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## Interlocutory Appeal of Preindictment Suppression Motions Under Rule 41 ( e )

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## Interlocutory Appeal of Preindictment Suppression Motions Under Rule 41(e)

Under rule 41(e) of the Federal Rules of Criminal Procedure,<sup>1</sup> a defendant may move to block the government's use of illegally seized evidence.<sup>2</sup> Rule 41(e) motions request both the return of the seized property and the prohibition of its use as evidence at trial.<sup>3</sup> While rule 41(e) grants the federal district courts the authority to hear these motions in the first instance,<sup>4</sup> whether a movant may immediately appeal these rulings is less clear.

One such area of uncertainty surrounds the immediate appealability of a ruling on a 41(e) motion in a case where seized evidence has been presented to a grand jury, but where no formal criminal proceeding is pending against the movant at the time the motion is denied.<sup>5</sup>

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1. Rule 41(e) reads, in pertinent part:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

FED. R. CRIM. P. 41(e).

2. The protection granted by rule 41(e) parallels, but does not expand upon, that guaranteed by the exclusionary rule. *See* *United States v. Calandra*, 414 U.S. 338, 348 n.6 (1974); *Alderman v. United States*, 394 U.S. 165, 173 n.6 (1969); *United States v. The Residence of Nicholas Furina*, 707 F.2d 82, 83 n.4 (3d Cir. 1983). *See also* notes 69-72 *infra* and accompanying text.

3. *See* note 1 *supra*; *see also In re Grand Jury Proceedings (Young)*, 716 F.2d 493, 495 (8th Cir. 1983); *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 158 (2d Cir.), *cert. denied*, 456 U.S. 927 (1982); *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 895 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980); *United States v. One Residence & Attached Garage*, 603 F.2d 1231, 1238-39 (7th Cir. 1979) (Wood, J., dissenting); *United States v. Merchant Diamond Group, Inc.*, 565 F.2d 252, 253 (2d Cir. 1977).

4. Such motions are cognizable even before a movant has been indicted. *See, e.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344, 355 (1931) (precedent supports district court jurisdiction of preindictment evidentiary motions); *Hunsucker v. Phinney*, 497 F.2d 29, 34 (5th Cir. 1974) (same), *cert. denied*, 420 U.S. 927 (1975); *Lord v. Kelley*, 223 F. Supp. 684, 687-88 (D. Mass. 1963) (same), *appeal dismissed*, 334 F.2d 742 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

One district court has recently denied that it has jurisdiction to hear preindictment motions under rule 41(e). *United States v. Mid-States Exchange*, 620 F. Supp. 358, 359 (D.S.D. 1985) (holding that the court "simply does not have the power to suppress or return evidence which is the subject of a current grand jury investigation"). Such a ruling, however, ignores the Supreme Court's language in *Go-Bart*, 282 U.S. at 355, which allows district courts to hear preindictment evidentiary motions while evidence is in the possession of a United States Commissioner. *Mid-States'* holding is also highly questionable in light of Eighth Circuit precedent. In *In re Grand Jury Proceedings (Young)*, 716 F.2d 493 (8th Cir. 1983), the court explicitly decided the issue of the appealability of preindictment 41(e) motions without even questioning the district court's jurisdiction to hear the original motion. *See also* notes 6-7 *infra* (cases from other circuits making the same implicit recognition).

5. This Note, therefore, does not address the appealability of 41(e) motions made prior to the empaneling of a grand jury.

Six federal courts of appeals refuse to hear such appeals, arguing that the force of precedent and policy precludes interlocutory review of preindictment orders concerning 41(e) motions.<sup>6</sup> On the other hand, four circuits allow immediate appeals in these cases.<sup>7</sup>

This Note argues that preindictment rulings denying<sup>8</sup> 41(e) motions are not immediately appealable. Part I discusses decisions that mandate dismissal of such appeals for want of jurisdiction. Part II examines the policy rationales behind these precedents. Finally, Part III argues that an adequate remedy exists outside of rule 41(e), rendering immediate appellate review of rulings on 41(e) motions unnecessary.

## I. IMMEDIATE APPEAL OF 41(E) MOTION RULINGS AND THE FINAL DECISION RULE

Compliance with the final decision rule<sup>9</sup> is a prerequisite to almost

6. *In re Grand Jury Proceedings (Berry)*, 730 F.2d 716 (11th Cir. 1984); *In re Grand Jury Proceedings (Uresti)*, 724 F.2d 1157 (5th Cir. 1984); *Standard Drywall, Inc. v. United States*, 668 F.2d 156 (2d Cir.), *cert. denied*, 456 U.S. 927 (1982); *Imperial Distrib., Inc. v. United States*, 617 F.2d 892 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 806 (3d Cir. 1979); *Church of Scientology v. United States*, 591 F.2d 533 (9th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

7. *In re Grand Jury Proceedings (Young)*, 716 F.2d 493 (8th Cir. 1983); *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *United States v. One Residence & Attached Garage*, 603 F.2d 1231 (7th Cir. 1979) (Wood, J., dissenting); *Gottone v. United States*, 345 F.2d 165 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965).

8. This Note concerns only appeals by movants whose 41(e) motions were denied. The federal statute that specifies when the government can appeal district court orders in criminal cases explicitly allows the government to appeal orders granting 41(e) motions. This provision provides:

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

18 U.S.C. § 3731 (1982).

It is not unfair for courts to allow immediate government appeals of 41(e) motions that are granted, while refusing to hear such appeals by unsuccessful movants. The reasons for permitting the government to appeal a 41(e) motion that is granted do not apply to the situation in which a 41(e) motion is denied. Specifically, the quoted section of § 3731 was designed to alleviate

the harmful effects on the practice and development of the law of suppression growing out of the absence of a Government appeal. These evils include inconsistent rulings at the trial level; the development of the law of suppression rulings, which Congress rightly viewed as a rapidly changing area, at the District Court level, without the benefit of appellate review; and the dilemma of the prosecutor in choosing whether to follow what he believes to be an unwise limitation on the prosecution or defying it in the hope of convincing a second judge that the first was in error.

*United States v. Greely*, 413 F.2d 1103, 1104 (D.C. Cir. 1969). Since a convicted criminal defendant is guaranteed the right to appeal a district court suppression decision, these policies favoring immediate appeals by the government are inapplicable.

