
**REPORT OF THE CRIMINAL
ADVISORY COMMITTEE**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**



JULY 1996

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Cameron Burke, Court Executive/Clerk of Court

The Board of Judges is particularly appreciative of the hard work and dedication of the Committee members. Their attendance at meetings, suggestions and willingness to find solutions to issues facing the Court will improve the administration of justice and service to the bar and public. Thank you.

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INTRODUCTION

The mission of the United States District and Bankruptcy Courts for the District of Idaho is to provide an impartial and accessible forum for the just, timely, and economical resolution of legal proceedings within the jurisdiction of the Courts, so as to preserve judicial independence, protect individual rights and liberties, and promote public trust and confidence.

This mission statement was part of the district's Long Range Plan which established goals to improve the administration of justice. One of the goals contained in this Plan was to establish a Criminal Advisory Committee to analyze current criminal procedures and recommend solutions to the Court.

In November 1994, the Judicial Conference of the United States recommended that each district establish a committee to review cost containment measures for Criminal Justice Act representation.

As a result of these initiatives, Chief United States District Judge Edward J. Lodge appointed a Criminal Advisory Committee in November 1994 for the following purposes:

- ▶ Determining the condition of the docket in regard to criminal cases.
- ▶ Identifying criminal case filing trends and the impact upon resources, including the impact upon public resources, the court, prosecutor, defense, probation and pretrial, and the United States Marshal.
- ▶ Identifying the principle causes of cost and delay in criminal litigation and habeas corpus proceedings.
- ▶ Examining specific issues including grand jury practices and procedures, plea negotiations, charging practices, trial procedures, scheduling systems, and rules.
- ▶ Completing a report to the Court which contains recommendations to improve criminal procedures and practices.

This document is the report of the Criminal Advisory Committee to the Board of Judges.



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COMMITTEE ACTIVITIES

A broad-based Criminal Advisory Committee from all regions of the state was appointed by Chief District Judge Lodge. Committee members included Criminal Justice Act panel attorneys, the Community Defender, Assistant U.S. Attorneys, judicial officers and staff, Probation and Pretrial Officers, U.S. Marshal and Clerk's Office personnel. The Committee met eight times during the last 15 months to examine issues relative to criminal case processing. Each member of the Committee brought different perspectives and experiences to the meetings.

Various subcommittees were formed to investigate, evaluate, and recommend new procedures or ideas to the full Committee. The Committee meetings were characterized by full and open discussion and many times consensus was reached on a particular issue.

This report summarizes the conditions affecting the docket, the factors which contribute to cost and delay, and provides recommendations of the Committee to the Board of Judges.

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ISSUE: CONDITIONS AFFECTING THE DOCKET

A. JUDICIAL VACANCY

The District of Idaho experienced a district judge vacancy lasting 31 months. During the judicial vacancy, the Court expanded the responsibilities of the magistrate judges and relied upon visiting judges to assist with felony criminal trials. In addition, Chief District Judge Lodge worked long hours to manage criminal matters within the District of Idaho. The judicial vacancy certainly affected the court's ability to meet the demand for services. Any statistical analysis of Idaho workload during the past three years must consider the significant impact of the judicial vacancy upon case management within the court. District Judge B. Lynn Winmill was appointed by the President to fill this vacancy in August 1995.

B. GEOGRAPHY

One of the most significant challenges for the District of Idaho is that court sessions are held in 4 locations in a state which has 84,000 square miles. Divisional offices are located

250, 375, and 450 miles from the district headquarters in Boise. Travel to these locations takes time and requires coordination between the district, bankruptcy, and magistrate judges. Travel to the divisional offices is also a large budget item for the court but is necessary in resolving disputes on a regional basis. Members of the Bar and public have been very vocal about insuring that the Court has regular presence in all areas of the state. The Court remains committed to serving all areas of the state.

C. *STATISTICAL DATA*

During the Criminal Advisory Committee meetings, statistical data was presented about the condition of the criminal docket. This information was discussed and interpreted by the Court and members of the Committee. During the course of meetings, committee members requested additional data to assist with subcommittee assignments and to interpret case management trends. Below you will find several of the statistical trends reviewed by the Committee.

1. *FILING TRENDS*

Criminal defendant filings decreased by 9% and criminal case filings dropped 3% in calendar year 1995. Some of the factors discussed by the Committee which influence filings trends include: population increases; the extent of referral of cases to the state court; the number of judicial officers and Assistant U.S. Attorneys; staffing levels in the respective offices; resource availability; and the extent to which personnel are trained. Members of the Committee projected

that criminal case filings will increase in the next few years. The relocation of an Assistant U.S. Attorney to Coeur d'Alene is expected to increase criminal filings in the Northern Division.

Table 1 Criminal Workload For the 12 Month Period Ending December 31					
	1993	% Change	1994	% Change	1995
Criminal Case Filings	106	8%	114	-3%	111
Defendant Filings	160	18%	189	-9%	172
Criminal Case Terminations	94	26%	118	-6%	111
Criminal Defendant Terminations	141	25%	176	-3%	171
Pending Criminal Cases	72	-6%	68	0%	68
Pending Criminal Defendants	99	13%	112	1%	113

During calendar year 1995, the number of pending criminal cases remained the same while the number of pending criminal defendants increased by 1%.

During 1995, fraud cases again increased significantly by 67%. Drug offenses declined by 41% while the number of violent crime cases remained unchanged.

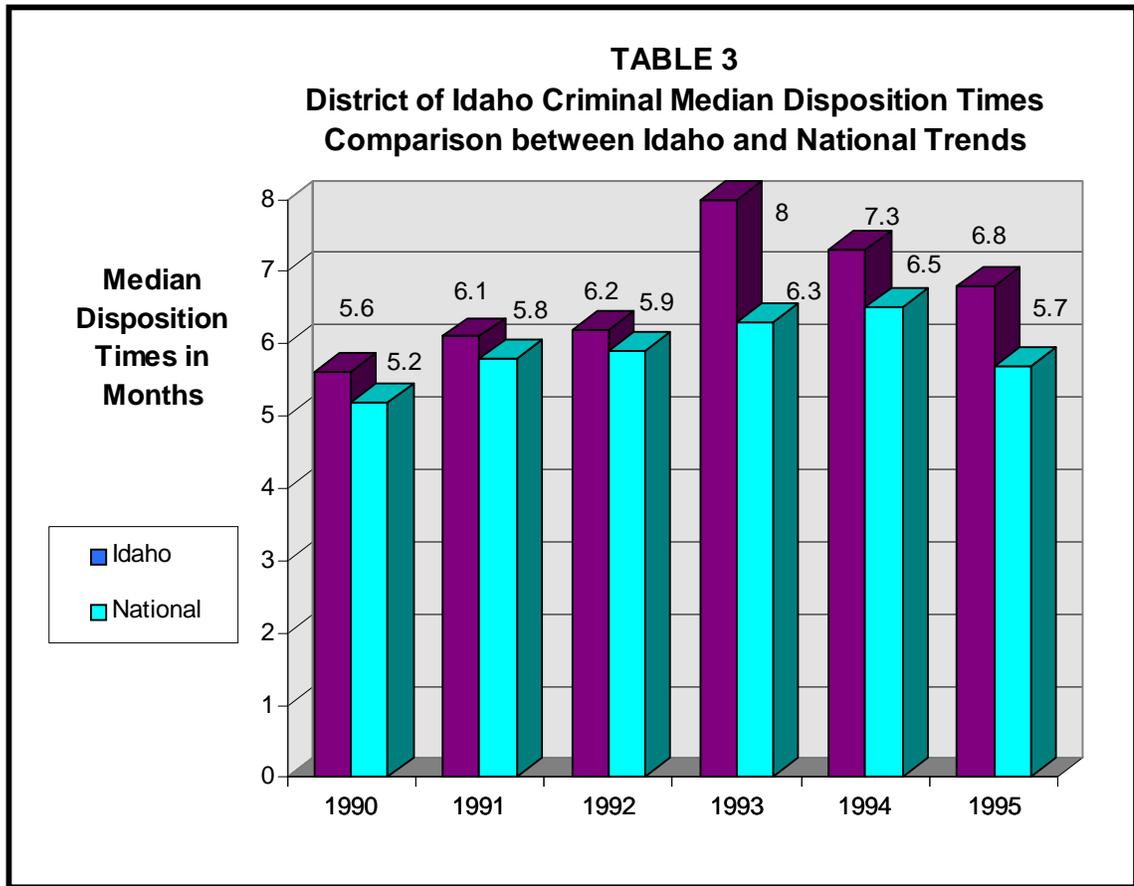
Criminal cases involving federal statutes decreased by 7% while state statute cases dropped 88%. Theft cases increased by 33%.

