have been inconsistent in identifying and resolving this question of constitutional equivalency. In interpreting some pretrial Criminal Rules, federal courts make a clear distinction between the showing required to obtain relief under the Criminal Rules, on one hand, and the showing required to obtain relief under constitutional post-conviction standards, on the other. By interpreting them through other pretrial Criminal Rules, federal courts have interpreted the showing required to obtain relief under them to be co-extensive with constitutional post-conviction due process standards.

Where the interpretation of a Rule is driven by a post-conviction constitutional jurisprudence, this article argues that pretrial relief for federal defendants may be unnecessarily and unjustifiably defined and constrained by constitutional due process minimums. On the contrary, at the pretrial stage, an accused is presumed innocent, the trial court is in a unique position to prevent error, and systemic interests in preserving

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convictions after the government has obtained a conviction are not present. In this context, these factors, this article argues, should dictate a far less demanding standard for obtaining relief pretrial under the Criminal Rules than the showing required of an offender seeking post-conviction relief. This article considers two frequently litigated federal pretrial procedures that co-exist with a constitutional doctrine developed in the post-conviction review context – pretrial discovery and change of venue based on local prejudice – to illustrate federal courts’ inconsistent approaches to the question of whether pretrial relief under the Rules should be analyzed independently from constitutional standards developed in the post-conviction review context.

Part I provides a background discussion of the history of the Federal Rules of Criminal Procedure. Part II analyzes the text and federal case law governing Rules 16 and 21, the two specific federal provisions examined by this article, and their companion federal constitutional doctrines. Part III explains how federal courts’ application of constitutional post-conviction standards to federal pretrial motions is both analytically unsound and unnecessary. The article argues that there is no jurisprudential or statutory basis for assuming that federal courts should interpret the Rules to codify only a minimum due process standard, and concludes that unless the plain language of a particular Rule indicates that Congress intended federal defendants to be afforded no more than the minimal constitutional protections developed in the post-conviction review context, federal courts are precluded from applying post-conviction standards of review to resolve pretrial requests for procedural relief under the Rules.

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*“The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed-with the benefit of hindsight-as affecting the outcome of the trial.”*

*United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005).

*“[The federal change of venue rule] is preventative. It is anticipatory. It is not solely curative as is a post-conviction constitutional attack. Thus, the rule evokes foresight, always a more precious gift than hindsight, and for this reason the same certainty which warrants the reversal of a conviction will not always accompany the change of venue.”*

*United States v. Marcello*, 280 F. Supp. 510, 513 (E.D. La. 1968).

## INTRODUCTION

In 1944, against the backdrop of an inconsistent body of common law and patchwork legislation governing trials in federal courts, Congress enacted the Federal Rules of Criminal Procedure (“Criminal Rules”) to formalize and standardize trial process and procedure in the federal courts.<sup>1</sup> The Advisory Committee Notes that accompany the Criminal Rules provide some interpretive guidance for individual Rules. But the task of interpreting the Criminal Rules has largely been left to the federal courts.<sup>2</sup> Some aspects of the Criminal

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<sup>1</sup> See George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 700 (1946) (“[Before the adoption of the Federal Rules of Criminal Procedure,] federal criminal procedure could fairly be described as chaotic. Some matters were governed by piecemeal legislation, enacted at different times, and without apparent effort to achieve an integrated, cohesive system. As to other matters, common law prevailed; in the areas subject to the conformity principle, federal procedure looked to the common law as modified by the constitutions, statutes, and decisions of the courts of the states.”).

<sup>2</sup> See 1 CHARLES ALAN WRIGHT, ANDREW D. LEIPOLD, PETER J. HENNING & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 32 (4th ed. 2008) (footnotes and internal citations omitted) (“When each Rule was enacted, and each time the Rules are

Rules cover purely technical aspects of federal criminal procedure, such as recording requirements for preliminary hearings,<sup>3</sup> and the length of time for which a grand jury may be constituted.<sup>4</sup> Some Criminal Rules, however, address procedures that have substantive, and even constitutional dimensions. Examples include the probable cause requirement for issuance of an arrest warrant,<sup>5</sup> and the requirement that the defendant be present at certain pretrial proceedings, at trial, and at sentencing.<sup>6</sup> As a result, federal courts' interpretation of the Criminal Rules may be constrained or informed by constitutional doctrines and requirements. Where this is the case, federal courts' interpretation of a Criminal Rule may be driven by federal constitutional common law in addition to a Criminal Rule's text and accompanying Advisory Committee Notes.

The Criminal Rules and federal courts' interpretation of them, of course, apply only to federal, not state, court proceedings because authority to enact criminal procedural rules and laws governing state court proceedings is reserved to the individual states. The authority of individual states, however, is not limitless; all state criminal statutes,

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amended, the Advisory Committee publishes Notes of its reasoning in adopting the change and its intended meaning. The Advisory Committee Notes can be helpful to courts and lawyers seeking to interpret the Rules, but have no independent precedential force. The Notes . . . 'have no official sanction and are intended merely as suggestions and guides.'").

<sup>3</sup> See FED. R. CRIM. P. 5.1(g) ("[P]reliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any [required] payment . . .").

<sup>4</sup> See FED. R. CRIM. P. 6(g) ("A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.").

<sup>5</sup> See FED. R. CRIM. P. 4(a) ("If the complaint or one or more of affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant . . ."); *id.* advisory committee's note ("The rule states the existing law relating to warrants issued by commissioner or other magistrate." (citing U.S. CONST. amend. IV)).

<sup>6</sup> See FED. R. CRIM. P. 43(a) (requiring that, unless provided otherwise under the Criminal Rules, a defendant be present at the initial appearance, the initial arraignment, the plea, every trial stage and at sentencing); *id.* advisory committee's note ("The first sentence of the rule setting forth the necessity of the defendant's presence at arraignment and trial is a restatement of existing law." (citing *Lewis v. United States*, 146 U.S. 370 (1892), *abrogation on other grounds recognized by Diaz v. United States*, 223 U.S. 442, 455 (1912))).

rules and procedures must still meet minimum federal due process guarantees under the Supremacy Clause of the U.S. Constitution.<sup>7</sup> The vast majority of criminal offenses in the United States are prosecuted by states, not by the federal government.<sup>8</sup> However, because those proceedings must meet minimum federal constitutional protections, an extensive body of federal constitutional criminal procedural jurisprudence has evolved in the context of federal court review of state court convictions.<sup>9</sup> In contrast, comparatively few criminal offenses are prosecuted by the federal government. As a result, the bulk of federal constitutional criminal procedural law is focused on locating the federal constitutional due process floor that criminal court procedures must meet.<sup>10</sup>

When a federal court is interpreting or applying a federal

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<sup>7</sup> U.S. CONST. art. VI, cl. 2 (stating that the United States Constitution, federal statutes, and Treaties are “the supreme law of the land”).

<sup>8</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011 193, 195 (2011), available at <http://www.census.gov/prod/2011pubs/12statab/law.pdf> (“The bulk of civil and criminal litigation in the [United States] is commenced and determined in the various state courts. Only when the U.S. Constitution and acts of Congress specifically confer jurisdiction upon the federal courts may civil or criminal litigation be heard and decided by them.”).

<sup>9</sup> See Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211, 242-43 (2008) (footnote omitted) (“Because the vast majority of criminal cases in the U.S. are prosecuted in state courts, certain kinds of important federal constitutional issues may arise more frequently-or nearly exclusively-in state court criminal proceedings.”); see also Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. Legal F. 315, 323-24 (footnotes and citations omitted) (“In its landmark 1953 decision, *Brown v. Allen*, the Supreme Court confirmed what a half-century of practice had increasingly made clear: federal habeas would generally provide a forum for de novo review of state decisions rejecting the federal constitutional claims of state prisoners. Over the next two decades, the scope and significance of the habeas forum expanded dramatically. As the Court enlarged the federal constitutional rights of state criminal defendants by extending Fourth, Fifth, Sixth, and Eighth Amendment protections to state proceedings via the Fourteenth Amendment’s Due Process Clause, the grounds for federal habeas relief radically broadened.”).

<sup>10</sup> Steiker, *supra* note 9, at 342 (“[T]he range of constitutional claims available to state prisoners increased dramatically in the 1950s and 1960s. The simultaneous expansion of the federal writ and federal constitutional rights thus led to increased federal supervision of state criminal processes.”).

Criminal Rule that has a companion constitutional doctrine, a question may arise as to whether the Rule's requirements are co-extensive with the constitutional protections defined by federal case law, or whether the Rule provides federal defendants a higher level of pretrial procedural protection than a post-conviction due process standard. Federal courts have been inconsistent in identifying and resolving this question of constitutional equivalency. In interpreting some pretrial Criminal Rules, federal courts make a clear distinction between the showing required to obtain relief under the Criminal Rules, on one hand, and the showing required to obtain relief under constitutional post-conviction standards, on the other. In interpreting with other pretrial Criminal Rules, federal courts have interpreted the showing required to obtain relief under them to be co-extensive with constitutional post-conviction due process standards.

This article argues that where the interpretation of a Criminal Rule is driven by a post-conviction constitutional jurisprudence, pretrial relief for federal defendants may be unnecessarily and unjustifiably defined and constrained by constitutional due process minimums. To illustrate, this article considers two frequently litigated pretrial procedures that co-exist with a constitutional doctrine developed in the post-conviction review context. The first procedure examined is federal pretrial discovery. Most federal discovery is subject to a limitation that only requires the government to produce items that are "material" to the defense. This article examines the development of two different definitions of the term "material" federal trial courts apply to pretrial discovery requests, depending on whether a defendant requests discovery under the Criminal Rules, or under the Fifth Amendment. The second procedure examined is change of venue based on local prejudice. With respect to federal change of venue procedure, federal courts have proven unable collectively to resolve whether a federal defendant's change of venue motion under the Criminal Rules should be analyzed independently from the constitutional standard developed in the post-conviction review context.

Part I of this article provides a background discussion of the history and purpose of the Federal Rules of Criminal Procedure. Part II analyzes the text, history and purpose of Rule 16 and Rule 21, the two specific federal rules examined in this article, along with their companion federal constitutional doctrines. Part III examines how federal courts' application of constitutional post-conviction standards to federal pretrial motions is both analytically unsound and unnecessary.



This article argues that there is no jurisprudential or statutory basis for assuming that federal courts should interpret the Criminal Rules to codify only minimum due process standards. On the contrary, at the pretrial stage, where an accused is presumed innocent, the trial court is in a unique position to prevent error, and systemic interests in protecting convictions and appellate court deference to the trial courts post-conviction are not present, normative, jurisprudential, and due process interests should compel a very different understanding of pretrial Criminal Rules. In the pretrial context, these considerations, as a minimum, should translate into a far less demanding and far more preventative standard for obtaining relief pretrial under the Criminal Rules than a due process constitutional minimum standard applicable to an offender seeking post-conviction relief on review. This article concludes that unless the plain language or statutory history of a particular Criminal Rule indicates that Congress intended federal defendants to be afforded no more than the minimal constitutional protections developed in the post-conviction review context, federal courts are precluded from applying post-conviction standards of review to resolve pretrial requests for procedural relief under the Criminal Rules.

### **I. Federal Rules of Criminal Procedure – Background and Interpretive History**

Congress enacted the Federal Rules of Criminal Procedure in 1944 following the successful implementation of the Federal Rules of Civil Procedure.<sup>11</sup> Before Congress enacted the Criminal Rules, federal

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<sup>11</sup> Madeleine J. Wilken & Nicholas Triffin, *Preface* to 1 *Drafting History of the Federal Rules of Criminal Procedure Including Comments, Recommendations, and Suggestions on Drafts of the Rules*, at xi (Madeleine J. Wilken & Nicholas Triffin eds., 1991) (footnotes omitted) (“In 1943, Congress gave the Supreme Court the power to make rules with respect to civil actions and to make uniform the procedures to be used both in cases of equity and in actions at law. The ensuing Federal Rules of Civil Procedure . . . were generally well received and there were many who believed that the various criminal rules in use in the District Courts should be made uniform as well. Consequently, Congress granted the Supreme Court the power to make rules of procedure for criminal cases . . .”). The Supreme Court appointed an Advisory Committee, which published its Preliminary Drafts for comment in 1943 and 1944. *Id.* at xiii-xiv. The Rules became effective on March 21, 1946. *Id.* at xv; *see also* Nathan E. Ross, *The Nearly Forgotten Supervisory Power: The Wrench to Retaining the Miranda Warnings*, 66 MO. L. REV. 849, 862 (2001) (footnote omitted) (“Congress authorized the Court to develop Federal Rules of Civil Procedure . . . to replace the prior federal laws that provided little coherence and fostered confusion. Satisfied with the Federal

criminal procedure consisted of a scattered collection of rules derived from various sources lacking any cohesion or internal consistency.<sup>12</sup> After the Rules became effective, the Advisory Committee created a set of Advisory Notes for the Criminal Rules to provide guidance to courts and practitioners.<sup>13</sup> The Advisory Notes indicate that, like the Federal Rules of Civil Procedure, the Criminal Rules codified and formalized some pretrial procedures in federal courts. In other instances, the Criminal Rules explicitly rejected and departed from existing procedures and customs.<sup>14</sup> In some cases, the Advisory Notes provide the Committee's view on how court should interpret and apply particular provisions.<sup>15</sup>

The Criminal Rules are at once constitutionally-based and yet not constitutionally-constrained. As with all statutes and procedural rules, both state and federal, the Criminal Rules must meet a federal constitutional floor and ensure the basic level of federal due process protections guaranteed to all defendants. And, like all state and federal statutes and procedural rules, the Criminal Rules can exceed the

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Rules of Civil Procedure, Congress also authorized the Court to promulgate Federal Rules of Criminal Procedure . . .”).