9. This rule, codified at 28 U.S.C. § 1291 (1982), reads: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review

all federal appellate jurisdiction.<sup>10</sup> This rule requires that courts of appeals dismiss for want of jurisdiction any appeal of a district court ruling that is not a "final decision."<sup>11</sup> In the criminal context, sentenc-

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may be had in the Supreme Court." The final decision rule dates back to the Judiciary Act of 1789, 1 Stat. 73, 83-85, which essentially codified the common law. *DiBella v. United States*, 369 U.S. 121, 124 (1962). For a historical perspective on the final decision rule, see generally Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

Although the final decision rule applies in both civil and criminal contexts, it is more rigorously applied in criminal cases. See, e.g., *United States v. MacDonald*, 435 U.S. 850, 853-54 (1978); *DiBella*, 369 U.S. at 126; C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3918, at 630 (1976) [hereinafter cited as WRIGHT]. Strict adherence to the rule prevents delay in the criminal justice system. See note 59 *infra* and accompanying text.

10. The only general statutory exceptions to the final decision rule are those specified in 28 U.S.C. § 1292 (1982). These exceptions give the courts of appeals interlocutory jurisdiction over district court decisions in cases involving injunctions or orders appointing receivers, and in admiralty cases. The statutory exceptions do not apply to motions made under rule 41(e). See *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 894 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980); see also WRIGHT, *supra* note 9, § 3918, at 630 (these exceptions are generally not applicable in criminal cases).

There are also two judicially created exceptions to the final decision rule. The first concerns cases in which denial of immediate appeal causes irreparable harm to the movant. The Supreme Court has employed this exception only where the movant's rights would be completely lost if the Court did not permit immediate appeal. See *Abney v. United States*, 431 U.S. 651 (1977) (protection against double jeopardy would be lost if interlocutory review of district court's decision refusing to quash indictment were not allowed, since the defendant would otherwise have to stand trial for a second time on the same charge); *Stack v. Boyle*, 342 U.S. 1 (1951) (protection against excessive bail lost if immediate appeal of bail decision is not permitted). Since a defendant may renew her 41(e) motion at trial (see notes 65-67 *infra* and accompanying text), a preindictment ruling on a 41(e) motion is not a conclusive decision. No comparable irreparable harm results from the denial of interlocutory appeal of preindictment 41(e) motions. See notes 68-76 *infra* and accompanying text.

In addition to the irreparable harm exception, the Supreme Court recognizes an exception to the final decision rule for district court orders which settle issues completely collateral to the case's primary concern. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (exempting from the final decision rule orders which "fall into that small class which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated"). Courts have not enlarged this "small class." For example, a person cannot appeal an order denying a motion to quash a subpoena *duces tecum*. After all, it is argued, the person so ordered retains the option of refusing to produce the evidence and appealing the judge's contempt citation. Given the availability of this mechanism, the district court's decision cannot be considered to determine conclusively the matter. *Cobbledick v. United States*, 309 U.S. 323, 327 (1940). Thus, the collateral order exception remains quite limited in scope.

The 41(e) motion does not fit into this limited category of cases. This motion relates directly to the guilt or innocence of the movant since it contests the admissibility of the proof that the government will use in its attempt to get a conviction. The Supreme Court, citing *DiBella*, explicitly exempted rulings which would lead to the suppression of evidence from the collateral order exception. *Abney*, 431 U.S. at 659; *accord* *Simons v. United States*, 592 F.2d 251, 252 (5th Cir.) (retrieval feature of 41(e) motions is collateral to the case, but suppression aspect is not), *cert. denied*, 444 U.S. 835 (1979); *United States v. Glassman*, 533 F.2d 262, 263 (5th Cir. 1976) (anything more than a motion asking solely for return of evidence is unappealable).

11. Indeed, the appellate court is required to raise this issue *sua sponte* if it is not brought up by any of the parties. See, e.g., *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 543 (1963); *Collins v. Miller*, 252 U.S. 364, 365-66 (1920); *In re Bassak*, 705 F.2d 234, 236 (7th Cir. 1983); *Pettinelli v. Danzig*, 644 F.2d 1160, 1161-62 (5th Cir. 1981). An appeal of a nonfinal decision must be dismissed even if both parties consent to appellate jurisdiction. See, e.g., *Brown Shoe Co. v. United States*, 370

ing represents the clearest illustration of a final decision.<sup>12</sup> However, where an appellant contests a presentence decision, such as a ruling on a preindictment 41(e) motion, courts have struggled to determine the precise boundaries of the final decision rule.

In *DiBella v. United States*,<sup>13</sup> a case involving a 41(e) motion, the Supreme Court directly addressed the question of whether a district court's ruling on a preindictment evidentiary motion was a final decision.<sup>14</sup> In that case, although the movant had filed a 41(e) motion during the grand jury proceedings, he had been indicted by the time the district court denied the motion.<sup>15</sup> The Court held that, under the final decision rule, the court of appeals could not hear the defendant's appeal.<sup>16</sup> Thus, *DiBella* requires a defendant to wait until after trial to appeal a postindictment denial of her preindictment 41(e) motion.<sup>17</sup>

*DiBella* set up a two-part test for the appealability of rulings on preindictment evidentiary motions, including motions made pursuant to rule 41(e). The Court held that these rulings are "final" within the meaning of the final decision rule only if: (1) the motion is made solely for the return of the property seized and (2) the motion is not tied to a criminal prosecution "*in esse*."<sup>18</sup> The Court found that the district court's ruling in *DiBella*, issued after the grand jury had indicted the movant, satisfied neither of these elements.<sup>19</sup> The following sections analyze both elements of the *DiBella* test and conclude that

U.S. 294, 305 (1962); *Lowry & Co. v. S.S. Le Moyne D'Iberville*, 372 F.2d 123, 123 (2d Cir. 1967).

12. See *Corey v. United States*, 375 U.S. 169, 174 (1963); *Berman v. United States*, 302 U.S. 211, 212 (1937).

13. 369 U.S. 121 (1962).

14. *DiBella* settled a conflict between the circuits on this issue. Compare *United States v. Koenig*, 290 F.2d 166 (5th Cir. 1961) (refusing to hold that a 41(e) motion brought before indictment, but decided after indictment, was a final decision), *affd. sub nom. DiBella v. United States*, 369 U.S. 121 (1962), with *Di Bella v. United States*, 284 F.2d 897 (2d Cir. 1960) (holding a similar 41(e) motion immediately appealable), *vacated*, 369 U.S. 121 (1962).