In regard to the timely disposition of criminal cases, during the 12-month period ending September 30, the median disposition time of criminal defendants decreased from 7.3 months in 1994 to 6.8 months in 1995.¹ The median disposition time of criminal defendants in 1993 was 8 months. It is significant that case processing times were reduced while the district experienced a 31-month judicial vacancy.

¹ *Statistical Tables for the Federal Judiciary*, Administrative Office of the U.S. Courts, September 1995.

Table 2
Criminal Case Filings by Type
For the 12-Month Period Ending December 31

	1993	% Change	1994	% Change	1995
Violent Crimes	9	78%	16	0%	16
Theft	17	-65%	6	33%	8
Fraud	10	50%	15	67%	25
Drug Offenses	12	125%	27	-41%	16
Immigration Viol.	14	-43%	8	-13%	7
IRS Violations	2	0%	2	100%	4
Federal Statutes	26	4%	27	-7%	25
State Statutes	5	60%	8	-88%	1
Other	11	-55%	5	80%	9
Totals	106	8%	114	-3%	111



2. CONTINUANCES

Continuances of court proceedings are one of the factors which influence the disposition time of criminal cases. The Committee discussed the impact of continuances upon the cost of litigation and noted that multiple court settings increase the time used for case management and sending notices, increase judge and attorney preparation time, increase the costs of incarceration, and certainly impact the median disposition time. In this district, continuances are filed by counsel or may be initiated upon the judge's own motion due to calendar conflicts. It was the perception that attorneys are entitled to one automatic delay. The Committee recommended that

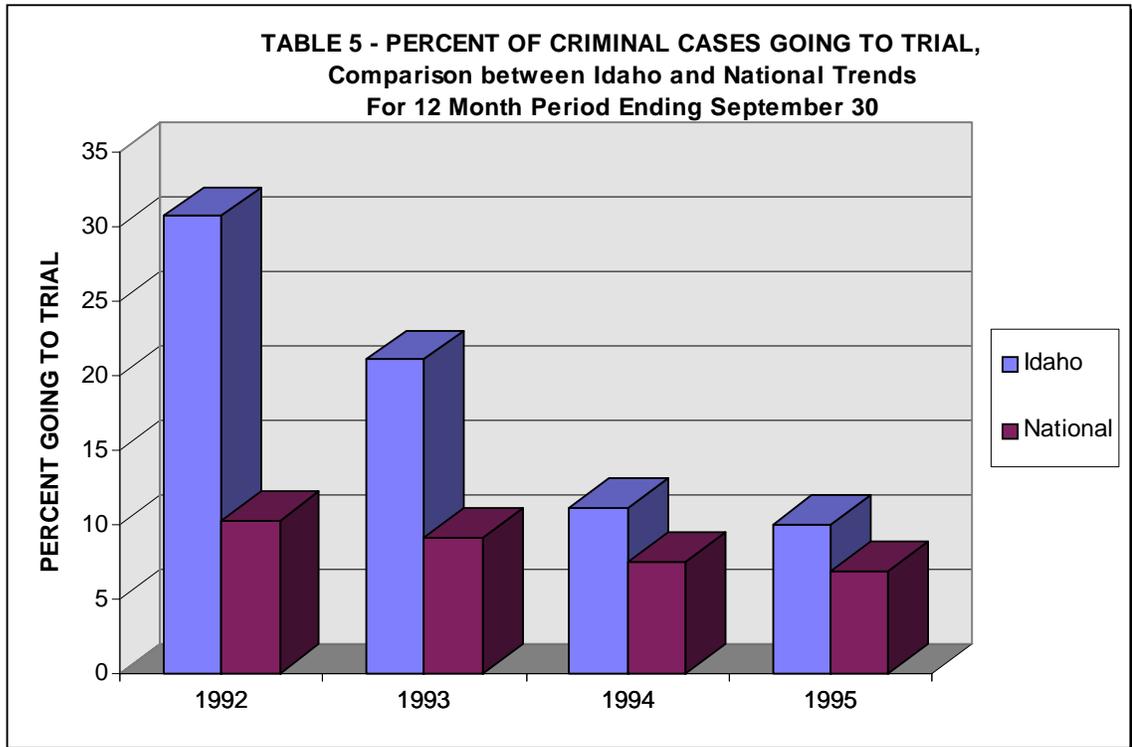
continuances should be controlled by the judges. The statistical data reviewed by the Committee is shown in Table 4, on page 11.

3. TRIAL PERCENTAGE RATE

In 1992, the percentage of criminal defendants adjudicated by jury trial in Idaho was 30.65%, while the national average was 10.24%. During 1995, the percentage of criminal defendants going to jury trial was 10% while the national average was 6.9%. While there has been a significant reduction in the trial rate of criminal defendants, a high trial percentage rate will continue to impact judicial resources in this district.

**TABLE 4 - U.S. DISTRICT COURT - DISTRICT OF IDAHO
NUMBER OF TRIAL CONTINUANCES**

	Oct 92 - Sep 93		Oct 93 - Sep 94		Oct 94 - Sep 95	
	CASES	TOTAL	CASES	TOTAL	CASES	TOTAL
CIVIL & CRIM.						
1 Cont.	x 75	= 75	x 94	= 94	x 111	= 111
2 Cont.	x 28	= 56	x 19	= 38	x 19	= 38
3 Cont.	x 6	= 18	x 9	= 27	x 6	= 18
4 Cont.	x 2	= 8	x 3	= 12	x 2	= 8
5 Cont.	x 0	= 0	x 1	= 5	x 0	= 0
6 Cont.	x 0	= 0	x 0	= 0	x 0	= 0
7 Cont.	x 2	= 14	x 0	= 0	x 0	= 0
Totals		171	+3%	176	-1%	175
CRIMINAL						
1 Cont.	x 11	= 11	x 33	= 33	x 35	= 35
2 Cont.	x 14	= 28	x 9	= 18	x 12	= 24
3 Cont.	x 3	= 9	x 8	= 24	x 2	= 6
4 Cont.	x 2	= 8	x 3	= 12	x 1	= 4
5 Cont.	x 0	= 0	x 1	= 5	x 0	= 0
6 Cont.	x 0	= 0	x 0	= 0	x 0	= 0
7 Cont.	x 2	= 14	x 0	= 0	x 0	= 0
Totals		70	+31%	92	-25%	69
CIVIL						
1 Cont.	x 64	= 64	x 61	= 61	x 76	= 76
2 Cont.	x 14	= 28	x 10	= 20	x 7	= 14
3 Cont.	x 3	= 9	x 1	= 3	x 4	= 12
4 Cont.	x 0	= 0	x 0	= 0	x 1	= 4
Totals		101	-17%	84	+26%	106



4. TRIAL COURT ACTIVITY

Although the new Article III district judge was not officially confirmed and appointed until August 1995, the total combined number of criminal and civil trials increased 39% during 1995. However, the combined number of days in trial decreased by 11% while the combined number of hours in trial declined by 22%. The most significant increase was the number of civil trials which rose 45%. The number of criminal trials went up by 35%. Furthermore, the amount of non-trial hearing hours increased by 31% during 1995.