<sup>12</sup> See Wendell Berge, *The Proposed Federal Rules of Criminal Procedure*, 42 MICH. L. REV. 353, 353 (1943) (“On numerous questions the practice of various districts and circuits is in conflict. Existing legislation is fragmentary, and has not been periodically revised in any systematic way to conform to experience.”).

<sup>13</sup> Wilken & Triffin, *supra* note 11, at xv-xvi (“Undaunted, or impelled by its own momentum, the Committee continued to labor on one last project: a set of notes to the Rules ‘to indicate . . . which provisions of the Rules are restatements of existing law, to define the extent of any changes, and to the extent that any of these Rules involve innovations, to ascertain their background and source.’” (citing U.S. GOVERNMENT PRINTING OFFICE, *Notes to the Rules of Criminal Procedure for the District Courts of the United States*, at IX (1945))).

<sup>14</sup> Dession, *supra* note 1, at 699 (“The rules work no revolutionary reforms. Some restate existing law. Others involve substantial changes. By and large those changes consist in adoption of modern practices developed in the more progressive states and in England. A few are new. The prime values sought to be served throughout were, as declared in Rule 2, ‘simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.’” (citing FED. R. CRIM. P. 2)).

<sup>15</sup> See 8A FEDERAL PROCEDURE, LAWYERS EDITION § 22:3 (2013) (“In the absence of a clear legislative mandate, the Notes of the Advisory Committee on the Federal Rules of Criminal Procedure provide a reliable source of insight into the meaning of a Rule of Criminal Procedure. While the Notes are not authoritative, they are somewhat analogous to congressional committee reports in determining the intention of the framers of the rules.” (citing *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002); *United States v. Mihalopoulos*, 228 F. Supp. 994, 1002 (D.D.C. 1964))).

constitutional floor and provide additional or a higher level of procedural protection not mandated by the Constitution.<sup>16</sup> Because the Criminal Rules may overlap with federal constitutional doctrines, federal courts' interpretation of them may be informed by an extensive body of federal constitutional criminal procedure. As noted, this body of law is mostly concerned with seeking to identify the floor for constitutional procedural protection available to criminal defendants generally, not the outer reaches of the procedural protection available to federal defendants under the Criminal Rules. A logical, but often overlooked, aspect of federal courts' interpretation and application of a given Criminal Rule in this context is whether a federal criminal defendant's request for pretrial relief should be governed or limited by the constitutional floor that applies when a federal court is reviewing a criminal proceeding post-conviction. As discussed below, this is an interpretive issue on which federal courts have reached different conclusions. This article argues that, absent a clear Congressional intent or a institutional or systemic justification to do otherwise, the pretrial procedural protection extended to an accused should not be the same as that afforded to a convicted offender and that federal trial courts should be required to apply preventative interpretation the Criminal Rules.

## II. Conflating Post-Conviction Due Process Review and Pretrial Relief Standards – Two Examples

A premise of this article is that federal courts have been inconsistent in analyzing whether federal pretrial procedural requirements under the Criminal Rules are coextensive with post-conviction due process standards. To illustrate this inconsistency, this article considers two frequently litigated federal pretrial procedures and their companion due process doctrines. This section examines contemporary federal courts' treatment of these two pretrial criminal procedures vis-a-vis their constitutional counterparts and argues that federal courts' application of post-conviction review standards to pretrial

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<sup>16</sup> See, e.g., *Jones v. Gasch*, 404 F.2d 1231, 1234-35 (D.C. Cir. 1967) (“The Criminal Rules . . . implemented the constitutional mandates but introduced a degree of flexibility of which the accused might optionally avail.”); see also FED. R. CRIM. P. 21(a)-(b) advisory committee’s note (“The rule provides for a change of venue only on defendant’s motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed. . . . By making a motion for a change of venue, however, the defendant waives this constitutional right.” (citing U.S. CONST. art. III, § 2, para. 3; *id.* amend. VI)).

motions may unjustifiably and unjustly constrain the procedural relief available to federal defendants under the Criminal Rules.

In federal cases, pretrial discovery is governed by Criminal Rule 16(a) and Fifth Amendment due process guarantees. Both Criminal Rule 16(a) and Fifth Amendment due process require defendants to make a threshold showing of “materiality” to compel disclosure of the bulk of discoverable material in a criminal prosecution. That is, for most categories of discovery in a federal criminal case, the defendant must show that the items requested are “material” to the defense. Although the term used for the showing required for both – “material” – is the same, federal courts may interpret the term differently depending on whether a defendant’s discovery request is made under Criminal Rule 16(a), on one hand, or under the Fifth Amendment due process clause, on the other. Specifically, where a federal defendant relies on the Fifth Amendment to compel discovery, most federal courts, relying on a body of jurisprudence developed in the context of post-conviction review, interpret the term “materiality” to require a higher showing than a motion brought under Criminal Rule 16(a). And federal courts have uniformly concluded that the materiality showing required under Criminal Rule 16(a) is not particularly demanding. Thus, under federal criminal pretrial procedure, what is “material” for purposes of Criminal Rule 16(a) may not be “material” for purposes of constitutional due process, leading to a more constrained interpretation of what pretrial discovery the prosecution is required to produce under a due process standard as opposed to a request under Criminal Rule 16(a). At the same time, unlike many state criminal procedural codes that require “lay down” discovery, a federal prosecutor’s discovery obligations under Criminal Rule 16(a) are limited to specific categories of evidence, which are comparatively limited in scope. The result is that to establish a due process claim to production of items that fall outside the specific categories of evidence identified in Criminal Rule 16(a), a federal defendant must make a higher pretrial showing of materiality than he or she is required to make to obtain discovery under Criminal Rule 16(a).

The second example is pretrial change of venue motions, specifically, change of venue motions that rely on prejudice in the trial district as a basis for transferring a proceeding to another venue. In federal cases, this pretrial procedure is governed by Criminal Rule 21(a), Fifth Amendment due process guarantees, and the Sixth Amendment impartial jury right. In the post-conviction context, the Supreme Court has recognized that a change of venue may be constitutionally required

in some cases of local prejudice,<sup>17</sup> and it has set a high bar for making this showing.<sup>18</sup> However, the question of whether a federal defendant's motion for pretrial relief under Criminal Rule 21(a) is governed by the constitutional standard developed in the post-conviction review context remains contested.

*A. Materiality and Pretrial Discovery*

The state and federal criminal justice systems have embraced very different philosophies and approaches to criminal discovery. Compared with liberal criminal discovery adopted by some states, federal criminal discovery is quite limited.<sup>19</sup> Federal defendants have three bases for requesting pretrial discovery: (1) Federal Rule of Criminal Procedure 16(a), (2) the Jencks Act, and (3) the Fifth Amendment due process clause.<sup>20</sup>

As discussed below, to obtain some categories of discovery under Criminal Rule 16(a) a federal defendant must make a showing of "materiality." To forward a Brady claim, defendants must also make a "materiality" showing. Thus, the term "materiality" is used in both contexts. Although the same term is used in both contexts, a three way split of authority exists regarding how to apply the Brady constitutional materiality requirement pretrial. This section sets out and discusses the three views taken by federal courts that have considered this issue: (1) the definition of materiality for Criminal Rule 16(a) is different from the

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<sup>17</sup> See *Groppi v. Wisconsin*, 400 U.S. 505, 510-11 (1971) (holding that in some cases, a change of venue may be the only constitutionally adequate remedy for prejudicial pretrial publicity).

<sup>18</sup> See *infra* note 94 and accompanying text.

<sup>19</sup> John D. Cline, *It Is Time to Fix the Federal Criminal System*, CHAMPION, Sept. 2011, at 34, 35 ("In some states, liberal discovery rules offset the prosecutor's overwhelming pre-indictment information-gathering advantage. In the federal system, however, discovery is limited."); H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 Rutgers L. Rev. 1089, 1089 (1991) ("It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters.").

<sup>20</sup> See FED. R. CRIM. P. 16 (requiring disclosure of defendant's oral or recorded statements and prior criminal record, certain documents and tangible objects, reports of medical examinations and scientific tests, and a summary of expert testimony); Jencks Act, 18 U.S.C. § 3500 (2012) (requiring disclosure of certain pretrial statements of government witnesses after the witness testifies on direct examination); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

Brady post-conviction materiality standard, (2) the Brady materiality standard in the pretrial context is co-extensive with the materiality definition applied to Criminal Rule 16(a), and (3) the Brady materiality standard entirely forecloses any constitutional grounds for requesting or ordering pretrial discovery.

Criminal Rule 16 sets out two categories of discovery federal defendants are entitled to that are governed by two different standards. The first category consists of discovery a defendant is entitled to upon request, with no additional showing needed to trigger the government's production obligation. This category includes the defendant's oral, written, or recorded statements,<sup>21</sup> the defendant's prior criminal record<sup>22</sup>, and a written summary of expert witness testimony the government intends to use in its case-in-chief.<sup>23</sup> The second category consists of discovery a defendant is entitled to only upon request and a showing of materiality. This category consists of documents and objects, and reports of examinations and tests within the government's possession, custody, or control that are "material" to the defense:

**(E) Documents and Objects.** Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph [documents and objects] . . . if the item is within the government's possession, custody, or control and . . . the item is material to preparing the defense[. <sup>24</sup>]

**(F) Reports of Examinations and Tests.** Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or

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<sup>21</sup> FED. R. CRIM. P. 16(a)(1)(A)-(C).

<sup>22</sup> FED. R. CRIM. P. 16(a)(1)(D).

<sup>23</sup> FED. R. CRIM. P. 16(a)(1)(G).

<sup>24</sup> Rule 16(a)(1)(E)(ii) and (iii) further provide that the government must, upon a defendant's request, provide "documents and objects" it intends to use in its case-in-chief at trial, or items obtained from or belonging to the defendant without requiring a showing of materiality showing. With respect to items falling under these two latter categories, the materiality of items is presumed without requiring an independent showing by the defendant. *See* FED. R. CRIM. P. 16 advisory committee's note (1974 amendment) ("[S]ubdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant . . . [t]his is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of 'materiality.' . . . Requiring disclosure of documents and tangible objects which 'were obtained from or belong to the defendant' probably is also making explicit in the rule what would otherwise be the interpretation of 'materiality.'" (citing CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 254 (1st ed. 1969 & Supp. 1971))).

mental examination and of any scientific test or experiment if . . . the item is within the government's possession, custody, or control; . . . the attorney for the government knows – or through reasonable diligence could know – that the item exists; and . . . the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

The definition of “document and objects” under Criminal Rule 16(a) is extensive.<sup>25</sup> And it will usually encompass the largest category of discoverable items in a federal criminal matter. As a result, a federal defendant will ordinarily need to make a pretrial showing of materiality under Criminal Rule 16 to obtain the bulk of discoverable items in the government's possession or control.

Criminal Rule 16 is not the only grounds for obtaining pretrial discovery in a federal case – whether a criminal defendant is entitled to compel the government to produce evidence pretrial is an issue with constitutional dimensions as well. A defendant has no general federal constitutional right to discover any of the prosecution's evidence.<sup>26</sup> However, under the Constitution, it is a violation of due process for the prosecutor to withhold exculpatory information that is “material” to the defense under a constitutional doctrine referred to as the “*Brady* Rule.”<sup>27</sup> In *Brady*, the Supreme Court established that the suppression of evidence requested by an accused pretrial that might reasonably be considered favorable to the defense violates federal due process if the evidence is material to the guilt or punishment of the accused.<sup>28</sup>

Thus, the *Brady* Rule stands for the proposition that a defendant has a constitutionally cognizable claim if the prosecution fails to produce evidence pretrial that: (1) relates to the guilt or innocence of the defendant<sup>29</sup> and (2) is “material.”<sup>30</sup> Although *Brady* established a

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<sup>25</sup> The definition of “documents and objects” encompasses “books, papers, document, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items.” FED. R. CRIM. P. 16(a)(1)(E).