15. *DiBella*, 369 U.S. at 121-23. The order of these events is quite important. While *DiBella* resolved the cases with this sequence of events, this Note addresses the situation where not only the arguments on the motion, but also the court's decision on the motion and the appeal of that decision, occur before the grand jury indictment.

16. In *DiBella*, the Court decided not only the case at hand, but also stated more broadly when appeals would lie from district court rulings on preindictment evidentiary motions:

When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment — in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." . . . Only if the motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.

369 U.S. at 131-32.

17. The same conclusion has been reached where the indictment followed the district court order, but preceded the filing of briefs with the court of appeals. See *In re Search Warrants (Trupiano)*, 750 F.2d 664, 668 (8th Cir. 1984).

18. See note 17 *supra*.

19. 369 U.S. at 132.

the absence of an indictment against the movant should not change the outcome of either element.

### A. *Motions Solely for the Return of Property*

A movant under rule 41(e) must request both suppression and return of seized evidence.<sup>20</sup> It is not possible to move “solely” to retrieve property under 41(e).<sup>21</sup> Thus, the “solely for the return of property” test<sup>22</sup> should always preclude interlocutory appeal of any 41(e) motion.<sup>23</sup>

In order to avoid this automatic bar against interlocutory appeal of 41(e) rulings, some courts find that the “solely for the return of property” test is met if the “primary purpose” of the motion is to regain the seized property.<sup>24</sup> However, to read a primary purpose test into *DiBella* distorts the plain language of the opinion. Even if one strains to interpret the *DiBella* test this way, a primary purpose test should not allow interlocutory appeal of preindictment 41(e) rulings. A movant’s claim that the primary purpose of her 41(e) motion is retrieval is, at the least, suspect.<sup>25</sup> Equitable motions exist that seek only the return of evidence and not its suppression.<sup>26</sup> Any movant whose true

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20. See note 3 *supra* and accompanying text.

21. See, e.g., *In re Search Warrants* (Trupiano), 750 F.2d 664, 667 (8th Cir. 1984); *In re Grand Jury Proceedings* (Young), 716 F.2d 493, 495 (8th Cir. 1983). The only exception is where a grand jury has not been empaneled at the time of the appeal, or a previously existing grand jury has adjourned. See *Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983) (the empaneling of a grand jury makes the criminal proceeding accusatory and not simply investigatory, making interlocutory appeal presumptively unavailable); *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 158 (2d Cir.) (the possibility of adjournment of the grand jury without the issuance of an indictment, which would make a motion for return of seized goods available, also makes immediate appeal impossible), *cert. denied*, 456 U.S. 927 (1982). For further discussion on the impact of the empaneling of a grand jury on the appealability of 41(e) motions, see note 76 *infra*.

22. *DiBella v. United States*, 369 U.S. 121, 131-32 (1962).

23. That the drafters of rule 41(e) desired such a result can be inferred from their decision, in altering the rule in 1972 (after the *DiBella* decision), to continue its automatic suppression feature. The drafters were certainly aware of the “solely for the return of property” language in *DiBella*, yet they chose not to allow 41(e) motions to be made simply for the retrieval of property. One can infer that by doing so they intended that no 41(e) motion be the subject of interlocutory appeal.

24. See, e.g., *In re Grand Jury Proceedings* (Young), 716 F.2d 493, 495 (8th Cir. 1983); *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 895 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980); *Shea v. Gabriel*, 520 F.2d 879, 881 (1st Cir. 1975).

25. See *United States v. The Residence of Nicholas Furnia*, 707 F.2d 82, 84 (3d Cir. 1983) (suggesting that motions under rule 41(e) cannot be considered solely for the return of evidence since they automatically suppress); *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 158 (2d Cir.) (omitting references to suppression in court papers does not eliminate this aspect of the motion; interlocutory review still unavailable), *cert. denied*, 456 U.S. 927 (1982); *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 895 (1st Cir.) (despite caption suggesting only return was being requested, the motion was one under rule 41(e) and was hence not solely for the return of property), *cert. denied*, 449 U.S. 891 (1980).

26. See notes 81-90 *infra* and accompanying text.

primary purpose is return of the evidence, rather than suppression<sup>27</sup> or delay,<sup>28</sup> could utilize such alternative procedures.<sup>29</sup> Thus, no matter how a movant characterizes her reasons for bringing a 41(e) motion, suppression is certainly a strong motivation.<sup>30</sup> *DiBella's* first test, then, does not allow immediate appeal of preindictment rulings on 41(e) motions.<sup>31</sup>

### B. Motions Not Tied to an Ongoing Criminal Prosecution

Other circuits, intent on claiming jurisdiction over pretrial appeals of 41(e) rulings, choose to ignore<sup>32</sup> or reject<sup>33</sup> the first element of the

27. See *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 895 (1st Cir.), cert. denied, 449 U.S. 891 (1980).

28. There is a legitimate fear that defendants will make 41(e) motions only to slow the grand jury's investigation. See *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 896 (1st Cir.), cert. denied, 449 U.S. 891 (1980). Since speed is critical to the criminal justice system, the Supreme Court emphasizes that such delay must be avoided. *DiBella*, 369 U.S. at 126; see notes 47-57 *infra* and accompanying text.

29. The resolution of these equitable motions involves weighing the government's and the movant's needs for the evidence. If the movant's need for the evidence is truly great, it will most likely outweigh the government's for holding the materials. In such cases, a court will return the evidence. See note 85 *infra*.

30. See *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 895 (1st Cir.) (despite motion's failure to mention suppression, court concludes that it is primarily directed at suppression, not return of the evidence), cert. denied, 449 U.S. 891 (1980); *United States v. One Residence & Attached Garage*, 603 F.2d 1231, 1238 (7th Cir. 1979) (Wood, J., dissenting) (Unlike equitable return actions seeking only the return of evidence, 41(e) motions automatically suppress evidence and thus are unappealable even where the motion does not specifically mention suppression.); *Parrish v. United States*, 376 F.2d 601, 603 (4th Cir. 1967) (Boreman, J., concurring) (arguing that a 41(e) motion was not made solely for the return of property and that an independent action that asked simply for return would be needed to allow immediate appeal).

31. This assumes that an active grand jury exists. Where no grand jury has been empaneled or where an existing one has adjourned, interlocutory appeal is available. See *Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983). For further examination of the impact of an active grand jury on a 41(e) motion's appealability, see note 76 *infra*.

