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United States v. Fort and the Future of Work Product in Criminal Discovery

Anne Shaver

UNITED STATES V. FORT AND THE FUTURE OF WORK PRODUCT IN CRIMINAL DISCOVERY

ANNE SHAVER*

I. INTRODUCTION

In January 2007, the Ninth Circuit ruled against sixty years of criminal discovery reform and drastically curtailed the discovery rights of criminal defendants. The decision in *United States v. Fort*[1] comes at a time when the "War on Crime" has altered the landscape of criminal discovery needs, especially as federal prosecutions based on state crimes have become more frequent.[2] *Fort* is significant because it reinterprets Federal Rule of Criminal Procedure 16(a)(2) to protect an enormous array of prosecutorial documents from discovery by the defense. Among these protected documents are local police reports which detail the crimes charged against the accused.[3] What is at stake in *Fort* is no less than the fundamental right of criminal defendants to understand the nature of the charges against them.[4]

The majority ostensibly decided *Fort* upon a careful review of the text of the Rules of Criminal Procedure, the legislative history, and

* J.D. May 2007, University of California at Berkeley, School of Law (Boalt Hall). Death Penalty Clerk, Contra Costa County Public Defender's Office. (anne_shaver@berkeley.edu)

1. United States v. Fort (*Fort I*), 472 F.3d 1106 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 375 (2007).

2. *See* Brief of Federal Public and Community Defenders as Amici Curiae Supporting Defendant-Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc at 2, United States v. Fort (*Fort II*), 478 F.3d 1099 (9th Cir. 2007) (No. 06-10473, No. 06-10478) [hereinafter Brief of Amici Curiae].

3. Petition for Panel Rehearing and Rehearing En Banc at 1-2, United States v. Fort (*Fort II*), 478 F.3d 1099 (9th Cir. 2007) (No. 06-10473, No. 06-10478).

4. U.S. CONST. amend. VI.

prior case law. However, the dissent makes a compelling case that none of the sources reviewed by the majority actually support their findings. What remain largely unexamined in either opinion are the underlying values of the work product doctrine, and their place in criminal discovery.

Fort's potential impact on criminal trial practice is vast, and it merits a reconsideration of work product values and their implications. Three important questions arise from the case. First, can police reports really be considered the work product of an attorney? Second, is Rule 16(a)(2) a work product exception, or something else? Third, is there a valid distinction between local and federal law enforcement reports for purposes of work product?

This article addresses the questions posed above, and considers the costs and benefits of the majority and dissenting opinions in *Fort*. It concludes that if police reports are work product, they should not be protected by 16(a)(2) unless they were prepared by federal officers. Congress and the courts have made clear that 16(a)(2) is a work product exception, which relies on an agency relationship between attorneys and investigators, including the police.[5] Therefore, as the dissent argues, local police officers who prepared reports before federal prosecutors took over the case are not agents of the prosecutor, and their reports are not work product.[6] However, the dissent does not respond to the strongest point of the majority's argument: that crucial cooperation between state and federal law enforcement will be threatened if 16(a)(2) is not read broadly to immunize these reports from discovery.[7] This article indicts the premise that a narrow reading of 16(a)(2) would chill law enforcement cooperation.

Part II relates the procedural history and facts of *Fort*. Part III describes the majority and dissenting opinions in detail, to allow for a nuanced discussion of the widely divergent findings. Part IV lays out the prior case law that addressed the issue presented in *Fort*. Part V analyzes the merits of the *Fort* opinions, considering the strength of each position in light of the underlying values of criminal discovery at stake, and then discusses the practical effects of *Fort's* holding on

5. *See* United States v. Nobles, 422 U.S. 225, 238 (1975); *see also* FED. R. CRIM. P. 16 advisory committee's note A (1975).

6. *Fort I*, 472 F.3d at 1125 (Fletcher, J., dissenting).

7. *Id.* at 1119 (majority opinion).

both defendants' rights and law enforcement interests. Part VI concludes with a recommendation that the United States Supreme Court grant certiorari and reverse *Fort*.

II. PROCEDURAL HISTORY AND FACTS

In *Fort*, the Government sought interlocutory review of an order from the Northern District of California. The district court had ruled that reports created by San Francisco police officers were not exempt from discovery under Federal Rule of Criminal Procedure 16(a)(2).[8] Rule 16(a)(2) provides:

> Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.[9]

The San Francisco Police Department initiated the investigation of the "Down Below Gang," a San-Francisco-based street gang operating in the Sunnydale Public Housing Project since 1998.[10] The record does not disclose whether federal involvement came at the request of local officials or was federally-initiated, but the local investigation had gone on for several years before federal agents got involved.[11] On October 27, 2005, a grand jury returned an eighty-six-count indictment against twelve defendants.[12] The federal government then prosecuted the defendants under the Federal Racketeer Influenced and

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8. United States v. Diaz (*Diaz I*), No. CR 05-0167, 2006 U.S. Dist. LEXIS 95791, at *8 (N.D. Cal. May 18, 2006).

9. FED. R. CRIM. P. 16(a)(2).

10. Government's Opening Brief on Appeal and Petition for a Writ of Mandamus at 9, United States v. Fort (*Fort I*), 472 F.3d 1106 (9th Cir. 2007) (No. CR 05-0167) [hereinafter Government's Opening Brief].

11. United States. v. Fort (*Fort II*), 478 F.3d 1099, 1101 (9th Cir. 2007) (Wardlaw, J., dissenting).

12. Government's Opening Brief, *supra* note 10, at 9. Only three of these twelve are defendants in *United States v. Fort*: Fort, Diaz, and Calloway. *Fort I*, 472 F.3d at 1107.