<sup>26</sup> See *United States v. Quinn*, 123 F.3d 1415, 1421 (11th Cir. 1997) (“The Supreme Court has made it clear . . . that there is no general constitutional right to discovery in a criminal case.”).

<sup>27</sup> The rule's name refers to *Brady v. Maryland*, a post-conviction challenge to a state court conviction in which the Court held that due process requires the prosecution to disclose evidence favorable to the accused. 373 U.S. 83, 85, 87 (1963).

<sup>28</sup> *Id.* at 87 (“We now hold that 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 punishment, irrespective of the good faith or bad faith of the prosecution.”).

<sup>29</sup> See Christopher Deal, *Brady Materiality Before Trial: The Scope of the Duty to*

materiality requirement, it did not define the term “material.”<sup>31</sup> Instead, it left the issue to be resolved in future cases. Post-*Brady*, in *United States v. Bagley*, the Supreme Court established that evidence is only material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>32</sup> A “reasonable probability”, the Supreme Court explained, “is a probability sufficient to undermine confidence in the outcome.”<sup>33</sup>

In *Kyles v. Whitley*, the Supreme Court subsequently reiterated that constitutional error in the context of undisclosed evidence arises only if the evidence was material.<sup>34</sup> In *Kyles*, the Court also provided a comprehensive explanation of the four aspects of materiality pertinent to the constitutional inquiry. First, a reasonable probability of a different result is shown where suppression of evidence undermines confidence in the outcome of the trial.<sup>35</sup> Second, a *Brady* violation is established if “favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”<sup>36</sup> Third, once a reviewing court has found constitutional error, there is no need for further harmless error review. And, fourth, whether suppressed evidence is “material” is “considered collectively, not item by item.”<sup>37</sup> In other words, a federal court will find no *Brady* violation absent a showing of a reasonable probability of a different (*i.e.* more favorable) outcome in the proceeding had the government timely disclosed the evidence in question in light of all the other evidence admitted at trial.

The due process materiality definition has been articulated as a purely post-conviction standard – under it, a defendant is only entitled to

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*Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1811-12 (2007) (“[I]nculpatory evidence . . . tends to prove the defendant’s guilt, and favorable evidence . . . tends to negate guilt or render inculpatory evidence less credible.”).

<sup>30</sup> See 2 WRIGHT ET. AL., *supra* note 2, at § 256 (“Even if evidence is exculpatory and not disclosed by the prosecutor, a *Brady* violation occurs only if the information was “material.”).

<sup>31</sup> See *United States v. Coppa*, 267 F.3d 132, 141 (2d Cir. 2001) (opining that *Brady* likely used “material” in its evidentiary sense to include all “evidence that has some probative tendency to preclude a finding of guilt or lessen punishment”).

<sup>32</sup> 473 U.S. 667, 682 (1985).

<sup>33</sup> *Id.*

<sup>34</sup> 514 U.S. 419, 434 (1995) (stating that the materiality standard examines whether, in the absence of the suppressed evidence, the defendant “received a fair trial,” meaning a trial “resulting in a verdict worthy of confidence”).

<sup>35</sup> *Id.* at 435.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 436.



relief if the defendant can show that the withheld evidence would have made a difference in the outcome of the defendant's trial. To make that evaluation, a trial court must necessarily know the outcome of the defendant's trial, which, obviously, can only be known post trial. A review standard that looks at the impact of withheld evidence on a trial makes sense in the appellate context. However, an obvious dissonance presents itself when the *Brady* standard is applied in a pretrial context since a trial a court logically cannot evaluate whether evidence withheld by the prosecution would have changed the outcome of a proceeding until a conviction has been obtained. Thus, like the appellate harmless error standard,<sup>38</sup> the *Brady* "reasonable probability" materiality standard is applied from a retrospective, post-conviction vantage point. In the pretrial context, its application is nonsensical, if not impossible.<sup>39</sup> Indeed, this is something the Advisory Committee noted when it amended Criminal Rule 16 in 1974, roughly a decade after *Brady*, by acknowledging that a pretrial materiality requirement may be difficult for a defendant to meet "if he does not know what the evidence is."<sup>40</sup>

Federal courts have acknowledged (and federal defendants have litigated) the anomaly of applying a post-conviction reasonable probability materiality standard to pretrial *Brady* requests. Even though the reasonable probability materiality standard requires a trial court to assume a hindsight perspective that it cannot possess pretrial, most federal trial courts require defendants to meet the post-conviction materiality standard to establish a constitutional pretrial claim to discovery.<sup>41</sup> Some federal trial courts have gone further, concluding that

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<sup>38</sup> See Deal, *supra* note 29, at 1783-84 (citations and footnotes omitted) ("*Brady* materiality is, in some ways, analogous to harmless-error review. . . . The idea behind harmless error is simple: Courts will not reverse a defendant's conviction unless the error might have mattered. Depending on the type of error, courts require differing levels of certitude that the error did not make a difference. With *Brady* materiality, the suppression of favorable evidence does not entitle a defendant to a new trial unless its disclosure portends a reasonable probability of a different result. . . . On this account, the government's pretrial nondisclosure violates *Brady* only if it would merit reversal on appeal.").

<sup>39</sup> See *Kyles*, 473 U.S. 667, 700 (1985) (Marshall, J., dissenting) (stating that pretrial materiality is a standard that "virtually defies definition"); see also Cline, *supra* note 19, at 35 (describing the *Brady* rule as "largely toothless" because of the materiality requirement).

<sup>40</sup> FED. R. CRIM. P. 16 advisory committee's note (1974 amendment) (citing STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL §2.1(a)(v) and commentary at 68-69 (Approved Draft 1970)).

<sup>41</sup> See, e.g., *United States v. Padilla*, No. CR 09-3598 JB, 2010 WL 4337819 (D.N.M.

the *Brady* materiality standard entirely forecloses *any* basis for ordering pretrial discovery on constitutional grounds, leaving Criminal Rule 16(a) as federal defendants' sole ground for obtaining pretrial discovery.<sup>42</sup> Because the scope of material deemed "Brady" material may be broader than the categories of discovery covered by Criminal Rule 16(a), the result under this approach is to leave federal defendants no pretrial procedural basis for obtaining discovery that may be material to the defense, but that falls outside Criminal Rule 16(a). Under this approach, a federal defendant's cannot obtain discovery pretrial based on a due process claim, only challenge the suppression of evidence through a post-conviction challenge. Further, the federal courts that apply the *Brady* post-conviction materiality standard to pretrial discovery requests do so not because they consider the approach analytically sound. Rather, they do so because they have concluded they are constrained by Supreme Court precedent to apply the constitutional hindsight standard to pretrial discovery requests.<sup>43</sup> Supreme Court precedent

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Sept. 3, 2010) ("In light of the Tenth Circuit's [precedent] . . . the Supreme Court's unambiguous holding that no constitutional violation occurs unless the United States withholds evidence material to guilt or punishment, and that materiality means evidence for which there is a reasonable probability that, had it been disclosed, a different verdict would have resulted, the Court is not inclined to adopt [a] broad pretrial disclosure standard. . . . [T]he Court believes that such an approach gets close to civil discovery rather than the standard the American courts have employed since *Brady v. Maryland*." (citing *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988); *Cone v. Bell*, 556 U.S. 449, 469-70 (2009); *United States v. Bagley*, 473 U.S. 667, 682 (1985)); see also *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) (reversing trial court order requiring immediate pretrial disclosure of all favorable evidence in the government's possession and rejecting a different pretrial *Brady* standard despite the difficulties inherent in determining materiality at that juncture); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1243 (D. Nev. 2005) (materiality standard governs *Brady* pretrial requests).

<sup>42</sup> See, e.g., *United States v. Causey*, 356 F. Supp. 2d 681, 688, 698 (S.D. Tex. 2005) (citation and internal quotation marks omitted) (denying motion to compel production of *Brady* evidence before trial and citing Fifth Circuit precedents holding that "*Brady* is not a pretrial remedy"); see also *United States v. Washington*, 669 F. Supp. 1447, 1451 (N.D. Ind. 1987) ("An order to produce *Brady* materials makes as little sense as an order to preserve the accused's right to be free from unreasonable searches and seizures . . . [f]rom a court's perspective, *Brady* is remedial in nature.").

<sup>43</sup> See *United States v. Agurs*, 427 U.S. 97, 107-08 (1976) ("Logically the same standard [for materiality] must apply [before and after trial]. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . . [but materiality determinations would be] inevitably imprecise . . . because the significance of an item of evidence can seldom

notwithstanding, a handful of federal courts have rejected the application of a post-conviction materiality definition to pretrial *Brady* requests, holding that the prosecution must disclose all evidence favorable to the defense pretrial, regardless of whether it is likely to affect the outcome of the proceeding.<sup>44</sup>

Like *Brady*, Criminal Rule 16(a) also limits the government's pretrial discovery obligation to certain items that are "material." Although federal courts have been inconsistent in the application of the *Brady* materiality standard pretrial, they uniformly recognize a more liberal materiality requirement applies to pretrial discovery requests under Criminal Rule 16(a).<sup>45</sup> *Brady*, as discussed, is limited to evidence that is favorable or helpful to the defense if there is a reasonable probability pretrial disclosure of the withheld discovery would have

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be predicted accurately until the entire record is complete."); *see also* *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[*Brady*] requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."); *Acosta*, 357 F. Supp. 2d at 1243 ("*Kyles*' articulation of the four prong test for determining materiality persuades the court that the Supreme Court would reject the position . . . that all exculpatory evidence and information that might lead to the discovery of admissible evidence is subject to mandatory pretrial disclosure under *Brady* and *Giglio*").

<sup>44</sup> *See* *United States v. Safavian*, 233 F.R.D. 12, 16-17 (D.D.C. 2005) (finding that pretrial judgments on materiality are "speculative" and dependent on questions that are "unknown or unknowable," and that the government's effort to evaluate its disclosure obligations in light of post-conviction materiality standards is an attempt to "look at the case pretrial through the end of the telescope an appellate court would use post-trial"); *United States v. Carter*, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) ("[Because a court] cannot know what possible effect certain evidence will have on a trial not yet held. . . . [courts] should ordinarily require the pre-trial disclosure of all exculpatory or impeachment evidence [without regard to materiality]."); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999) ("[Materiality] standard is only appropriate, and thus applicable, in the context of appellate review."); *see also* *United States v. Jack*, 257 F.R.D. 221, 229 n.8 (E.D. Cal. 2009) ("It has been suggested that where there is a pretrial motion seeking *Brady* material, the question is strictly whether the evidence sought is favorable to the defense and that the concept of materiality is irrelevant." (citing *Acosta*, 357 F. Supp. 2d at 1243; *Sudikoff*, 36 F. Supp. 2d at 1199)).

<sup>45</sup> *See* *Safavian*, 233 F.R.D. at 15-16; *United States v. Marshall*, 132 F.3d 63, 69 (D.C. Cir. 1998); *United States v. Lloyd*, 992 F.2d 348, 350-51 (D.C. Cir. 1993); *United States v. George*, 786 F. Supp. 11, 13 (D.D.C. 1991) (Rule 16(a) materiality hurdle "is not a high one"); *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989) ("[Rule 16 is] designed to provide to a criminal defendant . . . the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case.").

changed the outcome of the trial.<sup>46</sup> In contrast, federal courts interpret Criminal Rule 16(a)'s materiality standard as setting a much lower bar for establishing materiality. Under the standard courts apply to Criminal Rule 16(a), evidence is considered material "if there is a strong indication that it may play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."<sup>47</sup> Similarly, federal courts interpret the government's Criminal Rule 16(a) discovery obligation to require production of inculpatory, as well as exculpatory evidence (*i.e.* favorable or helpful to the defense).<sup>48</sup> Federal courts have further held that the government cannot limit its Criminal Rule 16(a) pretrial discovery obligations by reading the term "material" narrowly or "put itself in the shoes of defense counsel in attempting to predict the nature of what the defense may be or what may be material to its preparation."<sup>49</sup>

Thus, there is consensus among federal courts that the materiality requirement under Criminal Rule 16(a) is to be read liberally. But a three-way split of authority exists regarding how to apply the *Brady* constitutional materiality requirement pretrial. The three views taken by federal courts that have considered this issue are: (1) the definition of materiality for Criminal Rule 16(a) is different from the *Brady* post-conviction materiality standard, with pretrial *Brady* requests subject to a higher showing of materiality than Rule-based requests, (2) the *Brady* materiality standard in the pretrial context is co-extensive with the materiality definition applied to Criminal Rule 16(a), and (3) the *Brady* materiality standard entirely forecloses any constitutional grounds for requesting or ordering pretrial discovery, leaving Criminal Rule 16(a), as federal defendants' sole basis for requesting discovery pretrial in federal proceedings.