32. See, e.g., *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States v. One Residence & Attached Garage*, 603 F.2d 1231 (7th Cir. 1979); *Coury v. United States*, 426 F.2d 1354 (6th Cir. 1970).

33. See, e.g., *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1970). The Eighth Circuit pointed out that in an earlier Supreme Court case, *Carroll v. United States*, 354 U.S. 394 (1957), the Court had, in a footnote, stated that "[w]e do not suggest that a motion under Rule 41(e) gains or loses appealability simply upon whether it asks for return or suppression or both." 354 U.S. at 404 n.17. *DiBella* cited the *Carroll* footnote with approval. *DiBella*, 369 U.S. at 132. The Eighth Circuit asserted that

[a] literal reading of the *DiBella* decision indicates that the proceeding be solely for the return of the property, as well as being independent of a criminal prosecution. However, such a reading of *DiBella* seems inconsistent with footnote 17 of the *Carroll* opinion . . . . We adhere to the principles enunciated in that note in interpreting the *DiBella* decision. *Alexander*, 428 F.2d at 1171 n.3.

The Eighth Circuit's argument, however, is unconvincing. The *Carroll* footnote does not consider all of the factors that the Court deemed important in *DiBella*, which was decided five years after *Carroll*. Indeed, the Court's discussion in *Carroll* did not relate to *DiBella's* first test at all, as seen in its suggestion in the same footnote that a court should consider "the 'essential character and the circumstances under which it is made' [in order to] determine whether a motion is an independent proceeding or merely a step in the criminal case." *Carroll*, 354 U.S. at 404 n.17 (quoting *Cogen v. United States*, 278 U.S. 221, 225 (1929)). It is this sentiment which *DiBella*

*DiBella* test. Yet *DiBella*'s second element, which allows immediate appeal only if the motion is "in no way tied to a criminal prosecution *in esse* against the movant,"<sup>34</sup> is also a formidable obstacle to appeal. *DiBella* states unambiguously that 41(e) motions that are made, denied, and appealed before indictment do not meet the second prong of the test. In dicta, the Court stated that "[p]resentations . . . before a grand jury . . . are [part] of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train."<sup>35</sup>

*DiBella*'s narrowly phrased holding, however, did not reflect the Court's resolve on this issue. The Court explicitly denied interlocutory review of rulings on 41(e) motions only where "there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment."<sup>36</sup> The courts of appeals have clashed over whether the Court's dicta suggests that *DiBella*'s holding would prevent appeal of preindictment 41(e) rulings.<sup>37</sup>

Prior Supreme Court decisions contain guidance for resolving this dispute. These cases make clear that a criminal prosecution does indeed begin prior to indictment. In *Cobbledick v. United States*,<sup>38</sup> Justice Frankfurter concluded that grand jury hearings constitute judicial inquiries.<sup>39</sup> Much earlier, in *Cogen v. United States*,<sup>40</sup> the Court established a test to determine if pretrial evidentiary motions are indeed independent proceedings. This test looks to the "essential character and the circumstances under which [the motion] is made [to] determine whether it is an independent proceeding or merely a step in the trial of the criminal case."<sup>41</sup> Part of the "essential character" of a 41(e) motion is to suppress evidence that could be used against the movant in a criminal trial.<sup>42</sup> Since the Court has ruled that suppres-

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cites with approval in enunciating its *second* test. *DiBella* explicitly bases the appealability of a preindictment 41(e) motion on whether it requests return or suppression or both. Thus, the Eighth Circuit's language in *Alexander* is highly suspect.

34. *DiBella*, 369 U.S. at 132. "*In esse*" is defined to mean "[a]live; living; in being." BAL-LENTINE'S LAW DICTIONARY 617 (3d ed. 1969).

35. 369 U.S. at 131.

36. 369 U.S. at 131.

37. Compare *In re Grand Jury Proceedings (Young)*, 716 F.2d 493, 496 (8th Cir. 1983) (a criminal proceeding *in esse* begins at the time of arrest or arraignment), with *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 894-96 (1st Cir.) (concluding that *DiBella* denies appellate jurisdiction before indictment assuming the primary purpose of the 41(e) motion is to suppress), *cert. denied*, 449 U.S. 891 (1980).

38. 309 U.S. 323 (1940).

39. 309 U.S. at 327.

40. 278 U.S. 221 (1929).

41. 278 U.S. at 225. The Court also used this test in *Carroll v. United States*, 354 U.S. 394, 404 n.17 (1957), decided only five years before *DiBella*.

42. See *United States v. The Residence of Nicholas Furina*, 707 F.2d 82, 84 (3d Cir. 1983); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 806, 807 (3d Cir. 1979).

sion motions can "vitaly affect" the outcome of a criminal case,<sup>43</sup> a 41(e) motion is not fully independent of the criminal prosecution.<sup>44</sup> Thus, a broad reading of *DiBella*, consistent with its dicta, properly prohibits interlocutory appeals of preindictment 41(e) motions.<sup>45</sup>

## II. POLICY IMPLICATIONS

Refusing to allow interlocutory appeals of 41(e) rulings best serves the policy objectives underlying the grand jury system, the final decision rule, and rule 41(e). Allowing such appeals, on the other hand, would impose burdensome and unnecessary costs on the criminal justice system.

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43. *Cogen v. United States*, 278 U.S. 221, 223 (1929).

44. *See Smith v. United States*, 377 F.2d 739, 742 (3d Cir. 1967) (holding that *DiBella* settles all cases involving preindictment 41(e) motions and refutes any suggestion that interlocutory appeal is allowed if no indictment has been returned); *see also United States v. The Residence of Nicholas Furina*, 707 F.2d 82, 84 (3d Cir. 1983) (the Third Circuit has always taken a broad view of what constitutes a criminal prosecution *in esse*); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 806, 807 (3d Cir. 1979) (the possibility of a criminal prosecution is enough to make interlocutory appeal unavailable).

45. Certain courts, choosing not to rely exclusively on *DiBella's* dicta, have instead characterized *DiBella's* second test as one which asks whether the criminal process had shifted at the time of the making of the motion from the investigatory to the accusatory stage. *See, e.g., Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983); *Sovereign News Co. v. United States*, 690 F.2d 569, 571 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *United States v. One Residence & Attached Garage*, 603 F.2d 1231, 1235 (7th Cir. 1979) (Swygert, J., concurring); *Shea v. Gabriel*, 520 F.2d 879, 882 (1st Cir. 1975).