Corrupt Organizations Act (RICO),[13] using the San Francisco police officers' reports.[14]

Discovery disputes dominated the case from its inception. Although the government turned over copies of the local police reports to the defense,[15] it redacted any witness-identifying information, alleging that the defendants had murdered or attempted to murder several witnesses to prevent them from testifying.[16] The district court initially denied the defendants' request for the redacted material because of the threat to witness safety, but it ruled that the information must be turned over ninety days prior to trial.[17] However, nine months before trial the district court held hearings to decide whether it should require the government to produce the redacted material immediately, pursuant to Rule 16 and subject to a protective order.[18] On May 18, 2006, the court held that the local police reports were discoverable under Rule 16(a)(1)(E).[19] The court further held that the police reports were not exempt from discovery by Rule 16(a)(2) because it is a *federal* work product exemption.[20] The court

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13. 18 U.S.C. §§ 1961-1968 (2000).

14. *Fort I*, 472 F.3d at 1107.

15. The government asserted that the discovery it provided:

> [I]ncludes virtually all police reports related to the charged crimes, 34 ballistics reports, 6 DNA reports, 23 narcotics reports, 19 expert witness resumes, 52 Form 302s, 33 grand jury transcripts, 130 criminal history records, 8 medical examiner reports, 27 fingerprint reports, 26 chronological reports of investigation, 22 firearm reports, and access to all physical items of evidence.

Government's Opening Brief on Appeal, *supra* note 10, at 15 n.5.

16. *Id.* at 10-11, 15.

17. *Id.* at 14.

18. *Id.* at 16-17.

19. United States v. Diaz (*Diaz I*), No. CR 05-0167, 2006 U.S. Dist. LEXIS 95791, at *3 (N.D. Cal. May 18, 2006). Rule 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, *documents,* data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

FED. R. CRIM. P. 16(a)(1)(E) (emphasis added).

20. *Diaz I*, 2006 U.S. Dist. LEXIS 95791, at *7.

offered the government "an opportunity to prove up, report by report, the foundation for invoking the privilege of *Rule 16(a)(2)*."[21]

The government continued to dispute the discoverability of the reports. On June 16, 2006, the district court ordered the government to produce the reports, finding "no evidentiary basis for any of the local reports to be deemed federalized work product."[22] The court also issued a protective order designed to mitigate the witness safety concerns.[23] The government responded with a Notice of Noncompliance stating that it would not comply with the court's Rule 16 orders or its prior orders requiring disclosure of civilian witness information.[24] The court issued a sanctions order, and the government appealed the order to the Ninth Circuit on August 1, 2006.[25]

In *Fort*, the Ninth Circuit panel consisting of three judges vacated the district court's discovery and sanction orders.[26] Writing for the majority, Judge Graber held that the police reports were privileged under 16(a)(2), and remanded all discovery matters to be decided accordingly.[27] Judge William Fletcher dissented.[28] The defendants petitioned for panel rehearing and rehearing en banc, which were denied on March 8, 2007.[29]

Defendant Calloway subsequently entered a plea bargain.[30] Defendants Fort and Diaz are preparing a petition for certiorari to the United States Supreme Court, pending settlement of their cases.[31]

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21. *Id.* at *10.

22. United States v. Diaz (*Diaz II*), No. CR 05-0167, 2006 U.S. Dist. LEXIS 44883, at *30 (N.D. Cal. June 16, 2006).

23. *Id.* at *2-15.

24. Government's Opening Brief on Appeal, *supra* note 10, at 22.

25. *Id.* at 23.

26. United States v. Fort (*Fort I*), 472 F.3d 1106, 1107 (9th Cir. 2007).

27. *Id.* at 1107, 1121-22.

28. *Id.* at 1122 (Flecther, J., dissenting).

29. United States v. Fort (*Fort II*), 478 F.3d 1099, 1099 (9th Cir 2007). Judge Wardlaw dissented in the denial of the rehearing and was joined by Judges Pregerson, Reinhardt, Fletcher, Fisher, and Paez. *Id.* at 1100 (Wardlaw, J., dissenting).

30. E-mail from John Cline, Attorney for Robert Calloway, to Anne Shaver (Apr. 28, 2007, 12:27 WST) (on file with author).

31. E-mail from Michael Thorman, Attorney for Fort and Diaz, to Anne Shaver (Apr. 30, 2007, 11:54 WST) (on file with author).

III. THE OPINIONS

A. Majority

The *Fort* majority held that the defense was not entitled to discovery of the information redacted from the police reports because the reports were covered by Rule 16(a)(2).[32] Notably, Judge Graber's opinion never asserted that the reports were technically work product; instead, the court found that Rule 16(a)(2) encompassed work product but was intended to be a broader protection of investigative materials.[33]

To reach this result, the majority first examined the text of Rule 16.[34] It found the applicability of 16(a)(2) depended on the meaning of the terms "government agent" and "the case."[35] Although the majority conceded that the term government "is used as shorthand for 'federal government' throughout the Rules,"[36] it wrote that the relevant question was who qualified as a "government agent."[37] It found that "'government agent' includes non-federal personnel whose work *contributes to* a federal criminal 'case,'"[38] regardless of when that work was completed.[39] Judge Graber gave two rationales for this interpretation. First, she looked to the statutory construction of the phrase "government agent" elsewhere in Rule 16, noting that other circuits have held that this phrase in Rule 16(a)(1)(A) requires federal prosecutors to disclose statements made by defendants to local law enforcement officers.[40] Second, Judge Graber referred to Federal Rule of Criminal Procedure 6 as a guide to the intent of the drafters, because Rule 6 deals with "potential cooperation among federal, state, and local law enforcement."[41] She found that because Rule 6