### B. Fair, Impartial Trial and Change of Venue

Before Congress adopted the Criminal Rules, there was no provision in federal law allowing defendants to seek a change of venue on the basis of local prejudice in the venue where the trial was set.<sup>50</sup> For

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<sup>46</sup> See *supra* text accompanying note 27.

<sup>47</sup> *Lloyd*, 992 F.2d at 351 (citing *George*, 786 F. Supp. at 56, 58).

<sup>48</sup> *Marshall*, 132 F.3d at 69.

<sup>49</sup> *Safavian*, 233 F.R.D. at 15-16.

<sup>50</sup> See FED. R. CRIM. P. 23 (Preliminary Draft No. 2 1944) advisory committee's note, reprinted in 4 *Drafting History of the Federal Rules of Criminal Procedure* 107 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) [hereinafter DRAFTING HISTORY]

the first time under federal law, the 1944 Criminal Rules included a change of venue provision.<sup>51</sup> The provision requires federal courts to transfer a criminal proceeding upon a defendant's motion if the court is "satisfied" that there exists "so great a prejudice" in the venue where the proceeding is pending that the defendant cannot obtain a fair and impartial trial there.<sup>52</sup>

The current version of Rule 21(a)<sup>53</sup> is virtually identical to the original version of the rule. Since its enactment, the Rule has been amended only to remove the reference to "division" in the original version to reflect the elimination of Division venue within the Federal District Courts, and to replace the word "shall" with the word "must" to incorporate global stylistic changes to the Federal Rules of Criminal Procedure.<sup>54</sup> The current version of Rule 21(a) reads as follows:

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(citations to state codes omitted) ("The rule introduces into the federal criminal procedure a method of transferring cases from one federal district to another in two situations. The first (Subdivision (a)) is that frequently covered in state codes, i.e., where a fair trial cannot be had in the place where the prosecution is instituted. There is no provision similar to these state statutes in the statutes regulating federal criminal procedure.").

<sup>51</sup> See *Jones v. Gasch*, 404 F.2d 1231, 1234-35 (D.C. Cir. 1967) (internal citations and footnotes omitted) ("The Constitution ordains the trial of offenses against the United States in the state and district of alleged commission. . . . Although the Fifth Amendment secures the right to a fair trial, and the Sixth the right to an impartial jury, no method of removing the case was then available, even where prejudice in the locality of the crime made an unbiased verdict quite impossible. . . . Among the innovations [of the Criminal Rules] were provisions for . . . a change of venue when community prejudice forestalled a fair trial locally.").

<sup>52</sup> See *supra* note 50.

<sup>53</sup> The change of venue rule was originally contained in proposed Rule 40(c)(2). It subsequently appeared in Rule 23 in the Preliminary Drafts and Final Report, and in Rule 21 in the final version of the Rules. See 1 DRAFTING HISTORY, *supra* note 50, at 127 tbl.B. Although Rule 21 has been amended on several occasions (Rule 21 was amended in 1966, 1987, 2002, and 2010), the change of venue provision has remained substantively unchanged. See FED. R. CRIM. P. 21 advisory committee's note.

<sup>54</sup> The 1966 version of Criminal Rule 21 eliminated the reference to transferring to another Division within a District. This change reflects the elimination of Division venue in 1966. FED. R. CRIM. P. 21 advisory committee's note (1966 amendment). The current version of Rule 21 uses the term "must" rather than "shall" to describe the court's obligation to grant a venue change. The Advisory Committee Notes indicate that these terminology changes are stylistic and technical. FED. R. CRIM. P. 21 and advisory committee's note (2002 amendment); see also FED. R. CRIM. P. 18 and advisory committee's note (2002 amendment).

**Rule 21. Transfer for Trial**

(a) For Prejudice. Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

As with Criminal Rule 16(a), Rule 21(a) was enacted and amended against a backdrop of pre-existing constitutional jurisprudence that overlaps with the substance of the rule. In the case of Criminal Rule 21(a), the overlapping constitutional doctrines arise under the Sixth Amendment guarantee to a trial before an impartial jury and the Fifth Amendment due process fair trial guarantee.<sup>55</sup> When Criminal Rule 21(a) was adopted in 1944, federal courts had already identified local prejudice in the district where a defendant was to stand trial as an issue with constitutional dimensions. For example, as early as 1807 in the trial of Aaron Burr for treason and related crimes, Chief Justice John Marshall, sitting as a circuit judge, interpreted the constitutional impartial jury guarantee to require disqualification of jurors in the charging venue who had expressed any opinion on "any fact conducive to the final decision of the case."<sup>56</sup> Later federal court opinions considered and refined the Sixth Amendment constitutional jurisprudence, defining the meaning of an "impartial" juror and identifying the contours of the due process fair trial guarantee in the face of local prejudice in the charging venue.<sup>57</sup>

When Criminal Rule 21(a) was adopted, a body of constitutional law existed addressing the underlying substance of that procedural rule –

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<sup>55</sup> The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury "in the State where the . . . Crimes . . . have been committed." U.S. CONST. art. III, § 2, cl. 3; *see also id.* amend. VI (conferring the right to trial by "jury of the State and district wherein the crime shall have been committed"). The Supreme Court extended Sixth Amendment jury trial guarantees to state court proceedings in its 1968 decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). Prior to that, cases considering juror bias in the charging venue were analyzed as a Fourteenth Amendment due process proposition, not as a Sixth Amendment question. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

<sup>56</sup> *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807).

<sup>57</sup> *See Patterson v. Colorado*, 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print").

protecting a defendant's impartial jury and fair trial rights in a proceeding set in a venue where those rights may be compromised by local prejudice. Some federal courts concluded they had inherent authority and discretion to order a change of venue before Criminal Rule 21(a) was adopted.<sup>58</sup> However, with no change of venue provision in existence under federal law prior to the adoption of Criminal Rule 21(a), federal courts did not have a clear source of authority to order a change of venue. The innovation of Criminal Rule 21(a) was to establish a preventative pretrial procedure requiring trial courts to move federal criminal proceedings when a defendant establishes, to the satisfaction of the trial court, that local prejudice threatens the defendant's ability to obtain a fair and impartial trial in the venue where trial is set.<sup>59</sup>

Criminal Rule 21(a), of course, did not create a new procedural right to a fair and impartial jury in the trial venue; that right already existed under the federal constitution.<sup>60</sup> What Criminal Rule 21(a) did was establish a change of venue as a procedural remedy available to defendants able to show that they could not secure an impartial jury in the trial venue due to local prejudice. In contrast, there was no corresponding federal law addressing the issue of remedying local prejudice in *state* court proceedings as a matter of federal constitutional law until the 1960s. Thus, federal defendants were afforded a procedural right to a change of venue when Criminal Rule 21(a) was adopted in 1944. But the Court did not recognize a federal constitutional claim to a change of venue based on local prejudice until almost two decades later after federal habeas became established as a forum for litigating federal constitutional claims and produced a well-developed body of federal constitutional criminal procedural law in the context of challenges to

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<sup>58</sup> See, e.g., *United States v. Reece*, 280 F. 913 (D. Idaho 1922).

<sup>59</sup> Federal Rule of Criminal Procedure 21(a) provides that a federal trial court "must" change venue "if [it] is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." FED. R. CRIM. P. 21(a).

<sup>60</sup> See *Skilling v. United States (Skilling II)*, 130 S. Ct. 2896, 2913 (2010) ("The Constitution's place-of-trial prescriptions . . . do not impede transfer of [a] proceeding to a different [venue] district at the defendant's request if extraordinary local prejudice will prevent a fair trial—a 'basic requirement of due process.'" (citing *In re Murchison*, 349 U.S. 133, 136 (1955))); *Krogmann v. United States*, 225 F.2d 220, 228 (6th Cir. 1955) (recognizing that newspaper articles actually read by jurors that convey highly prejudicial information not admissible or admitted at trial constitutes such essential unfairness as to justify the setting aside of the verdict and the granting of a new trial).

state court conviction on federal constitutional grounds.<sup>61</sup>

In the early to mid-sixties, the Supreme Court decided a series of cases involving post-conviction challenges to state court proceedings contending that local prejudice, trial court procedures, and/or media coverage in the charging venue had deprived petitioners of their federal constitutional right to due process.<sup>62</sup> When these cases arose, the Supreme Court had not yet held that Sixth Amendment jury trial guarantees extended to state court proceedings.<sup>63</sup> Thus, the state court petitioners in these early cases sought relief on Fourteenth Amendment due process grounds, not under the Sixth Amendment impartial jury right. In these cases, the Supreme Court reversed the state court convictions at issue, holding for the first time that local prejudice and the conditions under which a trial takes place may deprive a defendant of the federal constitutional right to due process.

This early case law concerning the fair trial rights of state court defendants on post-conviction review formed the foundation for the constitutional change of venue standard that would come to be applied in federal cases as well. Because these cases involved state court proceedings and Sixth Amendment protections had not yet been extended to state court proceedings, the Court originally articulated the standard as a due process, not a Sixth Amendment proposition.<sup>64</sup> Under one early formulation of the due process standard, in *Sheppard v. Maxwell*, the Supreme Court held that a defendant was constitutionally entitled to a remedy if the defendant could show a “reasonable likelihood” that prejudice in the charging venue “will prevent a fair trial.”<sup>65</sup> Debate exists as to whether the “reasonable likelihood” standard

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<sup>61</sup> See Steiker, *supra* note 9, at 319 (“It was not until the 1950s and early 1960s that the modern role of federal habeas as a forum for relitigating virtually all federal constitutional claims was firmly established, with defendants litigating federal habeas applications in a manner similar to other federal civil suits.”).

<sup>62</sup> See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); see also *Estes v. Texas*, 381 U.S. 532, 538 (1965); *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (“The requirement that a jury’s verdict ‘must be based upon the evidence developed at the trial’ goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . . [and the Constitution requires] at the very least that the ‘evidence developed’ against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.”).

<sup>63</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>64</sup> See *id.*

<sup>65</sup> 384 U.S. at 363; see also *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982)



remains viable. Some state and federal courts continue to apply this standard.<sup>66</sup> However, the Supreme Court has not relied on the *Sheppard* “reasonable likelihood” language to resolve an impartial/fair trial right issue since it decided that case in 1966.<sup>67</sup> And it appears that the Supreme Court has silently disavowed the “reasonable likelihood” test and replaced it with a more exacting local prejudice standard.<sup>68</sup>

The local prejudice standard later incorporated the Sixth Amendment impartial jury right, and it has undergone several transformations since its inception. Under the current postconviction constitutional change of venue standard, a defendant must establish either presumed or actual prejudice in the potential jury pool in the charging venue.<sup>69</sup> The presumed prejudice standard has evolved into a

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(“[The standard asks whether] prejudicial, inflammatory publicity about [the] case so saturated the community from which his jury was drawn as to render it virtually impossible to obtain an impartial jury.”).

<sup>66</sup> The following illustrative federal cases recite the change of venue standard to require a showing that the defendant’s prospects of not receiving a fair and impartial trial in the charging venue are “reasonably certain,” or “likely,” or other similar terms. *United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997); *United States v. Peters*, 791 F.2d 1270 (7th Cir. 1986); *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978); *United States v. Kouri-Perez*, 985 F. Supp. 25 (D.P.R. 1997); *Williams v. Vasquez*, 817 F. Supp. 1443 (E.D. Cal. 1993); *United States v. White*, 386 F. Supp. 882 (D. Wis. 1974); *see also United States v. Marcello*, 280 F. Supp. 510, 513-14 (citing *Singer v. United States*, 380 U.S. 24, 35 (1965)) (identifying the contemporary federal practice as consistent with the due process “reasonable likelihood” standard).

<sup>67</sup> *See State v. Bradley*, 461 N.W. 2d 524, 536 (Neb. 1990) (“[T]he U.S. Supreme Court did not apply *Sheppard’s* ‘reasonable likelihood’ test [in subsequent cases to resolve pretrial publicity issues] . . . [O]urs represents the better reasoned view is further supported by the like application the federal courts make of Fed. R. Crim. P. 21(a), which provides that a change of venue may be had ‘if the court is satisfied that there exists . . . so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.’ . . . It is also significant that the ‘cannot’ language present in the rule at the time *Sheppard* was decided has not been changed.” (citing *Murphy v. Florida*, 421 U.S. 794 (1975); *Brown v. State*, 601 P.2d 221 (Alaska 1979); *People v. McCrary*, 549 P.2d 1320 (Colo. 1976)); *see also Buttorff*, 572 F.2d 619; *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976); *United States v. Delay*, 500 F.2d 1360 (8th Cir. 1974). *But see Marcello*, 280 F. Supp. at 513-14.

<sup>68</sup> Constance M. Jones, Comment, *Appellate Review of Criminal Change of Venue Rulings: The Demise of California’s Reasonable Likelihood Standard*, 71 Calif. L. Rev. 703, 704 (1983) (asserting that *Murphy* clarifies that the *Sheppard* language is not constitutionally required and that there are only two alternative federal tests—actual prejudice and inherent prejudice).