It appears from this data that the impact of the criminal calendar in displacing civil trials has diminished during the last few years.

The efforts of the magistrate judges have been particularly helpful to the district judges in managing the criminal caseload. Through the court's opt-out procedure, the magistrate judges have been assigned 30% of the civil cases. This has enabled the district judges to try more criminal felony trials. The magistrate judge criminal workload has also increased tremendously during the last year. Magistrate judge court hours have increased 31% during calendar year 1995 and misdemeanor court trials increased 100% while arrest warrant applications jumped 43% during this period.

Table 6
District Judge Trial and Hearing Activity
For the 12 Month Period Ending December 31

	1993	% Change	1994	% Change	1995
Civil					
Hours in Trial	343	-18%	282	-23%	217
# of Trials	12	-8%	11	45%	16
# Days in Trial	63	-14%	54	-26%	40
Criminal					
Hours in Trial	728	-54%	333	-22%	260
# of Trials	23	-13%	20	35%	27
# Days in Trial	127	-59%	52	4%	54
Total Civil & Criminal					
Hours in Trial	1071	-43%	615	-22%	477
# of Trials	35	-11%	31	39%	43
# Days in Trial	190	-44%	106	-11%	94
# Trips to Divisions	16	38%	22	18%	26
Other Activity					
Hours Non-Trial	216	-13%	189	31%	248
# Separate Days	146	-7%	136	17%	159

**TABLE 7 - Magistrate Judge Criminal Workload
for the 12 Month Period Ending December 31**

	1993	% Change	1994	% Change	1995
COURT HOURS	828	0%	827	+31%	1080
PETTY OFFENSES					
Dismissals/Acquittals					
Without Trial	11	18%	13	131%	30
CONVICTED					
Without Trial	56	-36%	36	-22%	28
Court Trial	5	180%	14	100%	28
TOTAL	61	-19%	50	+12%	56
Total Defendants	52	348%	233	-24%	177
Non-Appearance Dismissals	18	150%	45	-38%	28
CVB Forfeitures	0	-	75	-35%	49
CVB Summons	24	-38%	15	140%	36
CVB Citations	26	273%	97	-18%	80
CVB Warrants	0	-	90	-37%	57
28 USC §636(a) DUTIES					
Search Warrants	53	-19%	43	-23%	33
Arrest Warrants	11	27%	14	43%	20
Initial Appearances	104	21%	126	-33%	84
Detention Hearings	31	110%	65	-34%	43
Preliminary Exams	13	-46%	7	14%	8
Arraignments	121	22%	148	-28%	107
Other	33	148%	82	-50%	41
TOTAL	366	33%	485	-31%	336
§636(b) DUTIES (FELONIES)					
Evidentiary Hearings	3	-33%	2	-100%	0
Dispositive Motions	10	-30%	7	-57%	3
Contested	10	10%	11	-9%	10
Uncontested	15	40%	21	29%	27
Other	25	168%	67	-27%	49

D. CALENDAR AND CASE MANAGEMENT

Case management is one of the most important elements in resolving criminal cases in a timely manner. Literature on case management in the United States cites several factors in achieving early resolution of criminal cases. These include: firm trial dates and early resolution of pretrial motions;² judicial leadership and commitment; control of continuances; and ongoing supervision of the case process.³ The judges of the Court are committed to using these case management tools to resolve criminal cases in a timely manner.

The Committee reviewed the district's calendaring system and was presented with a summary of calendaring practices for each chambers. The Committee noted that calendaring practices were different depending upon the judicial officer who was assigned the case. While the Committee supported each chamber's individual practices, it was the sense of the Committee that the informal case management procedures be documented and reviewed with the Bar.

Several issues were discussed by the Committee including the importance of realistic trial settings. It was reported that 30-day criminal trial settings were routinely continued upon motion of counsel. The Court reported that in divisional offices, motions to suppress and to dismiss were held on the morning of trial or the day before. This practice saves court travel expense and personnel time. In Boise, the general rule is to conduct oral argument on substantive criminal motions at least one week in advance of trial.

² *Examining Court Delay*, National Center for State Courts, John Goerdts, 1989.

³ *Caseflow Management in the Trial Court*, Maureen Solomon and Douglas Somerlot, American Bar Association, 1992.

The Committee reviewed the differences in calendaring practices which may or may not allow oral argument on criminal motions. The attorney members of the Committee expressed an interest in having oral argument on most motions pending before the court.

After many discussions on calendaring practices, the Committee recommended that wherever practicable, substantive motions be scheduled more than 1 week before trial, continuances be restricted, and that the judges use more telephonic conferences. The Committee also suggested that criminal trials be scheduled with realistic time frames, but within the Speedy Trial Act. The Committee suggested that criminal cases be set 50 to 60 days from the date of arraignment.

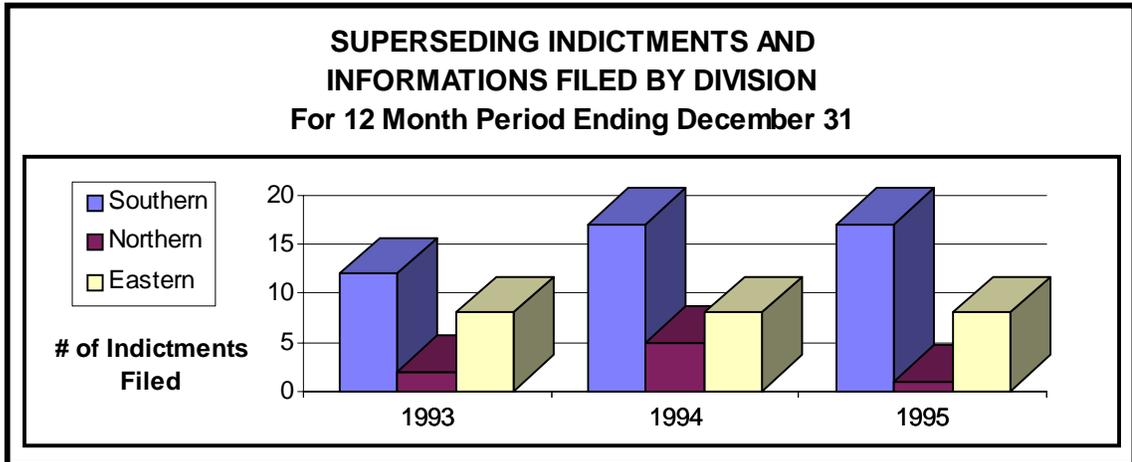
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ISSUE: PROCEDURAL MATTERS AFFECTING COST AND DELAY

A. SUPERSEDING INDICTMENTS

The Committee reviewed the impact of superseding indictments upon cost and delay. The Court is continually faced with the legal issue of whether or not the Speedy Trial Act clock must begin again after a superseding indictment is filed. The Committee recognized that superseding indictments may result in trial continuances, require the Marshal to bring defendants into court multiple times, and also result in longer detention periods for prisoners.