32. *Fort I*, 472 F.3d at 1107-08.
33. *See id.* at 1115.
34. *Id.* at 1110.
35. *Id.*
36. *Id.* at 1111.
37. *Id.*
38. *Id.* at 1113 (emphasis added).
39. *Id.*
40. *Id.* at 1112.
41. *Id.* Rule 6 governs federal grand jury proceedings. FED. R. CRIM. P. 6. Rule 6(e)(3)(A)(ii) provides for disclosure of grand jury proceedings to "any

expressly incorporated non-federal government employees, it was evidence of the drafters' intention to promote cooperation between local and federal law enforcement.[42] Thus, the majority held that this intention should be imputed to Rule 16 as well, even though Rule 16 had not been similarly amended to expressly include this definition of government agent.[43]

Having found that San Francisco police officers were government agents within the meaning of 16(a)(2), the majority next considered whether a separate federal prosecution could be considered the same "case" as the local prosecution.[44] The majority cited prior case law to support its finding that "case" includes any prosecution of the same person for the same crime.[45] In other words, a federal prosecution that begins subsequent to a state prosecution is the same "case" for the purposes of Rule 16 as long as it involves the same defendant and the same crime(s).[46] But the majority did acknowledge that district courts have reached conflicting holdings on this very issue.[47]

Next, Judge Graber turned to the intentions of the Advisory Committee. The majority found that 16(a)(2) is not a mere work product exception: "We are not persuaded that the drafters meant to limit Criminal Rule 16 to the civil 'work product' doctrine. Rule 16 itself, while encompassing government work product and having its genesis in the idea of work product, draws its boundaries more broadly than those of Civil Rule 26."[48] To support this finding, the

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governmental personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce criminal law." FED. R. CRIM. P. 6(e)(3)(A)(ii).

42. *See Fort I*, 472 F.3d at 1112-13.

43. *See id.* at 1112.

44. *Id.* at 1113.

45. *Id.* at 1113-14 (citing United States v. Armstrong, 517 U.S. 456 (1996); United States v. Cedano-Arellano, 332 F.3d 568 (9th Cir. 2003)).

46. *Id.* at 1114.

47. *Id.* (citing United States v. Cherry, 876 F. Supp. 547, 551-52 (S.D.N.Y. 1995); United States v. Green, 144 F.R.D. 631, 641 (W.D.N.Y. 1992); United States v. Duncan, 586 F. Supp. 1305, 1313 (W.D. Mich. 1984); United States v. DeBacker, 493 F. Supp. 1078, 1082 (W.D. Mich. 1980)). For further discussion of the conflicting holdings of *Cherry*, *Duncan*, *DeBacker*, and *Green*, see discussion *infra*, pp. 138-40.

48. *Fort I*, 472 F.3d at 1115.

opinion cited the Advisory Committee's decision to amend 16(a)(2) using different language than the civil work product doctrine.[49] Although the Committee specifically refers to the Rule as the "work product" exception,[50] it chose to define work product as "reports, memoranda, or other internal government documents"[51] rather than "the mental impressions, conclusions, opinions, or legal theories of the attorney for the government."[52] Judge Graber's opinion states that this choice evinces the Committee's intention that Rule 16(a)(2) be a broader exception than just work product.[53]

Having determined that Rule 16(a)(2) was not a work product rule, the opinion sought to determine the true scope of the rule by looking to other discovery obligations in criminal procedure. First, the majority found that the Jencks Act[54] does not distinguish between statements obtained by federal and state officials in its requirement that the government disclose witness statements to the defense.[55] In addition, the majority considered that 16(a)(2) exempts reports created by FBI agents (Form 302 reports) as support for the proposition that all law enforcement reports should be within the Rule, regardless of their origin.[56] Finally, under the general discovery provision, Rule 16(a)(1)(E), materials become discoverable by the defense when they are in the possession of the federal government.[57] Thus, the key issue triggering 16(a)(2) is that the federal prosecutors had possession of the reports, and not who produced them.[58]

At the end of the opinion, the majority briefly examined policy considerations. Their overarching concern was to avoid inhibiting

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49. *Id.* (citing FED. R. CRIM. P 16 advisory committee's note D (1975)).

50. FED. R. CRIM. P. 16 advisory committee's note D (1975).

51. *Id.*

52. *Id.*; *see Fort I*, 472 F.3d at 1115. The latter definition is the civil work product definition in FED. R. CIV. P. 26.

53. *See Fort I*, 472 F.3d at 1116.

54. 18 U.S.C. § 3500 (2000). The Jencks Act requires the government to produce to the defense any statement made by a government witness that is in the possession of the government once that witness has testified. 18 U.S.C. § 3500(b) (2000).

55. *Fort I*, 472 F.3d at 1116-17.

56. *See id.* at 1119.

57. *Id.* at 1118.

58. *See id.*

cooperation between local and federal law enforcement agencies, "'to the benefit of criminals but to the detriment of the public good.'"[59] It noted that such cooperation is especially crucial in RICO prosecutions, where the predicate acts of the charge are often state law crimes.[60]

B. Dissent

Judge Fletcher authored a vigorous dissent. His opinion stated two initial normative reasons why local police reports should not be included in 16(a)(2). First, the government's hesitation to turn over the reports stemmed from witness protection concerns, which are more properly addressed by a protective order.[61] Second, the Federal Rules of Criminal Procedure have consistently evolved towards allowing broad discovery for both the State and the defense; in order to preserve this policy, exceptions to discovery should be construed narrowly rather than broadly.[62]

Turning to the text of the Rules, Judge Fletcher asserted that 16(a)(2) is in fact a work product exception, and that it pertains only to the work product of the federal government. "Rule 16(a)(2) is designed to protect only the government's work product in connection with a criminal case . . . . Because the reports in question are the work product of the San Francisco Police Department, not of the government, they are not protected by Rule 16(a)(2)."[63]

Judge Fletcher provided several sources supporting his finding that 16(a)(2) is a work product exception. One was the Advisory Committee notes, which state that Rules 16(a)(2) and 16(b)(2) "set forth 'work product' exceptions to the general discovery requirements."[64] Another source was case law. Judge Fletcher cited both a U.S. Supreme Court and Ninth Circuit case finding 16(a)(2) a "work product rule."[65]

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59. *Id.* at 1119 (quoting United States v. Cherry, 876 F. Supp 547, 552 (S.D.N.Y 1995)).