<sup>69</sup> *See United States v. Skilling (Skilling I)*, 554 F.3d 529, 559 (5th Cir. 2009), *aff’d in part, vacated in part, and remanded by* 130 S. Ct. 2896 (2010) (explaining the

multi-factor test that requires a defendant to show “that prejudicial, inflammatory publicity about [the defendant’s] case so saturated the community from which his jury was drawn as to render it virtually impossible to obtain an impartial jury” in order to obtain a change of venue.<sup>70</sup> Under that test, which is highly deferential to trial court evaluations of local prejudice, the reviewing court is required to look at the voir dire record, the atmosphere of the community at the time of the trial, and the length to which the trial court had to go to select impartial jurors.<sup>71</sup> Most recently, in reviewing a challenge to a federal conviction, the Supreme Court suggested that the jury’s ultimate verdict is an additional factor a reviewing court should consider in evaluating whether a trial court erred in denying a defendant’s pretrial motion to change venue on the ground of local prejudice.<sup>72</sup> This new consideration – the jury’s verdict – is obviously one that is unknowable until after trial.

Where a defendant makes a showing of presumed prejudice, the defendant does not need to show that any juror was actually biased against him or her.<sup>73</sup> Although Supreme Court precedent provides that

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difference between presumed and actual prejudice).

<sup>70</sup> *Skilling I*, 554 F.3d at 558 (quoting *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982)); see also *Skilling II*, 130 S. Ct. 2896, 2915-17 (2010) (finding that factors relevant to evaluating presumed prejudice include: (1) “media interference with courtroom proceedings”; (2) “the size and characteristics of the community in which the crime occurred”; (3) the nature and tone of the media publicity; (4) the amount of time that had elapsed between the crime and the trial; (5) the impact of the crime on the community; and (6) the effect of a co-defendant’s “well publicized decision to plead guilty”); *Murphy*, 421 U.S. at 799-803.

<sup>71</sup> After *Murphy*, in *Patton v. Yount*, 467 U.S. 1025, 1031 (1984), the Supreme Court held that it would apply a presumption of correctness to a trial court’s assessment of prejudicial pretrial publicity, under the “totality of the circumstances” standard, and that it would only reverse a conviction upon a showing of “manifest error,” thus raising the standard for post-conviction relief based on local prejudice even higher. *Irvin*, one of the Court’s foundational change of venue cases, was decided five years before Congress added to the habeas corpus statute an explicit presumption of correctness for state-court factual findings, see Act of Nov. 11, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1105-1106, and two years before the Supreme Court’s opinion in *Townsend v. Sain*, 372 U.S. 293 (1963), provided the guidelines that were later codified.

<sup>72</sup> In *Skilling*, the Supreme Court considered it “of prime significance” that *Skilling*’s jury acquitted him of some of the numerous counts the government brought against him. See *Skilling II*, 130 S. Ct. at 2916.

<sup>73</sup> *Skilling I*, 554 F.3d at 558 (“[P]roof of such poisonous publicity raises a presumption that appellant’s jury was prejudiced, relieving him of the obligation to establish actual prejudice by a juror in his case.”); see also *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975) (finding that evidence of pervasive community prejudice against the accused dispenses with the requirement that actual jury prejudice

both presumed and actual prejudice may be grounds for a change of venue or post-conviction relief, as a practical matter, very few change of venue motions have ever been granted (or convictions reversed) on presumed prejudice grounds alone.<sup>74</sup> Further, according to some, but not all, federal circuit courts<sup>75</sup>, the presumed prejudice showing comes with an important qualifier – the government is permitted to rebut a presumption of presumed prejudice if it can show, notwithstanding the defendant’s showing of presumed prejudice that, based on the voir dire record, there was no actual bias and that the trial court, therefore, actually impaneled an impartial jury in the defendant’s case.<sup>76</sup> Where the government rebuts a showing of presumed prejudice, “the conviction will stand despite appellant’s showing of adverse pretrial publicity.”<sup>77</sup> Thus, in practice, a defendant cannot obtain a change of venue pretrial (or reversal of a conviction post-trial for failure to grant a change of venue) on constitutional grounds unless the defendant can show, based on the trial court record, that the trial court actually seated a juror who was biased against the defendant.

The adoption of Criminal Rule 21(a) predated the development of the Supreme Court’s local prejudice/impartial jury right jurisprudence

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be shown).

<sup>74</sup> Although the Supreme Court continues to recognize the possibility of presumed prejudice as a basis for a change of venue, it has not overturned a single conviction on presumed prejudice grounds since *Rideau*. Similarly, only a handful of federal pretrial change of venue motions have been granted on presumed prejudice grounds. *See, e.g.*, *United States v. McVeigh (McVeigh I)*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996) (finding presumed local prejudice case arising out of bombing of Federal Office Building in Oklahoma City warranted change of venue without necessity of engaging in voir dire); *see also* *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980) (internal quotation marks and citation omitted) (“[T]he *Rideau* principle of [presumed] prejudice is only rarely applicable . . . and is confined to those instances where the petitioner can demonstrate an extreme situation of inflammatory pretrial publicity that literally saturated the community in which his trial was held.”).

<sup>75</sup> *See* Christina Collins, Comment, *Stuck in the 1960s: Supreme Court Misses an Opportunity in Skilling v. United States to Bring Venue Jurisprudence into the Twenty-First Century*, 44 *Tex. Tech L. Rev.* 391 (2012) (noting that some federal circuits have concluded that an actual prejudice showing is rebuttable by the government, an issue the Supreme Court declined to resolve in *Skilling*).

<sup>76</sup> *United States v. Chagra*, 669 F.2d 241, 250 (5th Cir. 1982) (internal quotation marks omitted) (explaining that even if a defendant cannot meet the higher burden for finding presumed prejudice, it is possible for the defendant to “raise[] a significant possibility of prejudice” such that the district court’s voir dire is subject to additional scrutiny).

<sup>77</sup> *Id.*

by over fifteen years. As noted, this body of law arose in the context of federal review of state court convictions to ensure compliance with minimum federal due process standards as articulated by the Supreme Court. When the Supreme Court took up these state court challenges, relatively few cases interpreting Criminal Rule 21(a) had been decided by federal courts.<sup>78</sup> As a result, there was no early delineation between these two separate bases for requiring a change of venue in federal cases, just a developing body of law involving state court proceedings in which the Supreme Court had recognized a federal due process right to procedural relief to counteract local prejudice in a charging district.

Possibly due to the lack of a free-standing body of case law under Criminal Rule 21(a), early on, many federal courts simply incorporated the Supreme Court's due process post-conviction constitutional analysis into their resolution of federal defendants' rule-based motions to change venue.<sup>79</sup> The effect of lower federal courts' reliance on the Supreme Court's early change of venue decisions involving state proceedings was to unnecessarily "constitutionalize" the federal change of venue motion under Rule 21(a) by infusing federal courts' interpretation of the federal procedural rule with constitutional standards developed in the context of post-conviction review.<sup>80</sup> As with the *Brady* post-conviction materiality discovery standard, the actual prejudice prong of the change of venue inquiry is retrospective in that it is based on a review of the record of voir dire conducted by the trial court and, post-*Skilling*, apparently the jury's verdict as well. And, like the *Brady* post-conviction due process standard, the change of venue due process standard is described by some courts as imposing a "substantial burden" on a defendant to satisfy a court that so great a prejudice exists in the trial venue that the defendant cannot obtain a fair and impartial trial there.<sup>81</sup>

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<sup>78</sup> See, e.g., *Juelich v. United States*, 214 F.2d 950 (5th Cir. 1954); *United States v. Parr*, 17 F.R.D. 512 (S.D. Tex. 1955); *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952).

<sup>79</sup> See, e.g., *United States v. Holder*, 399 F. Supp. 220, 225-26 (D.S.D. 1975) ("[Rule 21(a)] provides a procedural device for the defendant to waive his right to a trial in the place where the crime was committed in order to maximally protect his [constitutional] right to a fair and impartial hearing.").

<sup>80</sup> See, e.g., *United States v. Partin*, 320 F. Supp. 275, 279 (E.D. La. 1970) (citing the constitutional due process standard as the test for a pretrial change of venue under Criminal Rule 21(a) and describing the defendant's burden under the Rule as "substantial").

<sup>81</sup> *Id.*

A few federal courts have paused to consider whether Criminal Rule 21(a) should be interpreted co-extensively with the constitutional standard developed in the post-conviction change of venue context, or whether it should be interpreted more liberally in the federal pretrial context.<sup>82</sup> In *United States v. Marcello*, for example, a case decided not long after the Supreme Court established the constitutional change of venue standard, the federal district court noted in dicta that Criminal Rule 21(a) adopted “the exact phraseology (‘fair and impartial trial’) which has evolved as the constitutional guarantee provided by the due process clause and by the Sixth Amendment right to trial by an impartial jury.”<sup>83</sup> Notwithstanding the overlap between the language in Criminal Rule 21(a) and the Supreme Court’s articulation of the change of venue due process standard, the *Marcello* court rejected the notion that pretrial relief under Criminal Rule 21(a) should “be measured by the same

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<sup>82</sup> *United States v. Marcello*, 280 F. Supp. 510 (E.D. La. 1968); see also *United States v. Williams*, 523 F.2d 1203, 1209 n.11 (5th Cir. 1975) (“[W]e decline consideration of two threshold problems that would inhere in an examination of the trial court’s exercise of discretion in denying appellant’s Rule 21 motion. First, the relationship between the discretion that a trial judge can exercise in denying a Rule 21 motion and the applicable due process standards is not altogether clear. Certainly, due process standards place a bottomline on the discretion exercisable by the district court, but the real question is the degree by which the district court’s discretion operates within boundaries somewhat narrower than those set by due process. Second, the extent to which a reviewing court can look to the actual conduct of the trial in passing on the denial of a Rule 21 motion is similarly a concern not completely free from difficulty.”); *United States v. Mitchell*, 752 F. Supp. 2d 1216, 1219-20 (D. Utah 2010) (“Although Rule 21 adopts the constitutional guarantees of a fair and impartial trial, courts have recognized that the rule does not require a defendant to meet the same constitutional standards for a change of venue that a defendant must show in a post-conviction constitutional attack.” (citing *Marcello*, 280 F. Supp. 510)).

<sup>83</sup> The operative language under both the version of Rule 21(a) considered in *Marcello* and the current version is a requirement that the trial court order a change in venue “if the court is satisfied that there exists in the [venue] so great a prejudice against the defendant that he cannot obtain a fair and impartial trial [there].” *Marcello*, 280 F. Supp. at 513. The Constitution requires that the government try criminal cases before an impartial jury “of” the state and district where the crime was committed and that the defendant be afforded due process of law in criminal cases. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”); *id.* art. III, § 2 (“[Criminal trials] shall be held in the State where the said Crimes shall have been committed.”); *id.* amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”). As the *Marcello* court noted, the Supreme Court generally refers to this Sixth Amendment/due process package as the right to a fair and impartial trial. *Marcello*, 280 F. Supp. at 513.

standards applicable to the constitutional guarantee; that is, [that] a change of venue under Rule 21(a) . . . require[s] the same showing which is necessary to reverse a conviction on the ground that the defendant's right to a fair and impartial trial was violated."<sup>84</sup> Criminal Rule 21(a), the *Marcello* court noted, "is preventative. It is anticipatory. It is not solely curative as is a post-conviction constitutional attack. Thus, the rule evokes foresight, always a more precious gift than hindsight, and for this reason the same certainty which warrants the reversal of a conviction will not always accompany the change of venue."<sup>85</sup>

More recently, in the lower appellate court opinion in *Skilling*, the circuit court noted that because the defendant did not distinguish between the constitutional standard, on one hand, and Criminal Rule 21(a), on the other, in his venue motion it would "review his venue arguments only against the minimum constitutional baseline, which he did raise, and not the standard of Rule 21, which would be more favorable to him."<sup>86</sup> Although the circuit court tacitly recognized that Criminal Rule 21(a) should present a lighter burden for federal defendants, it nonetheless concluded that the omission did not matter in *Skilling's* case because it would "come to the same result under either standard."<sup>87</sup> Unfortunately, because it reached this conclusion, the

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<sup>84</sup> The *Marcello* court noted that the language of Criminal Rule 21(a) "may well be the statutory basis for the well-settled rule that a motion for a change of venue is directed to the sound discretion of the court" and observed "it could hardly be suggested that the vital constitutional right to a fair and impartial trial hinges upon the discretion of a trial judge." *Marcello*, 280 F. Supp. at 513 (citing *Bearden v. United States*, 320 F.2d 99, 101 (5th Cir. 1963); *Greenhill v. United States*, 298 F.2d 405, 411 (5th Cir. 1962); *Shockley v. United States*, 166 F.2d 704, 709 (9th Cir. 1948); *Kersten v. United States*, 161 F.2d 337, 339 (10th Cir. 1947)).