Committee members noted that some defendants are indicted before all the information is available to the Government. Several factors are involved in whether or not to indict quickly. These include seizure of assets, risk of flight by defendants, and the protection of witnesses.



It was reported that those cases with multiple defendants and multiple counts were generally superseded and this causes difficulty in tracking speedy trial requirements and affects the case processing time.

The Committee reviewed a policy of the United States District Court in Florida that allows defendants to waive personal appearance on a superseding indictment if the defendant was previously arraigned. After recommendation by the Committee, the Court agreed to try an experimental procedure in regard to superseding indictments. At the time superseding indictments are filed with the court, the Clerk's Office will send a waiver of appearance form to the defendant's counsel with an appearance date for arraignment on the superseding indictment. If the defendant executes the waiver and files it with the court before the scheduled hearing date on the superseding indictment, the hearing will be vacated. At the next hearing date, a judge will arraign the defendant on the superseding indictment. It is anticipated that this procedure will limit the number of appearances, reduce

the cost of litigation, and reduce costs and risks associated with the transportation of detained defendants.

B. LAST MINUTE PLEAS

The Committee reviewed the impact of last minute pleas upon criminal case processing. The Committee found that if cases are settled at the last minute, it results in unnecessary juror fees, lost calendar days, and wasted time for counsel, judges, and litigants. National literature on criminal case management trends uniformly emphasizes the importance of early pleas in resolving criminal cases in a timely manner.⁴

The Committee agrees that an open file policy and full disclosure early in the case allows parties to file timely motions, pursue active plea negotiations, and adequately prepare for trial. Early resolution of motions will also encourage earlier pleas.

Defense counsel pointed out defendants with no resources resist suggestions by counsel to enter pleas early. One option is for the Court and Government not to offer or accept pleas 48 hours prior to trial. If the Government did this, it would change the local legal culture which views last minute pleas as acceptable. The cost of travel to divisional offices and the downtime in rescheduling other hearings were also cited as problems related to last-minute pleas.

⁴ *Changing Times in Trial Courts*, Barry Mahoney, National Center for State Courts, 1988.

The Committee was informed that under the Sentencing Guidelines, the defendant may lose up to one point if a plea is not entered timely and could lose two other points for not accepting responsibility for the crime.

It was the consensus of the Committee that practices must change to resolve cases that will likely result in a plea. With only 10% of cases going to trial, a policy needs to be in place to accommodate early pleas. The Committee recommended that the Procedural Order cite Local Rule 11.1 which requires plea negotiations to be completed at least 48 hours before trial.

C. *OPEN FILE POLICY*

The Committee fully discussed the importance of an open file policy. Many of these issues are discussed in more depth in the “Procedural Order” section of this report.

The Committee agreed that discovery practices should not be used to put defendants at a disadvantage. The Government indicated that agency cooperation is necessary for timely disclosure. On occasion, information trickles into the office and agencies such as the Alcohol, Tobacco and Firearms, the Immigration and Naturalization Service, and the Federal Bureau of Investigation which all have different priorities than the U.S. Attorney. It was also noted that out-of-town attorneys have a more difficult time reviewing U.S. Attorney files which are located in Boise.

The Committee heard comments that defense attorneys file "canned" motions before discovery information is received in order to protect the record. It was also reported that criminal case settings, within 30 days of arraignment, were unrealistic.

After reviewing all perspectives and current procedures, the Committee recommended a full and open file policy as reflected in the Procedural Order adopted by the Court.

D. PROCEDURAL ORDER

The Committee dedicated four ardent meetings and many subcommittee meetings to develop a Procedural Order which governs criminal proceedings in the District of Idaho. At the last meeting, the Committee adopted a Procedural Order which was subsequently objected to by the U.S. Attorney. The Committee and the Court adopted this Procedural Order to promote greater pretrial discovery, comply with the requirements of the Speedy Trial Act, and reduce the cost of litigation.

During the course of meetings, it was pointed out that many courts use procedural orders to set deadlines early in the case. The Committee also recognized that the Judicial Conference mandated that courts establish procedures which reduce cost and delay in criminal cases. In fact, the Report of the Federal Courts Study Committee indicated in 1990 that pretrial discovery should receive the immediate attention of the Department of Justice and the Judicial Conference. A Committee note indicated that "appropriate statutory and or

procedural amendments should be enacted to authorize federal district judges, in their discretion, to permit, without the consent of the parties, greater discovery in criminal cases”⁵

During Idaho’s Committee meetings, the Government stated on-going objections to several issues that were intended to be included in the Procedural Order and these were noted in the minutes of the meetings.

Under the Procedural Order adopted by the Court, the magistrate judges are designated as the judicial officers who enter the order regarding discovery and pretrial motions at the time of arraignment on the indictment.

Some of the benefits of a Procedural Order recognized by the Criminal Advisory Committee include: early court control in setting deadlines; elimination of the filing of routine motions; publication of agreed-upon disclosure rules; and establishing a “road” map for the criminal case. A subcommittee of the Criminal Advisory Committee was formed to research this topic and make recommendations to the full Committee. The efforts of this subcommittee resulted in the Procedural Order which was ultimately adopted by the Court.

A summary of the recommendations adopted by the Committee and the Court in regard to the Procedural Order are shown below. Please refer to Appendix A for the full text of the Procedural Order which governs most criminal cases except those that are complex or reactive.

⁵ *Report of the Federal Courts Study Committee*, April 1990.

- ▶ Within 7 days of arraignment, the Government shall disclose Brady material; notice of payments, promises of immunity or leniency; whether defendant was identified in any lineup; the telephone numbers and names of witnesses; the criminal record of the informants; the rough notes of agents and officers; transcriptions of grand jury testimony (28 days if not available); and copies of finger or palm prints.

- ▶ If the defendant triggers reciprocal discovery, upon request from the Government, the defendant shall disclose within 14 days of arraignment all books and papers in possession of the defendant, results of physical or mental examinations, and a summary of defendant's testimony.

- ▶ Within 28 days of arraignment, the defendant must provide to the Government a notice of intent to offer the defenses of alibi, insanity, or claims of defense involving the exercise of public authority.

- ▶ Pretrial motions must be filed within 28 days after arraignment with responses due within 14 days of filing the motions; reply memorandums are due within 7 days of the response.

- ▶ Within 14 days prior to the date of trial, counsel must meet and confer in preparation of a statement describing all exchanges of discovery material.

- ▶ Within 14 days prior to trial, counsel should make every effort to stipulate to the facts.

- ▶ Pretrial statements, requests for voir dire, and requested jury instructions are due 14 days prior to trial.

- ▶ Within 14 days before trial, the Government shall provide the defendant its case-in-chief exhibit lists, with the defendant to provide the Government its case-in-chief exhibit list 7 days thereafter.
- ▶ Within 14 days of trial, the Government shall provide to the defendant a list of witnesses and the defendant shall provide to the Government a witness list 7 days thereafter.
- ▶ All plea negotiations should be completed 48 hours before trial.