60. *Id.*

61. *Id.* at 1122-23 (Fletcher, J., dissenting).

62. *Id.* at 1123.

63. *Id.*

64. *Id.* (quoting FED. R. CRIM. P. 16 advisory committee's note (1975)).

65. *Id.* (citing United States v. Armstrong, 517 U.S. 456, 463 (1996); United

The dissent also found that the text of the rule clearly established that local police reports are not protected.[66] Judge Fletcher reasoned that "internal government documents" means documents pertaining to the internal relations of the federal government, and the majority conceded that "government" here referred to the federal government.[67] Thus, local reports generated outside the federal government for non-federal purposes did not qualify.[68] In addition, 16(a)(2) protects only documents "made by a federal government attorney or other government agent."[69] The police reports in *Fort*, by contrast, were made by local police.[70] Moreover, in Judge Fletcher's opinion, the phrase "made by" negates the majority's emphasis on possession as the key to discovery.[71] Since it was undisputed that "attorney for the government" referred to the federal government, the applicability of the Rule to the local reports depended on the finding that local police officers were "other government agents."[72] Judge Fletcher argued that the officers were not agents of the federal government because they had no prior or contemporaneous federal authorization for their work.[73] He contended that the majority's finding that the officers were "other government agents" required interpreting the phrase "other government agent" to mean the agent of another government besides the federal one.[74] This would be an absurd result, because then the only federal personnel eligible for work product protection would be the attorney; for example, not even documents prepared by an FBI agent for a federal case would be protected, because the FBI is part of the federal government.[75]

States v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000)).

66. *See id.* at 1124.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1125.

71. *See id.* ("The phrase 'made by,' like 'internal government,' thus signals that documents protected from disclosure by Rule 16(a)(2) are a subclass of the broader class of documents 'within the government's possession, custody, or control' described in Rule 16(a)(1)(E).").

72. *Id.*

73. *Id.*

74. *Id.* at 1126.

75. *Id.*

After making the case that 16(a)(2) is textually clear as a work product exemption for federally-generated documents only, Judge Fletcher went on to specifically address each of the majority's arguments. First, he rejected the idea that because 16(a)(1) requires the state to disclose statements made by the defendant to local police agents, 16(a)(2) should be read to include local reports as well.[76] The functions of the two rules are different: (a)(1) is a broad discovery mandate to the state, needed to ensure "the fair and efficient administration of criminal justice."[77] 16(a)(2), by contrast, is a work product exception which must be read narrowly so as not to swallow the rule.[78] Second, Judge Fletcher contested the majority's argument that it was acceptable to include local reports in 16(a)(2) because Rule 6(e)(3) allows the government to disclose grand jury testimony to "any government personnel—*including those of a state or state subdivision, Indian tribe, or foreign government.*"[79] Judge Fletcher argued that the rule drafters explicitly enlarged the scope of government in Rule 6, which highlights that it is deliberately different than the rest of the rules.[80] If the drafters had intended the same results for Rule 16, he concluded, they would have made a similar drafting change.[81] Third, Judge Fletcher argued that "[n]either the language nor history of Rule 16(a)(2) suggests that the rulemakers intended to expand its protection beyond traditional work product,"[82] and that it has the same scope as Rule 26 of civil procedure.[83] Finally, in response to the majority's suggestion that the rule be read symmetrically with the Jencks Act and Rule 16(a)(1)(E), the dissent pointed out that 16(a)(2) should be read in symmetry with 16(b)(2), the work product rule for the defense team.[84] 16(b)(2) protects against state discovery of documents made by the defendant or defendant's

76. *Id.* at 1126-28.

77. *Id.* at 1127 (quoting United States v. Howell, 231 F.3d 615, 625 (9th Cir. 2000)).

78. *Id.* (citing Comm'r v. Clark, 489 U.S. 726, 739 (1989)).

79. *Id.* at 1128 (quoting FED. R. CRIM. P. 6(e)(3)(A)(ii) (emphasis added)).

80. *See id.*

81. *Id.*

82. *Id.*

83. *See id.* at 1129.

84. *Id.* at 1130.

attorney or agent.[85] Because the drafters intended the defense and the State to enjoy reciprocal discovery rights, it makes sense that these two rules should have the same scope.[86]

The dissent concluded that "[t]he purpose of the work-product exception—to give parties freedom and incentive to develop their own cases—simply is not 'promoted by shielding from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents.'"[87] Ultimately, Judge Fletcher wrote that any debate in *Fort* should have focused on the "drafting of a protective order under Rule 16(d)(1)" rather than "the scope of work-product privilege under Rule 16(a)(2)."[88]

IV. PRECEDENT

Fort is not the first case in which a court held that local police reports are protected from discovery by 16(a)(2) during a federal prosecution. Two district courts have reached the same holding as the *Fort* majority. In *United States v. Cherry*, the court held that reports generated by the New York Police Department were protected work product of the federal prosecutor, even though the reports were made before federal involvement in the case.[89] Notably, the court did not discuss the text of Rule 16, but instead relied on policy considerations. The court reasoned that the work product principle underlying 16(a)(2) would be undermined if it was limited to federal agents, because federal prosecutors depend so much on state agents' work.[90] "The distinction makes a difference in this case because about 95 percent of the federal prosecutors' investigatory file consists of documents generated by the NYCPD during the course of its own,

85. FED. R. CRIM. P. 16(b)(2).

86. In relation to this point, Judge Fletcher pointed out that if the majority's holding were to stand, the defense could also immunize their documents from discovery merely by placing them in the hands of federal personnel—a result which the majority surely did not intend. *Fort I*, 472 F.3d at 1130 (Flectcher, J., dissenting).