This shift has been used in recent cases to mark the time at which a defendant's sixth amendment right to counsel begins. *See, e.g., Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (plurality opinion of four justices with one additional justice concurring in the result) ("The initiation of judicial criminal proceedings is . . . the starting point of our whole system of adversary criminal justice. . . . It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.") (footnote omitted). It is clear that the right to counsel begins when a "critical step" (including arraignment or indictment) in the criminal justice process has occurred. *E.g., United States v. Wade*, 388 U.S. 218, 224-25 (1967); *Stovall v. Denno*, 388 U.S. 293, 298-99 (1967). Since this Note applies only to cases in which there has been no arrest, arraignment, or indictment, it is clear that, in many cases within its scope, the right to counsel had not yet attached. Thus, if the sixth amendment test is used, an independent criminal proceeding exists at this time and interlocutory appeal may prove available.

*DiBella*, however, makes clear that, for the purposes of determining the availability of interlocutory appeal, the independence of a hearing from a "criminal prosecution *in esse*" does not depend on the attachment of the right to counsel. The Court specifically stated that "the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability." *DiBella*, 369 U.S. at 131. Thus, the "mere circumstance" of the failure of the defendant's sixth amendment right to attach cannot be enough to make the ruling independent for the purposes of interlocutory appeal, and the sixth amendment test cannot be the one the court intended to be used. Indeed, *DiBella* makes clear that even if there is only a possibility that the movant may be brought to trial, courts should view 41(e) motions as being tied to an active criminal prosecution. *See In re Grand Jury Proceedings (Berry)*, 730 F.2d 716, 718 (11th Cir. 1984); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 806, 807 (3d Cir. 1979). Thus, the accusatory stage of the prosecution begins as soon as evidence is presented to an empaneled grand jury. *See Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983).

### A. Impact of Interlocutory Appeal of 41(e) Motions on the Grand Jury Process

Allowing a movant to appeal a 41(e) ruling in the midst of a grand jury investigation would adversely affect the grand jury process as a whole. While rule 41(e) allows some delay by requiring a court to hold an initial hearing on the motion, permitting an immediate and lengthy appeal of the court's ruling would interfere with the grand jury system to an unwarranted degree.<sup>46</sup> Allowing interlocutory appeal gives defense attorneys too much opportunity to stall criminal proceedings.<sup>47</sup> The Supreme Court has noted several reasons why courts must scrupulously avoid delay of grand jury proceedings.<sup>48</sup> First, delay hampers a grand jury's ability to fulfill its goal of fully investigating those people it suspects of criminal activity.<sup>49</sup> Second, because the grand jury plays such a critical role in the criminal justice system, the Court has noted that safeguarding a grand jury's investigation against delay is just as important as protecting the progress of a trial from undue interruption.<sup>50</sup> Indeed, the Court has linked freedom from delay at the grand jury stage of a criminal prosecution with the constitutional right to a speedy trial.<sup>51</sup> Finally, delay decreases the government's ability to gain an indictment and conviction, because it jeopardizes the availability of necessary evidence.<sup>52</sup>

Furthermore, the benefits of allowing immediate appeal of 41(e) motions do not outweigh these high costs. Of course, the right to appeal denials of 41(e) motions could protect some defendants against the burden of standing trial, since suppression could lead to dismissal by the court or a prosecution decision not to proceed with the case.<sup>53</sup> However, the Supreme Court, in *United States v. Calandra*,<sup>54</sup> explicitly held that this harm does not outweigh the danger that delay

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46. See *In re Grand Jury Proceedings (Berry)*, 730 F.2d 716, 718 (11th Cir. 1984); *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 158 (2d Cir.), *cert. denied*, 456 U.S. 927 (1982); see also *United States v. Calandra*, 414 U.S. 338, 349-50 (1974) (interrupting grand jury proceedings for evidentiary rulings would damage the criminal justice system); *Gelbard v. United States*, 408 U.S. 41, 70 (1972) (White, J., concurring) ("protracted interruptions of grand jury proceedings" are to be avoided); *DiBella v. United States*, 369 U.S. 121, 129 (1962) (allowing appeals of pre-indictment evidentiary motions, with their attendant stays, disrupts the criminal justice system).

47. *DiBella v. United States*, 369 U.S. 121, 129 (1962).

48. See, e.g., *United States v. Calandra*, 414 U.S. 338, 349-52 (1974).

49. *United States v. Calandra*, 414 U.S. 338, 349-50 (1974); see *Cobbledick v. United States*, 309 U.S. 323, 327 (1940). Such delay also has detrimental effects on any subsequent trial. See *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1301 (3d Cir. 1978).

50. *Cobbledick v. United States*, 309 U.S. 323, 327 (1940). Indeed, the grand jury is allowed to operate unfettered by the technical rules of criminal procedure. See note 56 *infra* and accompanying text.

51. See *Cobbledick v. United States*, 309 U.S. at 327. *DiBella v. United States* also mentions this constitutional safeguard. 369 U.S. 121, 126 (1962).

52. *DiBella v. United States*, 369 U.S. 121, 129 (1962).

53. See *United States v. Calandra*, 414 U.S. 338, 351 (1974).

54. 414 U.S. 338 (1974).

presents to the grand jury system.<sup>55</sup> The Court indicated that facilitating speedy grand jury proceedings was important enough to allow grand juries to issue indictments on the basis of illegally seized evidence.<sup>56</sup> The Court decided that a criminal defendant's opportunity to object to the admission of illegally seized evidence at trial is sufficient to vindicate the defendant's fourth amendment rights.<sup>57</sup> Thus, because a 41(e) movant has a right to raise the suppression issue again at trial, there is no need to allow interlocutory appeal of a preindictment 41(e) ruling.

### B. *Impact of Interlocutory Appeal of 41(e) Motions on the Policies Underlying the Final Decision Rule*

According to the Supreme Court, Congress enacted the final decision rule to promote and maintain a speedy and efficient judicial system.<sup>58</sup> The guarantees of the Constitution and the Federal Rules of Criminal Procedure give special importance to these policies in criminal cases.<sup>59</sup> In *DiBella*, the Court held that allowing interlocutory appeal of a postindictment ruling on a 41(e) motion would interfere with the smooth and efficient running of the criminal justice system.<sup>60</sup> The same reasoning applies when a motion is denied before a grand jury returns an indictment against the movant.