Some of the other issues discussed by the Criminal Advisory Committee, including the objections of the U.S. Attorney, are as follows:

- ▶ The arraignment should be treated as the beginning of the discovery period and, as such, it is important for defense counsel to be present at this hearing.
- ▶ The Committee discussed and was concerned about third-party disclosure of grand jury material or proceedings absent an order from the court. Language was incorporated into the Procedural Order to cover this issue.
- ▶ The Government expressed concern about the Procedural Order on the following matters:
 - i. The Government would prefer voluntary compliance on disclosure and discovery issues rather than be compelled by court order;

- ii. The Government believes certain time frames in the Procedural Order exceed what is contemplated in the federal rules and by statute;
 - iii. The Government is opposed to the disclosure of all rough notes as suggested in section 12 of the Procedural Order.
 - iv. The Government respectfully opposes those portions of the Procedural Order to the extent that such provisions create additional rights for the defendant and/or impose additional obligations or burdens on the part of the U.S. Attorney not currently covered by either federal rules, statutes, or case law;
 - v. The U.S. Attorney's Office indicated at various meetings that while it was their intention to make this Procedural Order work, they would like to reserve the objections which were previously discussed at Committee meetings. The U.S. Attorney's objections to the Procedural Order are contained in Appendix B.
- ▶ During the experimental phase of the Procedural Order, it was recognized that appeals may be filed by both the Government and the defense.
 - ▶ There was concern expressed that reciprocal discovery could be circumvented by the defendant not specifically making a request since the defendant would automatically receive much of this information. The Procedural Order was changed to address this issue.

E. LOCAL RULES CHANGES

The Committee discussed the possibility of making Local Rules changes associated with the recommendations of the Criminal Advisory Committee. It was the sense of the

Committee that any changes should be addressed by general order. This process provides more flexibility in amending procedures, if required, to make the criminal system more responsive to the needs of the Bench and Bar.

One recommendation by the Committee was to review the Local Rules to insure consistency between the civil and criminal rules where practicable. The Committee recommended uniform motions practices and this issue was addressed in the Procedural Order.

F. INITIAL APPEARANCES AND AVAILABILITY OF DEFENDANT

The Committee discussed the importance of having counsel at the initial appearance. If the defense attorney is not available, the proceedings have to be held again. This increases the cost of prisoner transportation and detention as well as increasing the cost to other agencies and the court.

It was also noted by the Committee that the timing of the initial appearance has been a problem. A subcommittee was formed to review this issue and reported that on occasion, the community defender and pretrial services officer do not have sufficient time to interview the defendant before court proceedings. The Marshal's Office noted that the routine of bringing prisoners to the courthouse at the same time each day was a potential security problem.

As a result of Committee meetings and an ongoing review by the Marshal's Office, a new policy was established which

states that if a defendant is arrested the night before, the defendant will be brought to the courthouse in the morning. If the court proceeding is scheduled in advance, the defendant will be available 90 minutes prior to the court hearing to meet with defense counsel and the pretrial services officer.

It was also reported that the community defender is handling all initial appearances, unless there is a conflict, even though CJA attorneys may be subsequently appointed. The Committee recognizes that this process is working well and saves time and money.

G. PRETRIAL MOTIONS

It was pointed out that defense attorneys may need more training because they do not always meet the 20-day deadline to file pretrial motions. The defense attorneys indicated they could not always raise issues within 20 days of indictment because they do not always have the discovery material. It is anticipated that the Procedural Order will solve this problem.

H. GRAND JURY ISSUES

Grand jury costs and the possible utilization of state-wide grand juries was reviewed by a subcommittee. This group reviewed three questions:

- i. Can the grand jury sit outside Boise?

- ii. Can the court draw grand jurors from a division which is not a statutory division of court, but rather a place of holding court?
- iii. Can a grand jury indict outside the division in which the grand jurors were drawn?

The subcommittee report adopted by the Committee concluded that the existing District of Idaho Jury Plan allows grand jury sessions to be conducted in Pocatello and Moscow. Further, the subcommittee indicated that the Idaho Jury Plan could be amended to authorize selection of jurors solely from a particular division, if approved by the Judicial Council of the Circuit. Finally, the subcommittee reviewed whether the grand jury can indict a case that occurred within the district, but not within the division from which the grand jury is drawn. It was reported that while no statute or case law prohibits this practice, exclusion of a “distinctive group” was a problem. It was also reported that changing a longstanding practice of district-wide selection may invite jury challenges.

In reviewing the cost of the grand jury, the Committee concluded that it may be more expensive to convene grand juries in all three locations of the state.

After reviewing the grand jury process, no substantive changes were recommended by the Committee. Some of the statistical information reviewed by the Committee is shown below:

TABLE 9
1995 GRAND JURY STATISTICS

Average length of session	2.5 days
Average number of sessions per year	12
Average cost per session	\$7,692
Average number of hours per session	17.4
Average number of jurors present	20
Average number traveling the day before	9
Average number traveling home the day after	7

I. CRIMINAL SETTLEMENT PROCEDURES

A subcommittee was appointed to review settlement procedures used by the Southern District of California. It was reported that this program is on hold pending a challenge in the Ninth Circuit Court of Appeals.

J. PROBATION/PRETRIAL SUBCOMMITTEE

A Probation/Pretrial Subcommittee was formed to address issues relating to sentencing and post-conviction procedures. The Committee agreed that the Sentencing Guidelines eliminate most of the Court's discretion in sentencing defendants. Committee members also reported that the uncertainty of plea negotiations, settlement procedures, and the prediction of the expected outcome under the Sentencing Guidelines, all have an effect upon criminal case processing.

During review of procedures, the subcommittee noted that the probation officer's preparation of the presentence report is being hampered by some defendants' refusal to sign releases for the gathering of information. Defense counsel reported that they had no objection where the requested information is specific, such as the social security records, employment records, and mental health records; but they have advised defendants not to sign a general release of information which covers "everything under the sun."

The Court noted that the Sentencing Guidelines require the judges to look at "all relevant conduct" but cannot consider this conduct if it is not in the presentence report.

After full discussion, it was suggested defense counsel encourage their clients to sign release of information forms which are reviewed or prepared by defense counsel.

K. DETENTION RATES

Although the Ninth Circuit as a whole has the highest detention rate of all the Circuits, the District of Idaho has the lowest detention rate within the Ninth Circuit as well as the lowest violation rate for those defendants who are released after the Government has filed a motion for detention. No changes to the detention process were recommended by the Committee.

L. DEATH PENALTY CASES

The Committee reviewed the impact of death penalty case representation on the cost of litigation. The Court has requested that the Community Defender Program be expanded to include death penalty representation. It is expected that this will reduce the cost of litigation if approved by the Administrative Office of the United States Courts.

M. COMMUNITY DEFENDER AND CJA COSTS

The cost of CJA claims and the Community Defender Program was reviewed by the Committee. Although the number of CJA claims decreased by 25%, the cost of CJA claims increased by 5%. However, the present cost-per-claim ratio is still more favorable than 1993, which was prior to the implementation of the Community Defender Program in Idaho.

The Court has applied for an additional community defender for the Eastern Division to help control rising CJA costs. The Courts' experience with the existing community defender system has been very favorable. The attorneys are more familiar with the Sentencing Guidelines, U.S. Attorney policies, and court procedures. The community defenders have done an excellent job in representing criminal defendants appearing in the United States District Court.

Table 10
Criminal Justice Act (CJA) Cost of Criminal Defense
for the 12 Month Period Ending December 31

	1993	% Change	1994	% Change	1995
CJA Claims	192	57%	301	-25%	227
CJA Costs	\$693,814	-14%	\$595,436	5%	\$625,903

The Committee reported that CJA costs are not always recovered when defendants retain counsel after having received a court-appointed attorney. It is recommended that policies be implemented that capture this information so that funds can be collected from the defendant.