<sup>85</sup> *Marcello*, 280 F. Supp. at 513 (citing *Singer v. United States*, 380 U.S. 24, 35 (1965)); see also *Delaney v. United States*, 199 F.2d 107, 113-14 (1st Cir. 1952) (noting in case pre-dating Supreme Court change of venue state court due process precedents that in a federal prosecution, the court was concerned with more than the "rock-bottom requirements" of the due process clause of the Fourteenth Amendment); *United States v. Tokars*, 839 F. Supp. 1578, 1584 (N.D. Ga. 1993) ("Having analyzed the foregoing factors, the court finds that it is a close question whether a sufficient presumption of prejudice exists to constitutionally mandate a change of venue . . . . Turning to an alternative analysis of the motions for change of venue under the principles of the *Marshall* [supervisory powers/Rule 21(a)] case, the court similarly finds that a change of venue should be granted. The decision on this basis is not a close one.").

<sup>86</sup> *Skilling I*, 554 F.3d 529, 559 (5th Cir. 2009), *aff'd in part, vacated in part, and remanded by* 130 S. Ct. 2896 (2010).

<sup>87</sup> *Id.*

circuit court in *Skilling* did not offer any explanation of how the standards differ.

*Skilling* eventually made its way to the Supreme Court. To date, *Skilling* is the only case in which the Supreme Court has considered a contemporary venue challenge on direct appeal of a federal conviction – as discussed, the Court’s previous change of venue case involved post-conviction review of state court proceedings and, therefore, only presented the question of whether a state court proceeding had fallen below the federal constitutional floor. Like the circuit court in *Skilling*, the Supreme Court recognized Criminal Rule 21(a) and the due process standard as distinct bases for seeking relief in a federal prosecution without explaining whether or how they differ.<sup>88</sup> Thus, in *Skilling*, the Supreme Court left unanswered two persistent questions in federal change of venue jurisprudence implicated in this article. One, is the pretrial change of venue standard under Federal Rule 21(a) coextensive with the constitutional standard that has evolved within the context of post-conviction review? And, two, are change of venue challenges brought by federal defendants on direct review subject to a less deferential standard of review than post-conviction challenges to state court proceedings brought in federal court by state court petitioners?<sup>89</sup>

Consistent with this doctrinal confusion and lack of guidance from the Supreme Court, federal courts have reached varying conclusions on these issues. To add a further level of complexity, in this context, some federal cases identify a third basis for ordering a pretrial change of venue, independent of Criminal Rule 21(a) and the Constitution – a trial court’s inherent, supervisory powers.<sup>90</sup> Some

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<sup>88</sup> Like the Fifth Circuit, the Supreme Court did not reach this issue because *Skilling* did not properly preserve it. *See Skilling II*, 130 S. Ct. 2896, 2913 n.11 (2010) (“*Skilling* does not argue, distinct from his due process challenge, that the District Court abused its discretion under Rule 21 by declining to move his trial. We therefore review the District Court’s venue-transfer decision only for compliance with the Constitution.”); *id.* at 2953 n.9 (Sotomayor, J. dissenting) (citations omitted) (“I thus agree with the Court of Appeals that “[i]t would not have been imprudent for the [District] [C]ourt to have granted *Skilling*’s transfer motion. *Skilling*, however, likely forfeited any Rule 21 or supervisory powers claim by failing to present it either in his opening brief before the Fifth Circuit or in his petition for certiorari . . .”).

<sup>89</sup> This are questions that federal courts have recognized for decades and that remains unresolved. *See United States v. Williams*, 523 F.2d 1203, 1209 n.11 (5th Cir. 1975) (noting the existence of an unresolved issue as to whether the trial judge’s discretion on a Rule 21 motion is more restrictive than that involved in due process review but finding it unnecessary to address issue).

<sup>90</sup> Federal courts have inherent authority to establish more rigorous standards for

federal courts have concluded that the pretrial change of venue standard under Criminal Rule 21(a) and/or the supervisory powers doctrine is less stringent than the federal due process standard.<sup>91</sup> Whether relying on Criminal Rule 21(a) or the supervisory powers doctrine, many federal courts have observed that the due process standard places a heavier burden on defendants in seeking a change of venue than the federal pretrial standard, thus recognizing or assuming there exists a federal pretrial change of venue standard that is less demanding than the due process post-conviction standard.<sup>92</sup> Still other courts and commentators

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federal proceedings than the minimum required of state courts by the United States Constitution. *See, e.g.*, *Ristaino v. Ross*, 424 U.S. 589, 597-98 & nn.9-10 (1976); *Murphy v. Florida*, 421 U.S. 794, 797-798 (1975) (majority opinion); *id.* at 804 (Burger, C.J., concurring); *cf. Williams*, 523 F.2d at 1209 n.11. And some federal courts have explicitly recognized that in the change of venue context, the supervisory powers doctrine requires a higher level of protection for federal defendants than the due process standard. *See infra* note 91.

<sup>91</sup> *Williams*, 523 F.2d at 1209 n.11 (comparing the Rule 21(a) standard to the due process standards that place a bottom line on a district court's exercise of discretion); *see, e.g.*, *United States v. Blom*, 242 F.3d 799, 803 (8th Cir. 2001) ("[The reviewing court has] supervisory power to order a new trial in federal cases for reasons that do not amount to a due process violation."); *United States v. Faul*, 748 F.2d 1204 (8th Cir. 1984) (Lay, C.J., dissenting) (arguing that federal supervisory standards should apply to the issue of pretrial publicity, not the due process standard); *United States v. Wright*, No. 4:01-CR-03040, 2002 WL 842208 at \*10 (D. Neb. May 3, 2002) (finding that it is "clear error" to evaluate venue change request only under "due process standard"; rather, a court must also evaluate such a motion under the "less stringent" supervisory powers test); *United States v. Moody*, 762 F. Supp. 1485, 1490 & n.6 (N.D. Ga. 1991) (citing *Murphy*, 421 U.S. at 803-04; *Marshall v. United States*, 360 U.S. 310 (1959)) (describing the "supervisory powers" test articulated by the Supreme Court as a "more exacting fairness standard" on the issue of change of venue).

<sup>92</sup> *See, e.g.*, *Yount v. Patton*, 710 F.2d 956, 968 (3rd Cir. 1983) ("The petitioner challenging his state court conviction in a habeas corpus proceeding must shoulder a particularly heavy burden. Unlike a defendant seeking review of his federal conviction, the petitioner cannot argue that simply because his jury has read of extra-record facts with a high potential for prejudice, a federal court must presume that the jury was prejudiced."); *Moody*, 762 F. Supp. at 1485 ("Defendant has made a proper showing under the established due process standards that there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, and a strong showing under the Supreme Court's 'supervisory standard' that he is entitled to a change of venue."); *see also Murphy*, 421 U.S. at 798-99 (holding that federal court reviewing a state conviction on habeas corpus may presume prejudice only in extraordinary cases where news media influence, inside or outside of the courtroom, "pervaded the proceedings"); *Stein v. New York*, 346 U.S. 156, 187 (1953); *Brown v. Allen*, 344 U.S. 443, 476 (1953) (federal conviction reversed under supervisory power); *cf. Rideau v. Louisiana*, 373 U.S. 723, 728, 729 (1963) (Clark, J., dissenting) ("[I]f this case arose in a federal



have conflated the constitutional and the Rule 21(a) inquiry, without distinguishing between them.<sup>93</sup>

The contours of this purported third basis for requesting or requiring a change of venue in a federal case – the supervisory powers doctrine – is the most amorphous and perhaps the least understood of the three legal theories a federal court could rely on to resolve a federal change of venue question. It is a theory that makes a frequent enough appearance in the case law to make itself known, but whose viability in the federal change of venue context is unclear since the Supreme Court has explicitly refused to develop a supervisory powers fair trial standard.<sup>94</sup> Although courts regularly entertain supervisory doctrine arguments in the change of venue context, in this writer's view, better analysis is that the supervisory doctrine as entirely inapplicable to

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court, over which we exercise supervisory powers, I would vote to reverse the judgment before us. . . . It goes without saying, however, that there is a very significant difference between matters within the scope of our supervisory power and matters which reach the level of constitutional dimension.”).

<sup>93</sup> See, e.g., *United States v. Lehder-Rivas*, 955 F.2d 1510, 1523-25 (11th Cir. 1992); *United States v. De La Vega*, 913 F.2d 861, 865 (11th Cir. 1990) (applying the constitutional due process standard in reviewing and affirming federal conviction); *United States v. Mitchell*, 752 F. Supp. 2d 1216, 1228 (D. Utah 2010) (“Although the court’s analysis above relates to the constitutional standard for presumed prejudice, the court believes many of the same factors are relevant to court’s decision under Rule 21. The court, therefore, relies on its analysis above for purposes of Rule 21 as well.”); *United States v. Partin*, 320 F. Supp. 275 (E.D. La. 1970) (citing the constitutional due process standard as the test for a pretrial change of venue under Criminal Rule 21(a) and describing the defendant’s burden under the Rule as “substantial”); *United States v. Kline*, 205 F. Supp. 637, 639-40 (D. Minn. 1962) (“I am satisfied from a reading of these decisions that pre-trial motions for transfers to other Districts for trial under Rule 21(a) should be granted sparingly, in exceptional cases requiring such unusual action, and then only when it appears with fair certainty that it is unlikely that a fair trial can be had in the District where the indictment is returned.”); Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1540 (1993) (“Indeed, if the defendant can show that there is a ‘reasonable likelihood’ of prejudice to the defendant’s right to a fair trial, the defendant has a constitutional right to a change of venue. Federal Rule of Criminal Procedure 21 codifies this constitutional standard.”).

<sup>94</sup> See *United States v. Haldeman*, 559 F.2d 31, 62-63 (D.C. Cir. 1976) (“We believe . . . that it is inappropriate to attempt to formulate a supervisory power standard for concluding that a fair jury cannot be selected. Except in the most extreme cases, like *Rideau*, such a pre-voir dire conclusion must depend solely on the subjective reaction of the judge who reaches it. Invocation of an appellate court’s supervisory power to require a continuance or a change of venue, although failure to do so did not constitute a denial of due process, would therefore introduce additional unguided discretionary line-drawing and consequent uncertainty into the process of litigating controversial cases.”).

federal change of venue motions since a specific rule governs this particular procedure in federal court. Although federal reviewing courts may develop and formulate procedural rules to govern matters in federal courts, they do not have supervisory powers to create rules where a Federal Rule of Criminal Procedure controls the procedure.<sup>95</sup> And, although federal trial courts sometimes refer to their “supervisory powers,” it would seem that the supervisory powers doctrine cannot have any relevance at the trial level since, by definition, the supervisory powers represents the authority of a supervisory (i.e. reviewing) court over the lower courts to regulate the administration of justice, rather than a source of trial or lower court authority to resolve issues or cases before it.<sup>96</sup>

In any event, considering the case law as a whole, at a minimum, one can glean a consensus among federal courts regarding the position of the supervisory powers doctrine in the change of venue rubric vis-à-vis the due process and Criminal Rule 21(a) standards. It appears that, if courts do distinguish among these standards, satisfying the due process inquiry presents the highest hurdle for a defendant – as noted, this standard requires a showing of either presumed or actual prejudice. As further noted, the bar for meeting the presumed prejudice has been set so high, that it is all but irrelevant on a practical level – the Supreme Court has only overturned one conviction under the presumed prejudice standard and only a handful of federal defendants have successfully moved for a change of venue under the presumed prejudice standard.<sup>97</sup>

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<sup>95</sup> See *Carlisle v. United States*, 517 U.S. 416 (1996) (ruling that trial court does not have “inherent supervisory power” to grant judgment of acquittal after case has been sent to jury since such action would contradict plain language of Rule of Criminal Procedure’s filing limit); see also *United States v. McVeigh (McVeigh II)*, 931 F. Supp. 753, 755 (D. Colo. 1996) (“The Supreme Court has very recently made it clear that a district court has no authority to depart from the requirements of the Federal Rules of Criminal Procedure.”) (citing *Carlisle*, 517 U.S. 416).

<sup>96</sup> See *Bruno v. United States*, 308 U.S. 287 (1939) (demonstrating how federal appellate courts exercise supervisory power over federal district courts in their administration of the federal criminal laws).