55. 414 U.S. at 349-52. For a further discussion of the Court's refusal to remedy such "unjustified" trials, see note 66 *infra*.

56. 414 U.S. at 345 ("[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . . or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination . . .").

57. See 414 U.S. at 351 (the exclusionary rule's deterrent effect is based on the inadmissibility of evidence at trial).

58. See *DiBella v. United States*, 369 U.S. 121, 124 (1962) (The final decision rule avoids "undue litigiousness and leaden-footed administration of justice.").

59. See, e.g., *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982); *United States v. MacDonald*, 435 U.S. 850, 853-54 (1978); *DiBella v. United States*, 369 U.S. 121, 124 (1962); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

Historically, appeals in criminal cases, even of truly final decisions, have been discouraged. Indeed, until 1889, an appeal as of right was not recognized in criminal cases. Even when the first statute was passed allowing appellate review of criminal convictions, it dealt only with those defendants convicted of capital offenses; a general right to appeal did not exist until 1911. See *Abney v. United States*, 431 U.S. 651, 656 & n.3. Certainly this history has had the effect of chilling interlocutory appeal in this area, as courts attempt to avoid "the delays and disruptions attendant upon immediate appeal [which] are especially inimical to the effective and fair administration of the criminal law." *DiBella*, 369 U.S. at 126.

The policy is also reflected in rule 2 of the Federal Rules of Criminal Procedure, which states that the rules are to "be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." FED. R. CRIM. P. 2 (emphasis added); see also FED. R. CRIM. P. 50(a) (preference to criminal cases on district court dockets); FED. R. APP. P. 45(b) (preference to criminal cases on court of appeals dockets). In fact, efficiency is such an important goal in criminal justice that district court orders denying motions to dismiss on the basis of breach of the defendant's right to a speedy trial cannot be reviewed until after conviction. See *MacDonald*, 435 U.S. at 857 (such an order "obviously is not final").

60. *DiBella*, 369 U.S. at 129.

Interlocutory appeal fosters inefficiency in three ways. First, as noted above, it causes unnecessary delay.<sup>61</sup> Second, whether a court denies the 41(e) motion before or after indictment, allowing immediate appeal encourages piecemeal review.<sup>62</sup> An appellate court is more likely to issue an incorrect decision on an interlocutory appeal, since the abbreviated record will not yet contain all the facts of the case.<sup>63</sup> Allowing appeal only after trial avoids this problem, thereby fostering efficiency.<sup>64</sup>

Finally, the authority of the district court to reconsider the suppression issue at trial exacerbates the inefficiency of allowing interlocutory appeal. All movants whose pretrial 41(e) motions fail have the right to raise the suppression issue again at trial.<sup>65</sup> Thus, the judge closest to the case gets another chance to examine the legality of the seizure of the challenged evidence. With more facts available, the judge could change her earlier decision and agree to suppress the evidence.<sup>66</sup> This "second chance" removes the required finality from the district court's first decision, making interlocutory appeal impermissible.<sup>67</sup>

### C. Impact of Interlocutory Appeal of 41(e) Motions upon the Policies Underlying Rule 41(e)

Because rule 41(e) codifies the protections of the exclusionary rule,<sup>68</sup> the same policy goals motivate both rules.<sup>69</sup> The Supreme

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61. See notes 46-52 *supra* and accompanying text.

62. See *Standard Drywall, Inc. v. United States*, 668 F.2d 156, 158 (2d Cir.), *cert. denied*, 456 U.S. 927 (1982); *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 894 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980).

63. The same pitfalls that endanger the trial court's decision at this stage affect the court of appeals. For a consideration of these disadvantages, see note 66 *infra*.

64. See *In re Milburne*, 77 F.2d 310, 311 (2d Cir. 1935) (noting that trials bring more facts to light, allowing for better decisions on evidentiary motions).

65. See, e.g., *DiBella v. United States*, 369 U.S. 121, 130 n.9 (1962) ("[T]he District Courts will wish to reserve final ruling until the criminal trial."); *United States v. Woodson*, 490 F.2d 1282, 1283 (9th Cir. 1973).

66. See, e.g., *DiBella v. United States*, 369 U.S. 121, 129 & n.9 (1962) ("[A]ppellate intervention makes for [a] truncated presentation . . . because the legality of the search too often cannot truly be determined until the evidence at trial has brought all circumstances to light." The Court noted that "the usual procedure followed at [the preindictment] stage is to decide the question on affidavits alone."); *McRae v. United States*, 420 F.2d 1283, 1287 (D.C. Cir. 1969) (new facts developed at trial may cast doubt on pretrial suppression orders); *Rouse v. United States*, 359 F.2d 1014, 1015-16 (D.C. Cir. 1966) (same); *Grant v. United States*, 291 F.2d 227, 229 (2d Cir. 1961) (same); *In re Milburne*, 77 F.2d 310, 311 (2d Cir. 1935) ("[I]t is impossible to make an intelligent disposition of [an evidentiary] motion until the trial, when all the facts and circumstances can be brought to light.>").

67. See *Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 70 (2d Cir. 1973) (the final decision rule prevents interlocutory appeal of decision that the trial court could itself change).

68. See note 2 *supra*.

69. Rule 41(e) was designed to codify the holdings of earlier cases such as *Gouled v. United States*, 255 U.S. 298 (1921), and *Weeks v. United States*, 232 U.S. 383 (1914), which relied on the

Court intended the exclusionary rule to effectuate the protections of the fourth amendment.<sup>70</sup> Neither the exclusionary rule nor rule 41(e) was intended to compensate a victim of an illegal search or seizure for any injury she sustained.<sup>71</sup> Instead, the goal of the exclusionary rule is to deter unlawful police conduct.<sup>72</sup>

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fourth amendment. FED. R. CRIM. P. 41 advisory committee note. It is unclear, however, whether the exclusionary rule is required by the fourth amendment. See note 70 *infra*.