87. *Id.* at 1130 (citing *In re* Grand Jury Subpoenas, 318 F.3d 379, 384 (2d Cir. 2003)) (citations omitted).

88. *Id.* at 1131.

89. United States v. Cherry, 876 F. Supp. 547, 551 (S.D.N.Y. 1995).

90. *See id.* at 551-52.

independent activities prior to a reference to the United States Attorney for prosecution under the RICO statute . . . ."[91] The *Cherry* court also considered that the practical consequence of making these reports discoverable would be to inhibit cooperation between the state and federal government.[92] Accordingly, the court held that the reports were protected work product.[93]

A Michigan district court reached the same result in *United States v. Duncan*.[94] The state prosecutor initiated the investigation and prosecution of the defendant, and then moved to dismiss the state proceeding to allow federal authorities to prosecute the defendant.[95] The defendant requested discovery of all police reports related to his investigation.[96] Without any discussion, the court held that the reports were protected by Rule 16(a)(2).[97]

On the other hand, three lower courts have reached the same conclusion as the dissent in *Fort*: that local police reports are not immune from discovery in a federal prosecution. In *United States v. DeBacker*, for instance, the defendant was initially investigated by the Michigan State Police and later charged by federal authorities.[98] The court held that the state police reports were discoverable because the state investigation began before the federal one. "[T]his court concluded that state police reports made before Federal involvement were discoverable under Rule 16 . . . . [T]he Assistant U.S. Attorney admitted that the investigation of defendant in this case was not a joint venture by the state and federal investigatory authorities, but was initiated by the state alone."[99] Therefore, the court ordered the government to turn over copies of the report to the defendant.[100]

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91. *Id.* at 549.
92. *Id.* at 551-52.
93. *Id.* at 552.
94. United States v. Duncan, 586 F. Supp. 1305 (W.D. Mich. 1984).
95. *Id.* at 1308.
96. *Id.* at 1313.
97. *Id.*
98. *See* United States v. DeBacker, 493 F. Supp. 1078, 1078-79 (W.D. Mich. 1980).
99. *Id.* at 1082.
100. *Id.*

Similarly, in *United States v. Gatto*, the court held that Rule 16(a)(2) did not exempt local police reports because they are not part of the federal "case" against the defendant.[101]

> The rule excludes reports prepared in connection with the investigation or prosecution *of the case*, not of other cases that may have come prior to it. The language of the statute suggests that it refers only to attorney work product on the current case, not to investigations and prosecutions from the past.[102]

For the *Gatto* court, then, the key inquiry was the same as in *DeBacker*—when did the federal investigation begin? Documents generated before that date cannot be considered the work product of that investigation.

United States v. Green also concluded that the defendant was entitled to discovery of state police reports in the hands of the federal prosecutor.[103] The court held that "to the extent that the government has in its possession reports or records from state or local law enforcement agencies or prisons, these items are discoverable unless they are the product of a joint investigation or unless they have become the work product of the federal investigators."[104] The first part of this holding is, like *Gatto* and *DeBacker,* based on the timing of the separate investigations. But the *Green* court also raised an interesting possibility—that state reports could somehow become federal work product.[105] However, the court did not elaborate on how that might take place, and it is not an idea replicated anywhere else in the case law.

This review of the case law reveals that the only case supporting the *Fort* majority's logic is *Cherry*, because *Duncan* contains no analysis. Therefore, the weight of the persuasive authority is with the dissent. Moreover, *Cherry* considers only the policy issue of enabling law enforcement cooperation. *Gatto*, *DeBacker*, and *Green*, by contrast, look to the actual text of the statute to inform their opinions.

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101. United States v. Gatto, 729 F. Supp. 1478, 1481 (D. N.J. 1989).
102. *Id.*
103. United States v. Green, 144 F.R.D. 631, 641 (W.D.N.Y. 1992).
104. *Id.*
105. *Id.*

V. ANALYSIS

Although Judge Fletcher was correct that the reports should be turned over to the defense, he was mistaken when he said that *Fort* should not be a case about work product. Rather, the issue raised in *Fort* necessarily implicates the scope of the work product exception in criminal discovery—a notion with which Judge Wardlaw opened his dissent to the order denying panel rehearing.[106] To clarify the contours of this issue, this section turns first to the history of criminal discovery and the work product exception that *Fort* disrupts. It suggests that police reports may not fit into the work product doctrine in theory. But, assuming that police reports are work product, the values underlying the work product doctrine justify treating local and federal reports differently under 16(a)(2). Second, this section considers the practical ramifications of the majority's position for both criminal defendants' interests and law enforcement's interests.

A. Statutory History and Interpretation

Until the 1960s, discovery in federal criminal procedure was quite restricted, especially as compared to pretrial discovery techniques that were available in civil cases.[107] Critics charged that criminal trials were "in the nature of a game or sporting contest," and not "a serious inquiry aiming to distinguish between guilt and innocence."[108] Arguing for broader discovery rules, some commentators claimed that liberal discovery in criminal cases is essential to ensuring a fair trial.[109] In particular, access to documents in the possession of the prosecution that are material to the defense is necessary for developing a defense theory and obtaining important evidence.[110] It

106. United States v. Fort (*Fort II*), 478 F.3d 1099, 1100 (9th Cir. 2007) (Wardlaw, J., dissenting) ("The issue is one of exceptional importance to the administration of justice in criminal proceedings: the scope of the work product privilege in criminal discovery.").