N. COMMUNICATIONS WITH JUSTICE SYSTEM AGENCIES

Several forums have been used, as the result of the Criminal Advisory Committee initiatives, to solicit ideas and recommend solutions to improve criminal case processing. During the Committee meetings, agents from the DEA, FBI, and IRS were invited to comment upon the proposed Procedural Order and provide their perspective relative to initiatives being considered by the Criminal Advisory Committee. A day of testimony was dedicated to this initiative and the Committee was very appreciative of the agency comments.

A representative of the ATF also appeared before the Committee to address requests by persons convicted of a felony to possess firearms. It was reported that while 18 U.S.C. § 925 provides a mechanism for persons convicted of a felony to request permission to carry a firearm, Congress specifically has not funded this activity of the ATF.

Another formal meeting was convened with representatives from the offices of the Clerk of Court, U.S. Attorney, U.S. Probation and Pretrial, Community Defender, and U.S. Marshal to discuss common issues and to provide a forum for the exchange of information.

During this exchange of information several issues were addressed and solved by the work group as follows:

- ▶ The Clerk's Office recommended that the agencies could benefit if access to the court's automated systems was expanded. The Marshal's Office is now connected to the court's electronic cc: Mail system.
- ▶ The Clerk's Office agreed that the automated court calendar should be current as of 4:45 p.m. and if any subsequent changes occurred, the courtroom deputy would telephonically notify the Marshal's Office and other agencies.
- ▶ The Clerk's Office certificate of mailing was revised to incorporate suggestions by the U.S. Attorney's Office.
- ▶ The Clerk's Office is reviewing possible changes to ensure the standardization of scheduling conferences.

- ▶ The court has developed a form for use by the Marshal's Office so that prisoners can be processed before a Judgment and Commitment Form is prepared.
- ▶ The U.S. Attorney and U.S. Marshal agreed to streamline the process involving the return of criminal summonses.
- ▶ The U.S. Attorney's Office agreed to develop a standard cover sheet for all criminal cases which will include the correct address (no post office box numbers) and Social Security number.
- ▶ It was agreed that the arresting agencies need to provide coordination with probation/pretrial so that they know when a defendant has been taken into custody.

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ACTION ITEMS AND RECOMMENDATIONS

The following summarizes the recommendations of the Criminal Advisory Committee to the Board of Judges:

- ▶ The Procedural Order should be adopted and used by the Court and other justice system agencies.
- ▶ Oral argument should be allowed on substantive motions, where practicable.
- ▶ Continuances should be controlled and limited by the Court.
- ▶ The Committee supported each chamber's individual case management practices and suggested that the informal case management procedures be documented and reviewed with the Bar.
- ▶ The Court should use telephone conferences whenever practicable.
- ▶ Motions should be scheduled more than one week in advance of trial, where practicable.

- ▶ Criminal trials should be set 50 to 60 days from the date of arraignment, if the Speedy Trial Act allows this time frame.
- ▶ The Court agreed to try an experimental procedure in regard to superseding indictments. At the time superseding indictments are filed with the court, the Clerk's Office will send a waiver of appearance form to the defendant's counsel with an appearance date for arraignment on the superseding indictment. If defendant executes the waiver and files it with the court before the scheduled hearing date on the superseding indictment, the hearing will be vacated.
- ▶ In complex cases, discovery should be turned over as evidence comes forward
- ▶ The date of arraignment should be treated as the beginning of the discovery period.
- ▶ The Criminal Local Rules should be amended to allow reply memorandums in criminal motions practice.
- ▶ Automated access for justice system agencies should be increased.
- ▶ Time frames for accepting pleas should be enforced in advance of trial
- ▶ Specific deadlines for disclosure of witnesses, telephone numbers, and addresses should be adopted and enforced.

- ▶ Defense counsel should encourage their clients to sign release of information statements, where appropriate, to expedite the pre-sentence report process.

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EVALUATION AND ASSESSMENT

Many of the suggestions recommended by the Criminal Advisory Committee have already been adopted by the Court.

The Court has agreed to establish the Criminal Advisory Committee as a standing committee to review and evaluate the new programs implemented in this report. It is hoped that the ongoing review will improve the administration of justice.

The Committee has scheduled a meeting in September 1996 to initially review the procedures adopted by the Court and to assess the impact upon criminal case processing, cost, and delay.

U.S. COURTS
96 MAR -1 PM 3:13
REC'D
CLERK
IBARO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IN THE MATTER OF:)
NEW CRIMINAL PRODECURAL ORDER.)
GENERAL ORDER NO. 124

Based upon ongoing problems with the discovery process and pretrial motions in criminal cases, the Criminal Advisory Committee has voted for the issuance of the attached Criminal Procedural Order in all criminal matters in the District of Idaho. The Procedural Order would be entered by the Magistrate Judge at the initial appearance of the defendant.

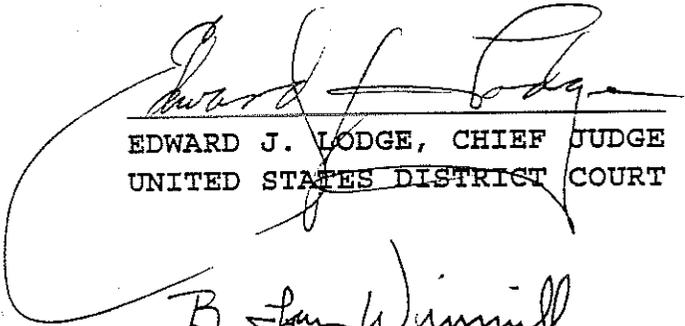
The Criminal Advisory Committee would review the application problems, if any, with the Procedural Order in August of 1996 and will make recommendations for changes to the Procedural Order where appropriate in the Fall of 1996. Finally, it was the intent of the Criminal Advisory Committee

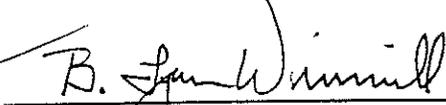
that the Procedural Order become effective on March 17, 1996. However, the United States Attorney's Office has requested that the effective date be April 1, 1996, so that the order will be effective when the new Grand Jury panel begins their service in April.

Being fully advised in the premises, the court hereby **ORDERS** that the attached Procedural Order is hereby adopted by the court as the Procedural Order to be entered in all criminal matters in the District of Idaho, and the Procedural Order shall become effective in the District of Idaho on April 1, 1996.

IT IS FURTHER ORDERED that the court clerk is directed to mail a copy of the Procedural Order to all current Criminal Justice Panel Attorneys and to have copies of the Procedural Order available for defense counsel's review at the clerk's office.

Dated this 26th day of February, 1996.


EDWARD J. LODGE, CHIEF JUDGE
UNITED STATES DISTRICT COURT


B. LYNN WINMILL
UNITED STATES DISTRICT JUDGE

Mikel H. Williams

MIKEL H. WILLIAMS, CHIEF JUDGE
UNITED STATES MAGISTRATE COURT

Larry M. Boyle

LARRY M. BOYLE
UNITED STATES MAGISTRATE JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Defendant.

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)
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Case No.

PROCEDURAL ORDER

A broader discovery by both defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence. The requirements of the Speedy Trial Act further necessitate that such discovery, and the entire pretrial process, be accomplished efficiently and expeditiously. Therefore, in the interest of promoting greater pretrial discovery, pursuant to 28 U.S.C. § 636, the district court judges have designated the magistrate judges to be the judicial officers entering an order regarding discovery and pretrial motions. Accordingly, and for good cause, the following Orders are to be entered routinely and at the time of arraignment on the indictment.