70. See *United States v. Calandra*, 414 U.S. 338, 347 (1974). The Supreme Court relied on the fourth amendment in adopting the exclusionary rule for federal criminal cases in *Weeks v. United States*, 232 U.S. 383 (1914). State courts have also been required to follow the exclusionary rule since the Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). At that time, it seemed clear that the exclusionary rule was required by the Constitution. See *Mapp*, 367 U.S. at 655 (Justice Clark, in an opinion joined by four other justices, stated: "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.") (emphasis added). But see *Stone v. Powell*, 428 U.S. 465, 484 n.21 (1976) (claiming that only four justices adopted this view in *Mapp*).

Since *Mapp*, however, the opinion of the Court appears to have shifted. A majority agreed in *Calandra*, 414 U.S. at 348, that the exclusionary rule was merely a "judicially created remedy." See also *Stone*, 428 U.S. at 495 n.37 (reaffirming that the exclusionary rule is a "judicially created remedy rather than a personal constitutional right"). The Court reiterated this view recently in *United States v. Leon*, 468 U.S. 897 (1984), where Justice White's majority opinion states that "the Fourth Amendment 'has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.'" 468 U.S. at 906 (quoting *Stone*, 428 U.S. at 486). This position has been attacked by commentators who stress that the origins of the exclusionary rule are constitutional. See, e.g., Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 598-600 (1983).

71. *United States v. Calandra*, 414 U.S. 338, 347 (1974).

72. A majority of justices on the Court has not always agreed that such deterrence is the primary objective of the exclusionary rule. In *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961), and *Elkins v. United States*, 364 U.S. 206, 222-23 (1960), the Court, after discussing deterrence, also mentioned that if judicial integrity were to be maintained, convictions could not be obtained using the fruits of unconstitutional searches and seizures. In *Mapp*, the Court concluded that the exclusionary rule guarantees the "judicial integrity so necessary in the true administration of justice." 367 U.S. at 660.

The shift in focus away from judicial integrity began in *United States v. Calandra*, 414 U.S. 338 (1974) (relying solely on the deterrence rationale in holding the exclusionary rule inapplicable at grand jury hearings), and continued in *Stone v. Powell*, 428 U.S. 465, 485 (1976), where the Court stated that the judicial integrity justification for the exclusionary rule had only a "limited role" to play. Thus, the Court concluded, "[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." 428 U.S. at 486. This is now the view of a majority of the Court. See *United States v. Leon*, 468 U.S. 897 (1984) (mentioning only deterrence as a basis for the rule and failing to discuss the impact of the newly created "reasonable mistake" exception on judicial integrity).

In his dissents to both *Calandra* and *Leon*, Justice Brennan, joined by Justice Marshall, has sharply objected to the majority's conclusion regarding the purposes of the exclusionary rule. See *Calandra*, 414 U.S. at 356 (Brennan, J., dissenting) (the majority's position represents a "startling misconception" of the purposes of the exclusionary rule); *Leon*, 468 U.S. at 932 (Brennan, J., dissenting) ("The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected."). Commentators have also disagreed with the majority's position. See, e.g., Kamisar, *supra* note 70, at 597-606 (arguing that the Court is incorrectly ignoring judicial integrity); Mertens & Wasserstrom, *Eleventh Annual Review of Criminal Procedure — Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 385 (1981) (calling *Calandra's* reasoning "questionable"); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 308 (1974) (arguing that while neither view is precisely correct, "Brennan at least points in the direction of a coherent position").

Given this objective, the Court has held that the exclusionary rule does not apply at the grand jury stage of criminal proceedings.<sup>73</sup> The Court rejected the claim that suppression at the pretrial phase of a case is an effective deterrent to police misconduct.<sup>74</sup> Like the Court's refusal to suppress illegally obtained evidence under the exclusionary rule prior to indictment,<sup>75</sup> denying immediate review of preindictment rulings on 41(e) motions is consistent with the deterrence policy underlying both suppression mechanisms. The protection afforded a criminal defendant by allowing her to raise the suppression issue again at trial sufficiently safeguards her constitutional rights.<sup>76</sup> Furthermore, if a movant is subsequently convicted, she has the right to appeal the trial court's decision to admit challenged evidence.<sup>77</sup> Thus, allowing immediate appeal of 41(e) motions does not serve one of the primary policy goals of rule 41(e).

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73. *United States v. Calandra*, 414 U.S. 338, 349-50 (1974).

74. *See United States v. Calandra*, 414 U.S. 338, 351 (1974) (It is "unrealistic" to expect an increase in deterrence if the exclusionary rule applies at this stage.); *see also Terry v. Ohio*, 392 U.S. 1, 13-14 (1968) (the rule cannot deter police conduct where conviction is not at stake).

75. *See, e.g., United States v. Calandra*, 414 U.S. 338 (1974) (allowing the grand jury to use illegally seized evidence as the basis of a criminal indictment).

76. As noted above, denying immediate appellate review of 41(e) motions will force some defendants to stand trial on charges based on illegally seized evidence. This problem is not solved if the district court reverses its earlier evidentiary ruling at trial. In *Calandra*, the Supreme Court held that the danger of delay to the grand jury system outweighs any harm caused by forcing these defendants to stand trial. *See notes 54-57 supra* and accompanying text.

Of course, even if they are eventually acquitted, some defendants may claim they were hurt by the grand jury's mere holding of the evidence. For example, the evidence could be required for business purposes. However, it is possible for this class of movant to make a separate motion that simply asks for return of the evidence, not its suppression. Therefore, any harm caused by the mere holding of the evidence can be attributed to the defendant's own failure to make the correct motion. *See Parrish v. United States*, 376 F.2d 601, 603 (4th Cir. 1967) (Boreman, J., concurring) (*DiBella* suggests to movants that they use these equitable motions). For further discussion on these equitable return motions, *see notes 78-90 infra* and accompanying text.

The argument of these movants, however, is quite compelling in cases where the delay in the return of evidence caused by the 41(e) motion's denial seems indefinite. *See United States v. Ryan*, 402 U.S. 530, 533 (1971); *Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983). Indeed, where no grand jury has been empaneled, immediate appeal is available, since there is no longer anything from which to suppress the evidence. In addition, since there is no grand jury, no criminal investigation has begun, and hence the 41(e) motion is a wholly independent proceeding. *See Angel-Torres*, 712 F.2d at 719; *see also Standard Drywall, Inc. v. United States*, 668 F.2d 156, 158-59 (2d Cir.), *cert. denied*, 456 U.S. 927 (1982) (an actual or potential criminal case against the movant is all that is needed to deny interlocutory appeal). *Standard Drywall* also points out that if a grand jury adjourns without returning an indictment, a 41(e) motion by the defendant would be an independent proceeding. 668 F.2d at 158.