<sup>97</sup> *United States v. McVeigh (McVeigh III)*, 153 F.3d 1166, 1181 (10th Cir. 1998) (citations omitted) (“[T]o reach a presumption that inflammatory pretrial publicity so permeated the community as to render impossible the seating of an impartial jury, the court must find that the publicity in essence displaced the judicial process, thereby denying the defendant his constitutional right to a fair trial. . . . However, the bar facing the defendant wishing to prove presumed prejudice from pretrial publicity is extremely high.”). Thus, “the claim of presumed prejudice is ‘rarely invoked and only in extreme situations.’” *Id.*

Given this history, it is safe to say that if the presumed prejudice standard still survives, it hangs on by a slender thread and it is by no means a viable change of venue theory for most defendants. That leaves the actual prejudice prong of the constitutional standard, which, as noted, is also difficult to establish, especially pretrial, given that it is based on a constitutional post-conviction standard. Further, even if courts have not agreed on precisely what is required to obtain relief under Criminal Rule 21(a) and/or the supervisory powers doctrine, it appears that most federal courts would agree that a federal defendant's burden for obtaining a pretrial change of venue under Rule 21(a) should be less demanding than under the due process post-conviction standard.<sup>98</sup> Thus, it appears federal courts would interpret Criminal Rule 21(a) as imposing the lightest burden on a defendant for obtaining a pretrial change of venue.<sup>99</sup>

### III. Promoting Preventative Instead of Curative Criminal Pretrial Relief

As described above, in the discovery context, most federal courts embrace different standards for evaluating whether evidence requested pretrial is "material" depending on whether a discovery request is based on the Criminal Rules or due process guarantees. The reason is that, with a few exceptions, lower federal courts have concluded that they are bound by Supreme Court precedent to apply a post-conviction definition

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<sup>98</sup> *United States v. Mitchell*, 752 F. Supp. 2d 1216, 1219 (D. Utah 2010) ("Although Rule 21 adopts the constitutional guarantees of a fair and impartial trial, courts have recognized that the rule does not require a defendant to meet the same constitutional standards for a change of venue that a defendant must show in a post-conviction constitutional attack." (citing *United States v. Marcello*, 280 F. Supp. 510 (E.D. La. 1968))).

<sup>99</sup> *See United States v. Wright*, No. 4:01-CR-03040, 2002 WL 842208, at \*10 (D. Neb. May 3, 2002) ("[I]t would seem that the standard for determining whether a change of venue is appropriate under this alternate rule is less stringent than the due process standard." (discussing *Marshall v. United States*, 360 U.S. 310 (1959))); *United States v. Tokars*, 839 F. Supp. 1578 (N.D. Ga. 1993); *United States v. Moody*, 762 F. Supp. 1485 (N.D. Ga. 1991); *United States v. Engleman*, 489 F. Supp. 48 (E.D. Mo. 1980); *see also United States v. Faul*, 748 F.2d 1204, 1224 (8th Cir. 1984) ("A more stringent standard governs the review of a federal district court's refusal to grant a change of venue under Fed. R. Crim.P. 21(a). Appellate evaluation of a denied change of venue request in a federal prosecution is based on . . . 'the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts,' and not as a matter of constitutional compulsion." (quoting *Murphy v. Florida*, 421 U.S. 794, 797 (1975))).

of “materiality” to pretrial *Brady* discovery requests irrespective of the difficulty, if not impossibility, of applying that post-conviction standard prospectively. At the same time, however, federal courts have had no trouble concluding that the definition of “materiality” for purposes of resolving a pretrial discovery motion under Criminal Rule 16(a) is not co-extensive with the *Brady* constitutional due process standard. As a result, federal courts construe the exact same term and concept more broadly in the pretrial discovery context when the issue arises under the Federal Rules of Criminal Procedure.

In contrast, although Criminal Rule 21(a) is over sixty years old and a similar issue of constitutional equivalency recently presented itself to the Supreme Court in *Skilling*, there is little consensus about whether federal courts should construe the terms “prejudice” and “fair and impartial” trial under Criminal Rule 21(a) consistently with or differently from the post-conviction due process change of venue standard. Considering the significant changes that have taken place in the constitutional due process change of venue jurisprudence since Criminal Rule 21(a) was adopted, commentators, practitioners, and federal courts have devoted surprisingly little consideration to Criminal Rule 21(a) as an alternative, non-constitutional basis for change of venue in federal cases. Instead, as noted, federal courts have variously either assumed that Criminal Rule 21(a) and the constitutional standard are coextensive, treated them as coextensive without offering any analysis to support this assumption, or simply asserted that Criminal Rule 21(a) should be interpreted more liberally than the due process standard without articulating how or why federal courts should do that. As further noted, apart from *Skilling*, all of the contemporary change of venue cases heard by the Supreme Court have arisen from challenges to state criminal convictions. As a result, most change of venue cases, even in the federal system, continue to be presented and litigated around a post-conviction standard developed in the context of federal review of state court convictions.

Applying a constitutional post-conviction standard to federal pretrial request for procedural relief is unsound and fails to achieve the overall goals of the Federal Rules of Criminal Procedure. Federal courts, consistent with their approach to Criminal Rule 16(a), should interpret Criminal Rule 21(a) more liberally in the pretrial context for several reasons. First, as federal courts have noted in the pretrial discovery context, as a practical matter, it is illogical to attempt to apply a retrospective standard in a pretrial context and no systemic or

constitutional interests are served by constraining the pretrial relief available to a federal defendant by application of a post-conviction standard. Absent Supreme Court precedent to the contrary (as in the case with applying the *Brady* materiality standard pretrial), nothing compels the lower federal courts to engage in this type of legal fiction. Second, nothing in the plain language of Criminal Rule 21(a) or its legislative history compels a conclusion that its operative language should be interpreted co-extensively with the change of venue due process standard. Thus, to conclude otherwise risks diminishing the level of procedural relief available to federal defendants under the Rules of Criminal Procedure with no practical, jurisprudential or statutory justification.

*A. The Criminal Pretrial Rules Should Not be  
Interpreted to Codify Minimal Constitutional Post-  
Conviction Review Standards*

A federal court's only inquiry in reviewing a state court conviction is whether a particular state court procedure or proceeding fell below a minimum level of constitutional protection guaranteed by the U.S. Constitution in the state court petitioner's case. This is a review properly constrained by constitutionally and statutorily mandated deference to state court proceedings.<sup>100</sup> In contrast, a federal appellate

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<sup>100</sup> Federal circuit courts review federal district court venue rulings on direct review under a less deferential standard than state court decisions on habeas review. *See Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006) ("Only when a manifest error occurs can a federal habeas court overturn a state court's finding regarding jury impartiality as a whole. This standard also applies to any questions about the impact of pretrial publicity on the jury pool." (citing *Patton v. Yount*, 467 U.S. 1025, 1031 (1984); *Swindler v. Lockhart*, 885 F.2d 1342, 1347 (8th Cir. 1989))). In contrast, change of venue decisions under Federal Rule of Criminal Procedure 21 are reviewed for abuse of discretion. *See United States v. Campa*, 459 F.3d 1121, 1143 (11th Cir. 2006). Where direct review of a federal conviction involves a constitutional issue, de novo review applies to an alleged denial of due process by failing to change venue where presumed prejudice. *See McVeigh III*, 153 F.3d at 1179. *But see Patton*, 467 U.S. at 1050-53 (Stevens, J. dissenting) ("I believe the Court's analysis regarding whether a juror has a disqualifying opinion is flawed. . . . *Reynolds* and *Irvin* teach that the question whether a juror has an opinion that disqualifies is a mixed one of law and fact. Therefore, one cannot apply the presumption of correctness found in [the federal habeas review statute] because the statutory language by definition applies only to the factual determinations of state courts. . . . There is special reason to require independent review [in cases] that arouse[] the passions of the local community in which an elected judge is required to preside. . . . Unlike an appointed federal judge with life tenure an elected judge has reason to be concerned about the community's reaction to his disposition of highly publicized

court's review of a lower federal court proceeding is plenary, constrained only by federal reviewing courts' self-imposed standards of review or by federal statute.<sup>101</sup>

At the federal appellate review level, the differences between the purpose and role of the federal court in reviewing a state court conviction, on one hand, and engaging in direct review of a federal conviction, on the other hand, are significant enough to warrant different levels of deference and standards of review.<sup>102</sup> At the federal pretrial juncture, not only are the systemic, policy, statutory, and jurisprudential reasons underlying the extreme deference federal courts accord a state court conviction entirely absent, there exists absolutely no justification for applying *any* appellate or post-conviction review standard to resolve a pretrial motion for relief. This is because interests that drive any appellate standards of direct review, such as deference to trial courts, institutional stability, and closure are entirely absent when a trial court is resolving a motion for pretrial relief.

Most importantly, in contrast to the appellate review stage, at the pretrial stage, a judge is in a position to prevent error prospectively (unlike an appellate court that is correcting error on review). Thus, the concerns that inform a trial court's analysis should be extending a defendant the greatest procedural protection possible in order to protect

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cases.”).

<sup>101</sup> *Delaney v. United States*, 199 F.2d 107, 113-114 (1st Cir. 1952) (internal quotation marks omitted) (“[A case involving] a state prosecution was concerned only with the rock-bottom requirements of the due process clause of the Fourteenth Amendment. . . . Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as ‘due process of law’ and below which we reach what is really trial by force.” (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)) (citing *Stroble v. California*, 343 U.S. 181 (1952))); *cf.* *Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991) (citations omitted) (“Our cases dealing with the requirements of *voir dire* are of two kinds: those that were tried in federal courts, and are therefore subject to this Court’s supervisory power and those that were tried in state courts, with respect to which our authority is limited to enforcing the commands of the United States Constitution.” (citing *Turner v. Murray*, 476 U.S. 28 (1986); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Ristaino v. Ross*, 424 U.S. 589 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Aldridge v. United States*, 283 U.S. 308 (1931); *Connors v. United States*, 158 U.S. 408 (1895)).

<sup>102</sup> *See Briley v. Bass*, 584 F. Supp. 807, 826 (D. Va. 1984) (finding that federal courts can establish more rigorous standards for their own governance than minimum constitutional guarantees of fairness imposed on state courts; a federal habeas court reviewing a state court proceeding must apply latter, less strict, standard).

his or her constitutional rights prophylactically. By so doing, a trial court protects systemic interests in the integrity and public perception of federal criminal court proceedings. A trial court cannot forward these interests when it imports a post-conviction standard into its resolution of a pretrial motion if that standard is one that has proven so difficult to surmount in the post-conviction context that relief is rarely granted under it.<sup>103</sup>

This was the point the *Sudikoff* court made in discussing the relationship between Rule 16(a) and *Brady*. That court noted the significant institutional and systemic differences between the role of a trial court judge and that of an appellate court as relevant to the question of what standard a trial court should apply to a pretrial request for relief. While appellate courts can “ignore” errors that are deemed harmless, trial courts must not.<sup>104</sup> To illustrate the difference in the context of pretrial materiality, the *Sudikoff* court used the example of suppression of evidence pretrial – noting that suppression of evidence could be “improper” without being prejudicial.<sup>105</sup> Thus, although an error may be harmless from an appellate review perspective, “it is still error.”<sup>106</sup>

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<sup>103</sup> See Deal, *supra* note 29, at 1806-1807 (“This ‘materiality as harmless-error’ analysis links Brady to a host of academic commentary on problems with harmless-error review. In particular, use of appellate materiality to guide pretrial disclosures, like harmless error, threatens to separate constitutional rights from remedies. Some separation is inevitable, since harmless-error review means that remedies are withheld for ‘harmless’ violations of an accused’s constitutional rights; however, the problem is exacerbated by the reticence of courts to overturn convictions when an error has occurred in the trial of a seemingly guilty defendant. Worse, hindsight bias skews judicial assessments of guilt after conviction: Once courts ‘learn what actually happened, that outcome seems to have been inevitable all along.’ Thus, while Brady relies on appellate court decisions to teach prosecutors what evidence they must disclose, three institutional factors lead appellate courts to underestimate the materiality of suppressed evidence: (1) the legally prescribed respect for the finality of convictions, (2) the natural desire to avoid reversing convictions of the guilty, and (3) the unconscious hindsight bias that makes a defendant’s guilt seem inevitable and uncontroverted.”).

<sup>104</sup> United States v. *Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999)

<sup>105</sup> *Id.* at 1199.

<sup>106</sup> *Id.*; see also United States v. *Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (“Because the definition of ‘materiality’ . . . is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase.”).