This Procedural Order is the result of many meetings with both the United States Attorney's Office and representatives of the defense bar in an effort to maximize the efficiency and fairness of the court system and at the same time reduce costs and expenses to the litigants. However, it should be understood by all parties that this Procedural Order is not intended to and does not create any rights that are expressly contrary to either the Federal Rules of Criminal Procedure or established law unless waived by compliance with this Order.

THEREFORE, IT IS HEREBY ORDERED that the attorney for the government shall within **seven (7)** calendar days from the date of arraignment on the indictment, disclose to the defendant and make available for inspection, copying, or photographing all of the following within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and provided, further, that in the event that the existence of the following becomes known to the attorney for the government after the date of such arraignment, the following disclosure and production shall promptly (within seven (7) days) be accomplished by the government:

REQUESTED:

1. Upon request of a defendant, that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged; and the substance of any

other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial; and where the defendant is a corporation, partnership, association or labor union, the foregoing statements of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

YES/NO

2. Upon request of a defendant, such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

YES/NO

3. Upon request of the defendant, books, papers, documents, photographs, tangible objects, buildings or places or copies or portions thereof which are within the possession, custody or control of the government and which are material to the preparation of the Defendant's defense or are intended for use by the government as evidence in chief at the trial or were obtained or belong to the defendant.

YES/NO

4. Results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government the existence of which is known or by the exercise of due diligence may become known to the attorney for the government and which are material to the preparation of the defense or intended for use by the government as evidence in chief at trial.

YES/NO

5. A written summary of testimony the government intends to use under rule 702, 703 or 705 of the Federal Rules of Evidence during its case in chief at trial which summary must describe the witnesses opinions, the bases and the reasons therefore and the witnesses qualifications.

YES/NO

6. All documentation submitted to the court in support of or in connection with any search warrant issued in connection with this case, and with regard to any such material filed under seal, such order of seal is hereby withdrawn and such materials shall be deemed unsealed at this moment and the attorney for the government shall make available for inspection and

copying any and all such material including but not limited to: applications for search warrants (whether granted or denied), all affidavits, declarations and materials in support of such search warrants, all search warrants and all search warrant returns.

7. All material evidence within the scope of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976), Kyles v. Whitley, ___ U.S. ___, 115, S. Ct. 1555 (1995) and their progeny.

8. The existence and substance of any payments, promises of immunity, leniency, preferential treatment or other inducements made to prospective witnesses, within the scope of United States v. Giglio, 405 U.S. 150 (1972), and Napue v. Illinois, 362 U.S. 264 (1959), and their progeny.

9. Whether a defendant was identified in any lineup, showup, photo spread or similar identification proceeding, and produce any pictures utilized or resulting therefrom and the names, addresses and telephone numbers of all identifying witnesses.

10. Unless otherwise provided, the names and, if known, the telephone numbers of all witnesses to the actions described in the indictment. In entering this portion of the order the court recognizes that the United States and the defendants shall have equal opportunity to interview witnesses and in that regard neither party shall interfere with that equal opportunity to interview witnesses and all counsel shall make every effort to see that said witnesses are not harassed or intimidated by anyone over whom counsel has control.

11. The criminal record of any and all prior convictions of any alleged informants who will testify for the government at trial.

12. All rough notes of the agents and officers involved in this case as provided by law. The United States shall instruct those agents and officers to preserve all rough notes. In the event that the government is uncertain as to whether certain rough notes must be turned over, the material shall be promptly submitted to the court for in camera inspection, with notice to the defendant. If a government agent with rough notes is expected to testify, the court encourages the government to provide the notes for defense counsel's review in a timely manner which would otherwise necessitate a delay in the trial so the defense counsel may have sufficient opportunity to review the notes.

13. Inform the defendant of the government's intention to introduce during its case in chief proof of evidence pursuant to Rule 404(b), Federal Rules of Evidence.

14. State whether the defendant was an aggrieved person, as defined by 18 U.S.C. § 2510(11), of any electronic surveillance, and if so, shall set forth in detail the circumstances thereof.

15. Transcribe and provide to the defendant all grand jury testimony of all witnesses who testified in connection with this case, provided that if such testimony is not transcribed as of the date of arraignment, such transcript shall be provided within twenty-eight (28) days from the date of arraignment. The government may at any time prior to the time required for providing transcripts to the defendant, file a motion showing cause why certain transcripts

or portions thereof should not be provided to the defendant as provided herein or the government may file a notice with the court indicating that the government is not providing the transcripts.

The United States is hereby authorized pursuant to Rule 6(e), Federal Rules of Criminal Procedure, to disclose the above described grand jury materials to the defendant and defendant's counsel. This limited release allows only the attorneys for the government, the defendant and the defendant's attorney to have access to these grand jury materials. Neither the defendant, nor counsel, are allowed to disclose the grand jury transcripts to third parties. Any release to individuals and organizations other than those specifically listed in a Rule 6 order is prohibited without a court order allowing such disclosure. United States v. Proctor & Gamble, 356 U.S. at 681.

16. Copies of all latent finger prints or palm prints which have been identified by the United States expert as those of a defendant and copies of any documents alleged to contain defendant's handwriting.

IT IS FURTHER HEREBY ORDERED that if the defendant has triggered reciprocal discovery as provided in Rule 16(b)(1)(A), (B), or (C), the defendant, upon compliance with such request by the government and on request of the government, shall within fourteen (14) days from the date of arraignment on the indictment, from the date of compliance with defendant's requests by the government or from the date of the request of the government, whichever shall last occur, disclose to the government and make available for inspection, copying, or photographing all of the following within the possession, custody or control of the defendant:

REQUESTED:

17. Books, papers, documents, photographs, tangible objects, or copies or portions thereof which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

YES/NO

18. All results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness's testimony.

YES/NO

19. A written summary of testimony the defendant intends to use under rule 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial which summary must describe the opinions of the witnesses, the bases and reasons therefore and the witnesses' qualifications.

YES/NO

IT IS FURTHER HEREBY ORDERED that the defendant shall provide the following notices of certain defenses to the government within twenty-eight (28) days from the date of arraignment:

20. The government is deemed through this procedural order to make written demand pursuant to Rule 12.1(a) of the defendant's intent to offer a defense of alibi. For the purposes of this demand, the government relies upon the indictment or information and materials to be provided in accordance with this procedural order for stating the time, date and place at which the alleged offense was committed. The court hereby finds that the indictment or information and materials provide such notice to the defendant in accordance with the Rule. If the defendant requires additional specificity in order to respond to said demand, the defendant shall file a motion to that effect within twenty-eight (28) days from arraignment.
21. If the defendant intends to rely on the defense of insanity, or if the defendant intends to introduce expert testimony relating to a mental disease or defect, the defendant must file a written notice of such intention within twenty-eight (28) days from the date of arraignment.
22. If the defendant intends to claim a defense of actual or believed exercise of public authority on behalf of law enforcement, the defendant must file a written notice of such intention within twenty-eight (28) days from the date of arraignment.

IT IS HEREBY FURTHER ORDERED as follows:

23. That all pretrial motions, if any, and accompanying memoranda shall be filed with the clerk of the court on or before the twenty-eighth (28th) day after the arraignment. All response memoranda to pretrial motions, if any, shall be filed with the clerk on or before the fourteenth (14th) day following the filing of any pretrial motion. All reply memoranda to pretrial motion responses shall be filed with the clerk of the court on or before the seventh (7th) day following the filing of such response. An additional copy of all pretrial motions, memoranda, responses and replies and other supporting documentation shall be submitted as a Judge's copy to the clerk of the court at the time of filing the original document.