107. *See* Robinson O. Everett, *Discovery in Criminal Cases*, 1964 DUKE L.J. 477, 477 (1964).

108. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for the Truth?*, 1963 WASH. U. L. Q. 279, 279 (1963) (quoting Williams, *Advance Notice of the Defence*, 1959 CRIM. L. REV. (Eng.) 548, 554 (1959)).

109. Everett, *supra* note 107, at 479.

110. *See generally id.* at 479-81 (describing potential benefits to the defense

may also help the defense to determine whether to enter a plea bargain; in fact, prosecutors often disclose these documents of their own volition in order to encourage a guilty plea, especially when the documents contain strong inculpatory evidence.[111] In an argument for the expansion of pretrial discovery rights for both defendants and the state, Justice William Brennan argued that:

> [w]hat assigned counsel obviously needs to discharge the heavy responsibility we give him is at least the opportunity to do what the state does when the trail is fresh, namely, seek corroboration of the accused's story, or lack of it, from external facts through avenues of inquiry opened by what the state has learned. . . . To shackle counsel so that he cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seems seriously to imperil the bedrock presumptions of innocence.
>
> And might not the expanded discovery benefit the prosecution as well as the accused? If sharpening of the issues, exposure of untenable arguments and more efficient marshaling of the evidence result from discovery, doesn't the prosecution profit?[112]

Arguments like these led to a drastic expansion of pretrial criminal discovery in the 1960s and 1970s, emphasizing reciprocity of rights between the State and the defense.[113]

Rule 16(a)(2), which the Advisory Committee and the Supreme Court refer to as the work product exception,[114] was a part of this expansion. The scope of the exception was hotly debated. Some argued that the work product exception should be narrower in criminal cases because the free rider problem—when one party contributes nothing and merely profits from the other's work—is far less likely to arise in these cases than in civil trials.[115] On the other hand, the traditional justification for work product—that it encourages fact-

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from discovery of various documents and other evidence held by the prosecution).

111. Brennan, *supra* note 108, at 282; *see also* RICHARD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1141 (1st ed. 2001).

112. Brennan, *supra* note 108, at 287.

113. FED. R. CRIM. P. 16 advisory committee's note A (1975).

114. *See infra* notes 130-32 and accompanying text.

115. *See, e.g.*, *"Work Product" in Criminal Discovery*, 1966 WASH. U. L. Q. 321, 335-36 (1960).

finding and hence furthers truth and accuracy—is just as strong in the criminal context.[116] In other words, the work product exception should be broad enough so it does not discourage law enforcement from engaging in fact-finding for fear that their reports will provide tools for defendants at trial. Indeed, this seems to be the very policy concern of the *Fort* majority: that discovery of the local reports could stifle future cooperation between the SFPD and the federal authorities.[117] *Fort* thus demonstrates that the historical tensions around the scope of work product remain in play today.

Two critical questions which remain unasked in either of the opinions, however, are what sorts of documents should be considered work product, and is it any different in criminal versus civil cases? Specifically, are police reports—whether local, state, or federal—the work product of an attorney? These reports contain many details, but the major issue in *Fort* is the reports as a source of witness statements.[118] But it is far from obvious that witness statements, taken by police at the crime scene, can be fairly characterized as an attorney's work product.

There was an initial debate in civil procedure whether work product should include statements made by witnesses to a party's agent.[119] Although this is now a well-settled part of civil work product, it is acknowledged that such statements are not really the mental process of the lawyer or agent.[120] In a way, though, they do reflect attorney work because he or she took the time to locate the witness and conduct the interview. In the civil context, it makes sense to encourage each party to do that legwork themselves, because theoretically each side should have equal access.

But in the criminal context, the considerations are different. For one thing, the police have access to crime scene witnesses that might disappear before the defense counsel is even appointed. Additionally, the prosecution has a degree of access to the law enforcement files that defendants do not.[121] Thus, perhaps labeling these reports as work

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116. *See id.* at 336.

117. *See* United States v. Fort (*Fort I*), 472 F.3d 1106, 1119 (9th Cir. 2007).

118. *Id.* at 1108.

119. *"Work Product" in Criminal Discovery, supra* note 115, at 324.

120. *See id.*

121. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some*

product is not appropriate in the criminal context because the truth seeking/fair trial justifications for work product are not present. Instead, the purpose of calling them work product seems to be to find a way to protect the reports' content for other reasons (witness protection, for example). But the Rules provide other mechanisms to deal with those concerns.[122] Moreover, the prosecution is mandated by *Brady v. United States*[123] to turn over any exculpatory information in its possession, and any police report will, inevitably, contain potentially exculpatory information, including the names of witnesses that may be impeachable. Thus, labeling police reports as work product creates an inevitable discovery conflict with crucial *Brady* rights, and underscores the idea that these reports are not really deserving of a blanket exception.

Nevertheless, many states' criminal codes explicitly include police reports in the work product exemption.[124] The federal courts have likewise interpreted Rule 16(a)(2) to include federal law enforcement reports.[125] But *Fort* merits revisiting, at least hypothetically, this fundamental question: "Is it obvious that the work of police officers should be treated like the work product of a prosecutor preparing for trial? Are there reasons to exempt police reports from routine discovery, apart from the policies associated with the work product doctrine?"[126] This quotation, from a widely used Criminal Procedure casebook, goes on to suggest that the real reason to exempt police reports is because discoverability will result in police officers minimizing their reporting and will impair the overall efficacy of law enforcement.[127] This is exactly the concern voiced by the *Fort* majority, specifically in relation to cooperation between different law enforcement jurisdictions in organized crime investigations.[128] Perhaps this is why the majority held that Rule 16(a)(2) is more than

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Lessons of Cognitive Science, 47 WM. & MARY L. REV. 1587, 1616 (2006).