*B. Interpretation of the Criminal Rules Should be Dictated by the Jurisprudence of Statutory Construction*

The Federal Rules of Criminal Procedure were promulgated to “simplify existing procedure and to eliminate outmoded technicalities,”<sup>107</sup> promote trial economy and efficiency where it can be achieved without compromising defendants’ fair trial rights,<sup>108</sup> “provide a uniform set of procedures and practices to govern criminal cases in federal courts consistent with the requirements of justice and sound administration,”<sup>109</sup> expedite criminal appeals,<sup>110</sup> prevent wrongful convictions,<sup>111</sup> and achieve an improvement in the administration of justice similar to that accomplished by the Federal Rules of Civil Procedure.<sup>112</sup> Criminal Rule 2 provides that the Rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.<sup>113</sup> Criminal Rule 2 “sets forth a principle of interpretation to be used in construing ambiguous rules, not a principle of law superseding clear rules that do not achieve the stated objectives.”<sup>114</sup>

Policy arguments are relevant to interpreting the language of a Criminal Rule if it is susceptible to more than one meaning.<sup>115</sup> However, “the plain language of the rule supersedes policy arguments; the court does not have a choice between a liberal approach toward the rule and a technical interpretation of the rule, when the plain language governs.”<sup>116</sup> The same rules of statutory construction that apply to criminal statutes apply with equal force to the Federal Rules of Criminal Procedure – the

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<sup>107</sup> 8A FEDERAL PROCEDURE, LAWYERS EDITION, *supra* note 15, § 22:3 (citing *United States v. Debrow*, 346 U.S. 374, 376 (1953); *United States v. Bickford*, 168 F.2d 26, 27 (9th Cir. 1948) (explaining that one of purposes of Federal Rules of Criminal Procedure was to eliminate technicalities)).

<sup>108</sup> *Id.* (citing *Bruton v. United States*, 391 U.S. 123 (1968)).

<sup>109</sup> *Id.* (citing *United States v. Weinstein*, 452 F.2d 704, 715 (2d Cir. 1971); *United States v. Wallace & Tiernan, Inc.*, 349 F.2d 222, 226 (D.C. Cir. 1965)).

<sup>110</sup> *Id.* (citing *Gallagher v. United States*, 82 F.2d 721 (8th Cir. 1936)).

<sup>111</sup> *Id.* (citing *United States v. Mihalopoulos*, 228 F. Supp. 994 (D.D.C. 1964)).

<sup>112</sup> *Id.* (citing *United States v. Claus*, 5 F.R.D. 278 (E.D.N.Y. 1946)).

<sup>113</sup> FED. R. CRIM. P. 2.

<sup>114</sup> 8A FEDERAL PROCEDURE, LAWYERS EDITION, *supra* note 15, § 22:3 (citing *Carlisle v. United States*, 517 U.S. 416 (1996)).

<sup>115</sup> *Id.* (citing *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987)).

<sup>116</sup> *Id.*



Rules must be strictly construed in favor of the defendant when a substantial right is involved,<sup>117</sup> and any ambiguity in the Rules must be resolved in the defendant's favor.<sup>118</sup> There is no distinction between the construction of the rules promulgated by the United States Supreme Court under congressional authority and other legislation adopted by Congress itself.<sup>119</sup> Thus, the language of the Criminal Rules themselves must be the starting point for any inquiry as to their scope and interpretation.<sup>120</sup>

Criminal Rule 21(a), the specific provision this section focuses on, provides: the court upon motion of the defendant shall change venue if the court is satisfied that there exists in the district "so great a prejudice against the defendant . . . [that he] cannot obtain a fair and impartial trial" in the trial venue.<sup>121</sup> The only word in Criminal Rule 21(a) for which the Federal Rules of Criminal Procedure provides a definitive interpretation is "shall."<sup>122</sup> That leaves a number of key words and phrases in Criminal Rule 21(a) subject to interpretation. For example, what does it mean for the court to be "satisfied?" and what is "so great a prejudice" that will "satisfy" a court that a defendant "cannot obtain a fair and impartial trial?"

As a threshold matter, there is not a perfect overlap between the aim of Criminal Rule 21(a) – a fair and impartial trial – and what the Sixth Amendment guarantees – a trial "by an impartial jury." Rule 21(a),

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<sup>117</sup> *Id.* (citing *Kees v. United States*, 304 F.2d 661 (7th Cir. 1962)).

<sup>118</sup> *Id.* (citing *United States v. Wilson*, 60 F.R.D. 55 (E.D. Mich. 1973), *rev'd on other grounds*, 491 F.2d 724 (6th Cir. 1974)).

<sup>119</sup> *Id.* (citing *In re Presentment of Special Grand Jury Impaneled January, 1969*, 315 F. Supp. 662 (D. Md. 1970)); *Rattley v. Irelan*, 197 F.2d 585 (D.C. Cir. 1952) (finding that the Federal Rules of Criminal Procedure have the force of statute and therefore abrogate common-law procedures and principles).

<sup>120</sup> Application of these basic rules of statutory construction, in this writer's view, should lead to the conclusion that the federal supervisory powers doctrine cannot provide an independent basis for ordering pretrial relief in the face of a governing Rule. See *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959) (finding that the use of the Court's supervisory power to create nonconstitutional rules can only be invoked "in the absence of a relevant Act of Congress"); see also Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984) (noting that the opened-ended language of "supervisory power" has prompted courts to apply this power freely and in a broad array of contexts).

<sup>121</sup> FED. R. CRIM. P. 21(a)

<sup>122</sup> When used in the Federal Rules of Criminal Procedure, the word "shall" is mandatory. *United States v. Warrington*, 17 F.R.D. 25, 28 (N.D. Cal. 1955).

by incorporating the phrase “fair and impartial trial,” on its face, is arguably broader than the Sixth Amendment, which, refers to an impartial “jury.” As noted in the discussion of the constitutional change of venue jurisprudence, the primary focus of the standard developed in that context has been adequacy of trial court efforts to ensure that prejudicial pretrial publicity has not infiltrated the jury box. The proof that it hasn’t, of course, lies in the government’s ability to establish that the trial court ultimately did not seat a juror who demonstrated actual bias towards the defendant as reflected by the record of voir dire. The plain language of Criminal Rule 21(a), in contrast, can be read to incorporate a much wider set of circumstances or events that could support a change of venue other than juror bias.<sup>123</sup>

This article has examined how the evolution of the change of venue due process standard has had a large influence on federal courts’ contemporary interpretation of Criminal Rule 21(a). That does not lead to a conclusion, however, that Criminal Rule 21(a) incorporated the federal post-conviction change of venue due process standard. This is true for the simple reason that enactment of the Rules of Criminal Procedure predated the Supreme Court cases setting out the due process standard by almost two decades. Having said that, however, Criminal Rule 21(a) has been amended subsequent to the development of the due process standard. Thus, arguably, the Advisory Committee could have provided clearer guidance as to the interplay and need to differentiate between the due process standard and Criminal Rule 21(a) after this issue arose in federal cases had it perceived a need to do so.

In any event, neither the Advisory Committee nor the Supreme Court has chosen to provide guidance on this issue. Thus, the task of addressing the issue of whether Criminal Rule 21(a) should be interpreted co-extensively with the due process change of venue standard has been left to the lower federal court for resolution on a case-by-case basis. This has turned out to be an experiment with mixed results. As discussed above, some courts have concluded that Criminal Rule 21(a) imposes a less stringent standard than the due process inquiry. However, courts do not always adequately identify the points of departure between the two or explain how the two differ in application. Federal courts that have based their reasoning on a textual analysis of

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<sup>123</sup> For example, in *United States v. Engleman*, 489 F. Supp. 48 (E.D. Mo. 1980), relying on Criminal Rule 21(a), the court relied on prudential considerations such as efficiency and convenience in deciding to transfer venue prior to voir dire.

Criminal Rule 21(a) have tended to focus on the certainty that a trial court should possess to be “satisfied” that the defendant has established the requisite level of prejudice to obtain relief under Criminal Rule 21(a) exists. For example, in *United States v. Marcello*, decided in 1968, after the Supreme Court articulated the due process standard, the court held that the standard for a Criminal Rule 21(a) change of venue motion is “the well-grounded fear that the defendant will not receive a fair and impartial trial which warrants the application of the rule.”<sup>124</sup> Later, in *United States v. Williams*, decided in 1975, the court stated that under the due process standard articulated by the Supreme Court at that time, “[w]here outside influences affecting the community’s climate of opinion as to a defendant are inherently suspect,” the test was whether “the resulting probability of unfairness requires suitable procedural safeguards, such as change of venue, to assure a fair and impartial trial.”<sup>125</sup> And in *United States v. Moody*, decided in 1991, the court articulated the Criminal Rule 21(a) standard to provide that a trial court must grant a change of venue whenever: (1) the court “is satisfied” of the existence of great prejudice; (2) outside influences affecting the community’s opinion as to defendant are “inherently suspect”; (3) there is “reasonable likelihood that prejudicial news prior to trial will prevent a fair trial;” or (4) there is “substantial likelihood” a fair trial cannot be had in the absence of transfer.<sup>126</sup>

Attempting to distinguish the standard for Criminal Rule 21(a) from the due process standard based on the level of certainty or likelihood of prejudice required for a trial court to be “satisfied” that a level of prejudice warranting a change of venue exists is misplaced for two reasons. First, the “reasonable likelihood” standard is derived directly from the Supreme Court’s early articulation of constitutional due process standard, a standard that the Court jettisoned in later cases. Second, and more importantly, a “reasonable likelihood” standard has no relationship to the actual text of Criminal Rule 21(a), and would seem to contradict it. Criminal Rule 21(a) provides that the trial court “shall” transfer a case if it is satisfied that the defendant “cannot” obtain a fair and impartial trial in the charging venue. “Cannot obtain a fair and

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<sup>124</sup> 280 F. Supp. 510, 513 (E.D. La. 1968).

<sup>125</sup> 523 F.2d 1203, 1208 (5th Cir. 1975).

<sup>126</sup> 762 F. Supp. 1485, 1487 (N.D. Ga. 1991); *see also* *United States v. Abrahams*, 466 F. Supp. 552, 556-57 (D. Mass. 1978) (finding that defendant established a “likelihood of prejudicial publicity precluding a fair trial” warranting a change of venue on the basis of prejudicial pretrial publicity).

impartial trial,” on its face, would seem to impose a more demanding standard requiring far more certainty of prejudice than a “reasonable likelihood” of prejudice precluding a fair trial.

A reading faithful to the text of Criminal Rule 21(a) and consistent with principles of statutory construction would focus instead on the phrase “so great a prejudice” and would ask how much prejudice needs to be shown (or even can be shown) in the pretrial context without the benefit of hindsight and a fully developed trial court record. As noted, the Supreme Court has defined and constrained the quality and nature of prejudice that will warrant the reversal of a conviction under the due process standard to cases in which the defendant can show, based on the voir dire record, that the trial court seated a juror who was actually prejudiced against the defendant. Although courts have not focused on the “prejudice” requirement of Criminal Rule 21(a), there is no textual or policy reason why interpretation of this term (like the “materiality” requirement for the federal discovery rules) should be dictated by the high prejudice bar required to warrant reversal of a conviction under the due process standard. Furthermore, approaching the interpretation of Federal Rule 21(a) from this angle gives force to the maxims of statutory construction that the plain language of a rule must prevail and that the rules should be construed in favor of the defendant when a substantial right is involved.

Because a trial court is still in a position to prevent error when ruling on a motion pretrial, the quality and extent of prejudice to meet the “so great a prejudice” requirement of Criminal Rule 21(a), should be relatively light and it should incorporate more than the presumed or actual juror prejudice showings required under the due process change of venue standard. On the contrary, it should allow consideration of any circumstances surrounding a federal trial that could possibly impact both the defendant’s fair trial rights and the public’s perception of the impartiality and fairness of the proceeding. This analysis, of course, must be conducted entirely from a pretrial perspective. Ideally, it would be undertaken before the trial court engages in voir dire in an effort to ferret out actual bias in the jury pool, an inquiry relevant to the due process standard, but not necessarily to the rule-based standard.<sup>127</sup> Such an approach is faithful to the plain language of the rule, places

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<sup>127</sup> This was the approach the court followed in *McVeigh*, one of the few contemporary federal criminal trials in which the defendant successfully moved for a change of venue. *McVeigh II*, 931 F. Supp. 753 (D. Colo. 1996).

responsibility on trial courts to assume a more proactive and preventative approach at the pretrial stage, and reconciles the post-conviction/pretrial standard dilemma that the federal courts have yet to resolve.

### **CONCLUSION**

Absent a clear indication that Congress intended a specific Federal Rule of Criminal Procedure to provide no more than minimal constitutional protection to federal defendants, federal courts should untether the interpretation of individual Criminal Rules from federal post-conviction constitutional jurisprudence. In the context of defining “materiality” for purposes of federal discovery, federal courts have successfully distinguished between pretrial and post-conviction standards. And, by doing so, they have given trial courts discretion and authority to act proactively to prevent error pretrial and more effectively protect federal defendants’ procedural and constitutional rights. Federal courts should take the same approach to interpreting the level of prejudice required to warrant a change of venue under Criminal Rule 21(a). Ultimately, construing procedural rules to require federal trial courts to prevent error, even if it means erring on the side of caution, forwards the goals of ensuring a fair trial for individual defendants and promoting public confidence in the federal court system.

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*AN OUNCE OF PRETRIAL PREVENTION*

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