If the adverse party has no opposition to the motion or application such shall be promptly communicated to the court. In the event an adverse party fails to file any responsive documents provided to be filed under this order in a timely matter, such failure may be deemed by the court to constitute a consent to the sustaining of said pleading or the granting of said motion or other application.

24. No later than fourteen (14) days prior to the date of trial legal counsel shall confer in anticipation of preparation of a written statement to be signed by counsel describing all discovery materials exchanged and of stipulations.

25. No later than fourteen (14) days prior to the date of trial, counsel shall make every possible effort in good faith to stipulate to all facts, the truth or existence of which is not contested, or points of law, the earlier resolution of which will expedite the trial. No

stipulation made by defense counsel at the conference shall be used against the defendant, unless the stipulation is reduced to writing and signed by the defendant and defendant's counsel. Any stipulation signed by the defendant and defendant's counsel, together with the written statement describing all discovery materials exchanged shall be filed with the court within seven (7) days following the conference at which time the parties shall notify the court if any motions previously filed are resolved by the stipulation.

26. Unless specific objection to the chain of custody or authenticity of any document, scientific evidence, photograph, book, paper or other tangible object disclosed by the parties and to be used or introduced at trial is made in the parties written statement to the court discussed in paragraph twenty-four (24) or by pretrial motion, it shall be deemed that the requirement of chain of custody and/or authenticity for the introduction of such evidence at trial is waived unless cause can be shown to the contrary by the objecting party.

27. Pretrial statements, requested voir dire, and requested jury instructions shall be submitted to the court on or before the fourteenth (14th) day preceding the trial date, together with copies as required by Local Rule 30.1. Proposed jury instructions shall also be provided to the judge's chambers on 3 1/2" disks in Wordperfect format. The parties shall notify the court in the pretrial statement if any scientific methodology is going to be objected to or challenged by either party under Daubert v. Merrell Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S. Ct. 2786 (1993). The court will make a determination if a hearing is necessary regarding the admissibility of the scientific evidence/testimony and will notify the parties if a hearing is scheduled.

28. That on or before the fourteenth (14th) day preceding the trial date the United States shall provide to the defendant an exhibit list and description of exhibits together with a copy of exhibits which exhibit list shall indicate all exhibits that have been stipulated for admission by the parties.

29. That within seven (7) days from the date the United States complies with the foregoing paragraph the defendant shall supply to the United States an exhibit list and description of exhibits together with a copy of the exhibits which exhibit list shall indicate all exhibits that have been stipulated for admission by the parties.

30. That prior to preparation of exhibit lists to be exchanged, counsel shall contact the in court deputy clerk to determine the method for listing and numbering trial exhibits. Ms. _____ is the deputy clerk to the Honorable _____; she may be reached at 334-_____. The Court will be provided a copy of the exhibit lists and witness lists on or before seven (7) days prior to the date of trial.

31. That on or before the fourteenth (14th) day preceding the trial date in this matter, the United States shall supply to the defendant a list of the names of all witnesses who will testify in the case in chief for the United States and within seven (7) days thereafter the defendant shall disclose to the government a list of the names, addresses and telephone numbers of all witnesses who will testify in the defendant's case in chief.

32. It shall be the continuing duty of counsel for both sides to immediately reveal to

opposing counsel all newly discovered information or other material within the scope of this order.

33. Upon written motion properly filed and served and a sufficient showing (in camera if appropriate) the court may at any time order that the discovery or inspection provided for by this

order be denied, restricted or deferred, or make such other order as is appropriate.

34. That the jury trial in this case is scheduled to commence on _____, the _____ day of _____, 199__ at _____ o'clock __.m. to continue for _____ days.

35. Pursuant to Local Criminal Rule No. 11.1 the parties shall complete all plea negotiations prior to 48 hours of the scheduled commencement of trial. In particular, the attorney for the government is encouraged to provide in plea negotiations a requirement that government offers to a defendant to plead guilty must be accepted by the Defendant prior to 48 hours of the scheduled commencement of trial.

DATED THIS _____ DAY OF _____, 199__.

United States Magistrate Judge



U.S. Department of Justice

United States Attorney
District of Idaho

Mailing Address:

Box 32
Boise, ID 83707

Street Address:

First Interstate Center
877 W. Main, Suite 201
Boise, ID 83702

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FTS 208/334-1211
FAX 208/334-9375

April 12, 1996

Honorable Edward J. Lodge
Chief Judge
District of Idaho
Federal Building
Boise, ID 83723

Dear Judge Lodge:

I am writing to express my concerns as well as concerns of Assistant United States Attorneys and Department of Justice personnel with regard to the Procedural Order you have entered. Before addressing those concerns, however, I do want to thank you for giving this office an opportunity to participate in the Criminal Advisory Committee proceedings. From the outset of the process, we have supported the two primary goals you identified. The first goal was to ensure documentation of disclosures to defense counsel, thus avoiding the situation where the United States claims to have made discovery available, but the defense claims that we did not, and there is no documentation one way or the other in the file. The second goal was to expedite the criminal justice process by preventing unnecessary delays. We remain committed to meeting these goals and will continue to provide full and early disclosure in the majority of our criminal cases.

In recent days, it has come to my attention that some court personnel, certain defense counsel and others have drawn the inference that, through our participation on the Criminal Advisory Committee, we have agreed to the substance of the Procedural Order in its entirety. Throughout the Criminal Advisory Committee process, representatives of this office raised objections to specific provisions under discussion. Our participation on the Committee should not be construed to mean that we waived any right to contest provisions of the eventual Order. While there is much in the Procedural Order with which we agree, we cannot agree with those parts of the Procedural Order which substantially depart from the Federal Rules of Criminal Procedure and from United States Supreme Court and Ninth Circuit case law. To the extent that the Procedural Order makes such departures and, in so doing, works to the detriment of victims, witnesses and clients of the United States, we will be compelled to object.

APPENDIX B

Honorable Edward J. Lodge
April 12, 1996
Page 2

I do believe that our discovery practice can only be described as liberal when compared with the practices of other United States Attorney's Offices as reflected in documents we have provided to the Committee. In our day to day experience over the last two and a half years, the discovery disputes reported to this office have been negligible. Nonetheless, since taking office, I have worked closely with my Division Chiefs, Terry Derden and Marc Haws, and all Assistant United States Attorneys to develop a clear and consistent expression of discovery practice in this district. I have attached a current statement of our discovery policy.

We have often stated our desire to work constructively with the Court, and that desire is sincere. We will strive to meet the two primary goals through our discovery policy. However, in order to protect victims, witnesses and clients of the United States, we need to object to certain provisions of the Procedural Order, requesting relief under the law. I am enclosing a draft of the form such objections will likely take.

In closing, I want to underscore my respect for you and for the other members of the federal judiciary in Idaho. I know that your actions are motivated solely by a desire to ensure that justice is served. Please know that I express my concerns and the concerns of those with whom I work in the same spirit.

With best regards,



BETTY H. RICHARDSON
United States Attorney

cc: Honorable B. Lynn Winmill
Honorable Mikel H. Williams
Honorable Larry M. Boyle
(w/attachments)

bcc: All Crim Division AUSAs
Marc Haws, Civil Chief
(w/o attachments)