Where a grand jury is currently sitting, delay is less of a concern, since it is limited, at most, to the length of the grand jury's term. *See Angel-Torres*, 712 F.2d at 720; *Imperial Distribs., Inc. v. United States*, 617 F.2d 892, 896 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980). The equitable motions mentioned above provide relief if even this period of delay would cause extreme harm to the movant.

77. Sentencing is clearly a final decision. *See note 12 supra* and accompanying text. If any error is alleged which makes the conviction or sentence improper, appeal will lie under the final decision rule, 28 U.S.C. § 1291 (1982). *See, e.g., Shea v. Gabriel*, 520 F.2d 879, 881 (1st Cir. 1975) (adequate chance for appellate review exists if the movant is later indicted and convicted).

### III. EQUITABLE RETURN MOTIONS AS ALTERNATIVES TO 41(E) MOTIONS

When the Supreme Court decided *DiBella*, it stated that appeals of preindictment evidentiary rulings should never be allowed where the motion was not made solely for the return of the property seized.<sup>78</sup> As Part I of this Note demonstrates, this sole-motive test may be impossible to meet in the context of 41(e) motions, because 41(e) motions necessarily request both suppression and return of the seized evidence.<sup>79</sup> However, a defendant may make a different motion, similar to that authorized by rule 41(e), that does satisfy the first part of *DiBella*'s test.<sup>80</sup> These alternative equitable motions request only the return,<sup>81</sup> not the suppression,<sup>82</sup> of evidence. Under such a motion, a court may order the government to return evidence to the movant, and still allow the grand jury to keep copies of the evidence or to reexamine the original evidence at a later time.<sup>83</sup>

Because these equitable return motions seek only to retrieve evidence, not to determine its admissibility at trial, the legality of the seizure in question is not at issue in these proceedings.<sup>84</sup> Instead, a court will deny an equitable return motion and permit the grand jury to hold the evidence only if the government's need to hold the evidence outweighs the movant's interest in retrieving it.<sup>85</sup> In this way,

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78. This is the first part of *DiBella*'s two-part test. See notes 18-31 *supra* and accompanying text.

79. See notes 24-31 *supra* and accompanying text.

80. These motions, however, are not made under rule 41(e), but are instead directed to the district court's broad equitable powers. See, e.g., *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-55 (1931) (district court has jurisdiction to hear equitable claim for return of evidence); *Hunsucker v. Phinney*, 497 F.2d 29, 32 (5th Cir. 1974) (same), *cert. denied*, 420 U.S. 927 (1975).

81. See *Imperial Distrib., Inc. v. United States*, 617 F.2d 892, 896 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980).

82. See *United States v. The Residence of Nicholas Furina*, 707 F.2d 82, 84 (3d Cir. 1983); *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1300 (3d Cir. 1978); see also *Mr. Lucky Messenger Serv. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978).

83. See *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1301 (3d Cir. 1978) (grand jury permitted to take and retain photographs of the cash seized).

84. Evidence of the "circumstances" of the seizure is irrelevant if the only issue is whether the evidence should be returned. It is the suppression aspect of the 41(e) motion that requires a showing of an illegal seizure. See *Mr. Lucky Messenger Serv. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978).

85. See *Mr. Lucky Messenger Serv. v. United States*, 587 F.2d 15, 17 (7th Cir. 1978). The critical inquiry, from the court's perspective, is the government's justification for holding the material. As the length of time that the government holds the evidence increases, the harm to the movant also increases and the balance tips more heavily in favor of the movant. Also to be considered are the movant's interest in and need for the evidence, whether he would suffer irreparable harm if it were not returned, and the existence of an adequate remedy at law. Movants can argue that 41(e) motions are not adequate remedies, since they require a showing of illegal seizure of evidence and since they are not immediately appealable. A consideration favoring the government is the goal of allowing the grand jury system to proceed unfettered. In addition, the government's right to conduct criminal investigations with some degree of secrecy is threatened if it must return evidence. See *Shea v. Gabriel*, 520 F.2d 879, 882 (1st Cir. 1975).

equitable return motions provide an adequate remedy for those who are injured by the grand jury's detention of their seized property. For such persons, the equitable motion provides a clear path to retrieve their property and allows them to choose a course which permits immediate appellate review.

In addition, because it is collateral to the issue of the movant's guilt or innocence,<sup>86</sup> a court's decision on one of these equitable motions is ripe for interlocutory review.<sup>87</sup> Moreover, immediate review is necessary to safeguard the movant's rights. Unlike postconviction review of 41(e) rulings, postconviction review of a denial of an equitable return motion is meaningless as it cannot protect the rights which a movant loses while the grand jury holds the evidence.<sup>88</sup> Thus, by changing her motion from one requesting return and suppression to one requesting simply return, a movant can ensure that she will be able to appeal immediately a court's refusal to return her property.<sup>89</sup> In this way, the availability of an equitable return motion solves many of the problems caused by the coupling of return and suppression under rule 41(e).<sup>90</sup>

### CONCLUSION

District court denial of preindictment motions made pursuant to rule 41(e) of the Federal Rules of Criminal Procedure should not be subject to interlocutory appeal. The final decision rule, which is strongest in the area of criminal law, prohibits this form of piecemeal review. Preindictment rulings on 41(e) motions fail to meet the Supreme Court's carefully crafted exceptions to the final decision rule. Furthermore, permitting immediate appeal of 41(e) rulings would cause pointless delay of the grand jury process. Because the availability of equitable relief eliminates any harm a movant may suffer from the retention of evidence by the grand jury, there is good reason to interpret the Supreme Court's holding in *DiBella* to prohibit interlocutory appeal of preindictment rulings on 41(e) motions.

— Clifford A. Godiner

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86. See *Carroll v. United States*, 354 U.S. 394, 403-04 (1957).

87. See *Mr. Lucky Messenger Serv. v. United States*, 587 F.2d 15 (7th Cir. 1978); *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297 (3d Cir. 1978).

88. See *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1300-02 (3d Cir. 1978).

89. See *Shea v. Gabriel*, 520 F.2d 879, 881-82 (1st Cir. 1975).

90. Thus, equitable return motions provide movants with a choice of two paths: one that will win only return, but will proceed to appeal immediately, and one that can result in both suppression and return, but is limited to district court consideration until after conviction.