122. For example, the state could move for a protective order. *See* FED. R. CRIM. P 16(d)(1).

123. Brady v. United States, 397 U.S. 742 (1970).

124. *See, e.g.*, ARIZ. R. CRIM. P. 15.4 (2007); S.D. CODIFIED LAWS § 23A-13-5 (2007); N.C. GEN. STAT. § 15A-904 (2006).

125. *See infra* note 130.

126. ALLEN ET AL., *supra* note 111, at 1141.

127. *Id.*

128. United States v. Fort (*Fort I*), 472 F.3d 1106, 1119 (9th Cir. 2007).

just a work product exception.[129] That is, the majority recognized that police reports are not truly "work product," but felt that they still merited protection for policy reasons.

The problem inheres in the fact that, in order to reach its holding, the majority ran contrary to both the text of the rule and the case law, both of which are clear that 16(a)(2) is a work product exemption. The United States Supreme Court and the Ninth Circuit explicitly refer to 16(a)(2) as the work product doctrine or privilege.[130] The comments to the Rules refer to 16(a)(2) as a work product rule. The notes state that "[t]he Committee also changed subdivisions (a)(2) and (b)(2), which set forth 'work product' exceptions to the general discovery requirements."[131] In addition, the notes state that Rules 16(a)(2) and 16(b)(2) "define certain types of materials ('work product') not to be discoverable."[132] Therefore, if the majority wanted to find a way to protect these reports, it should have looked elsewhere in the rules besides 16(a)(2). As it stands, the opinion seems like an end-run around the legislature's intentions.

But the dissent is not in the clear, either. The weight of authority, demonstrated in the legislative record, the case law, and states' practice, is that police reports are work product and that 16(a)(2) is a work product exception. Thus, in order to allow defendants to discover these reports, there must be a justification for treating the work product of local police differently than the work product of federal law enforcement. This justification is found in the concept of agency: when local police officers act as agents for local prosecutors, their work should be considered work product. In contrast, when federal prosecutors take over an investigation years after the local police began it, the local officers cannot logically be considered agents of the federal government for those initial years. Black's Law Dictionary defines "agent" as "[o]ne who is authorized to act for or in the place of another."[133] According to the Restatement of

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129. *Id.* at 1116.

130. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 463 (1996); United States v. Nobles, 422 U.S. 225, 238 (1975); United States v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000).

131. FED. R. CRIM. P. 16 advisory committee's note B (1975).

132. FED. R. CRIM. P. 16 advisory committee's note D (1975).

133. BLACK'S LAW DICTIONARY 68 (8th ed. 2004).

Agency, "[a] principal's right to control the agent is a constant across relationships of agency."[134] The *Fort* majority failed to offer any normative reason why these police officers should be "agents" of the federal prosecutor, and instead relied on textual arguments to demonstrate that the word "government" did not refer just to the federal government.

In Judge Wardlaw's dissent, it emerges that what is essential in her interpretation of agency is not a question of jurisdiction, but a question of timing; had the "Down Below Gang" investigation been a joint state-federal effort from the start, the reports would unquestionably be protected work product.[135] But given that the federal agents in this case came on years after the state investigation,[136] the dissent is persuasive in that the reports cannot logically be considered the work of an agent of the federal government. Therefore, there is a sound reason for distinguishing between local and federal police reports for work product purposes.

B. Policy

The majority position is supported by a reasonable policy judgment: requiring disclosure of these reports may inhibit cooperation between state and federal law enforcement. However, the majority makes only one fleeting reference to this concern.[137] To complete the picture left blank in the opinion, it is worthwhile to consider the practical implications of protecting these reports. That is, did the majority get it right as a normative issue, if not as a matter of law?

The answer is a resounding no. There is no evidence that the past practice of allowing discovery of local police reports chilled law enforcement cooperation in federal investigations. On the contrary, recent years have seen only a growth of such cooperation, often in the form of a joint federal-state effort[138]—a practice which the dissent's

134. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

135. United States v. Fort (*Fort II*), 478 F.3d 1099, 1102 (9th Cir. 2007) (Wardlaw, J., dissenting) ("[S]uch a joint-investigation showing, which would have justified the claim of privilege, was never made by the federal prosecutors.").

136. *Id.* at 1101.

137. United States v. Fort (*Fort I*), 472 F.3d 1106, 1112-13 (9th Cir. 2007).

138. Brief of Amici Curiae, *supra* note 2, at 2.

position would not preclude. In its briefs to the court, the government never offered any evidence that federal-state law enforcement would suffer if the dissent had prevailed. This is true even in jurisdictions where such data is readily available because courts have explicitly held that local police reports are not the work product of federal prosecutors.[139]

Moreover, the practical effect of *Fort* is a disaster for criminal trial practice in general and defendants in particular. In fact, thirteen different federal public and community defenders filed an Amicus brief endorsing Judge Fletcher's dissent and urging rehearing.[140] They argued that *Fort* will have wide-reaching effects, not only concerning police reports, but for all of criminal discovery.[141] Ultimately, it will benefit neither the criminally accused nor the prosecution.

Fort will affect a large number of cases. The Amicus brief states that between thirty and sixty percent of cases in the federal defenders offices were either originated by or involved local police.[142] Recall, too, that in *United States v. Cherry*, ninety-five percent of the documents in the prosecution's possession came from the NYCPD's independent investigation.[143] This is therefore not a trifling matter; in RICO cases especially, the discoverability of local police reports is a crucial issue.[144]

One practical effect of *Fort* is that it drastically enhances the scope of the government's *Brady* obligations. "If a local agency is a 'government agent' for Rule 16 purposes, it should also be deemed an agent for *Brady* purposes. This extends the federal government's *Brady* duties to include information in the control of local agencies that participated in the 'case.'"[145] Although the majority stated that its opinion was not intended to diminish the government's *Brady* obligations,[146] the majority's own symmetry arguments implicate the

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139. *See supra* pp. 139-40.

140. Brief of Amici Curiae, *supra* note 2, at 13-14.

141. *Id.* at 1-2.

142. *Id.* at 2.

143. United States v. Cherry, 876 F. Supp. 547, 549 (S.D.N.Y. 1995).

144. *See, e.g., id.*

145. United States v. Fort (*Fort II*), 478 F.3d 1099, 1106 (9th Cir. 2007) (Wardlaw, J., dissenting).

146. United States v. Fort (*Fort I*), 472 F.3d 1106, 1110 (9th Cir. 2007).

opposite result: that *Brady* obligations will be expanded. Without input from the defense during the back-and-forth of discovery, it will be impossible for even the most well-intentioned prosecutor to comply with *Brady*.[147] *Brady* mistakes will then lead, in turn, to another set of problems: "This is a recipe for mistrial or reversal on appeal—a result that delays justice, and wastes prosecutorial resources, judicial resources, and jury time, particularly in complex criminal cases (the very cases most affected by the panel majority's opinion)."[148]

Another effect of *Fort* is that it encourages a work product discovery war between the prosecution and the defense. The majority's reasoning allows materials to retroactively become federal work product.[149] Accordingly, because 16(a)(2) and 16(b)(2) are reciprocal, either the prosecution or the defense could withhold preexisting investigative materials based upon the subsequent creation of an agency relationship with their federal counterparts.[150] The majority argued that this possibility would be curtailed because in order to be protected, documents must be "nonpublic" and "made by an 'other government agent in connection with investigating or prosecuting the case.'"[151] But if the agency relationship can be created after the document is made, and the "case" refers to a person rather than a procedure, this is actually a huge class of documents. Perhaps this is what Judge Wardlaw had in mind when she listed "encouraging gamesmanship" as the first practical concern of *Fort*.[152] This will be especially true if the government is aggressive in labeling materials as privileged—conduct which will merely encourage the defense to lock up as much material as possible. *Fort* will therefore turn criminal discovery back into the "sporting event" that Justice Brennan decried so long ago, rather than a search for truth. [153]

Most importantly, *Fort* means that the overall quality of public defense will decline as defense attorneys have to scramble to get the basic documents indicting their clients. As the Amicus brief argues,

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147. *Fort II*, 478 F.3d at 1106 (Wardlaw, J., dissenting).
148. *Id.* at 1107.
149. *See Fort I*, 472 F.3d at 1125-26.
150. Brief of Amici Curiae, *supra* note 2, at 11.
151. *Fort I*, 472 F.3d at 1120 n.15 (quoting FED. R. CRIM. P 16(a)(2)).
152. *See Fort II*, 478 F.3d at 1106 (Wardlaw, J., dissenting).
153. Brennan, *supra* note 108, at 279.

"any limitation on access to state and local police reports will adversely affect the quality of justice, diminish the effectiveness of counsel's representation, and result in increased costs under the Criminal Justice Act as counsel are required to expend resources to obtain the reports from other sources."[154] Judge Wardlaw's dissent echoes these sentiments, citing concern over both the increased costs of public defense and the inevitable decline in quality that will ensue.[155]

The desirability of making these documents discoverable is highlighted by the fact that prosecutors routinely turn over police reports to the defense.[156] The federal public defender for the district of Oregon, for example, stated that the local prosecutor "as a matter of routine, provides the reports generated by state and local police officers."[157] And one California criminal defense lawyer said of police reports, "we often get them in discovery in state cases without request. Reason: they almost always contain material we are entitled to under the [California] discovery statute."[158] This practice is common among prosecutors for several reasons, which reflect some of the arguments above. First, the reports will inevitably contain some *Brady* material. Second, local statutes might mandate disclosure of some or all of the information, and it saves time to just disclose it all. Third, presenting the defense with the weight of the evidence leads more easily to plea bargains, which benefits the state. But regardless of the reason, the fact that turning over these reports is a routine practice for many prosecutors supports the contention that it is a necessary part of making the system function.

In sum, the practical results of *Fort* are the opposite of what the majority predicted. Rather than facilitating law enforcement by enhancing federal-state cooperation, *Fort* will have adverse effects on the ability of the system to work successfully. The prosecution will be unable to comply with its *Brady* obligations, criminal trials are

154. Brief of Amici Curiae, *supra* note 2, at 2.

155. *Fort II*, 478 F.3d at 1108 (Wardlaw, J., dissenting).

156. *See infra* notes 157-58 and accompanying text.

157. Brief of Amici Curiae, *supra* note 2, at 5A.

158. E-mail from Charles Sevilla, California criminal defense lawyer, to Anne Shaver (Apr. 16, 2007, 3:17 WST) (on file with author).

encouraged to turn into work product discovery wars, and the overall quality of public defense is threatened.

VI. CONCLUSION

In conclusion, the United States Supreme Court should grant certiorari to review the decision in *Fort*, and should reverse. The Ninth Circuit opinion is not supported by the text of the Rules, by the legislative history, or by policy. Both *Fort* and its only companion, *U.S. v. Cherry*, rely on a single policy concern—law enforcement cooperation—to justify their holding. Not only does their position lack empirical merit, but it also overrides the policy decision of the legislature to enact a narrow work product rule in criminal discovery.

A reversal would protect the truth-seeking values of liberal discovery, respect the legislature's intentions, and preserve the efficacy of criminal discovery procedure.