

U.S. District Court - NE MAGISTRATE JUDGE FORUM

Criminal -- May 4, 2023



Criminal Filings 2022

- ▶ Felony defendants decreased by 4.91% for the 12 months ending March 31, 2023
- ▶ Nebraska has the 9th highest per judge criminal filings nationally for 2022 at 169 per judge
- ▶ Nebraska criminal filings have fallen from 202 per judge in 2017.
- ▶ Filing to disposition has increased from 9.6 months in 2017 to 13.5 months in 2022. (240 in 2013)

U.S. District Court — Judicial Caseload Profile

NEBRASKA

			12-Month Periods Ending					
			Dec 31 2017	Dec 31 2018	Dec 31 2019	Dec 31 2020	Dec 31 2021	Dec 31 2022
Overall Caseload Statistics	Filings ¹		1,575	1,674	1,569	1,432	1,589	1,394
	Terminations		1,610	1,594	1,538	1,371	1,504	1,375
	Pending		1,139	1,210	1,224	1,286	1,370	1,382
	Percent Change in Total Filings Current Year Over Earlier Year		-11.5	-16.7	-11.2	-2.7	-12.3	
Number of Judgeships			3	3	3	3	3	3
Vacant Judgeship Months ²			12.0	13.0	18.7	0.0	0.0	0.0
Actions per Judgeship	Filings	Total	525	558	523	477	530	465
		Civil	224	254	234	235	274	237
		Criminal Felony	202	195	197	171	188	169
		Supervised Release Hearings	99	110	92	71	68	59
	Pending Cases ²		380	403	408	429	457	461
	Weighted Filings ²		504	516	481	464	498	453
	Terminations		537	531	513	457	501	458
	Trials Completed		21	18	20	12	19	12
Median Time (Months)	From Filing to Disposition	Criminal Felony	9.6	8.9	9.0	10.6	12.4	13.5
		Civil ²	8.9	7.4	8.8	7.9	5.0	6.8
	From Filing to Trial ² (Civil Only)		-	-	22.2	-	-	-
Other	Number (and %) of Civil Cases Over 3 Years Old ²		29 5.0	28 4.4	37 5.8	38 5.7	37 6.1	41 6.6
	Average Number of Felony Defendants Filed per Case		1.2	1.2	1.2	1.2	1.3	1.2
	Jurors	Avg. Present for Jury Selection	29.9	32.3	33.3	36.2	34.5	35.7
		Percent Not Selected or Challenged	12.2	9.8	20.1	19.5	16.7	23.9

**Numerical
Standing
Within**

U.S.	Circuit
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82	9
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39	5
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57	5
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9	4
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22	6
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50	5
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30	3
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43	5
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59	8
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41	5
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12	2
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26	6
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U.S. District Court — Judicial Caseload Profile

NEBRASKA

		12-Month Periods Ending						Numerical Standing Within		
		Sep 30 2010	Sep 30 2011	Sep 30 2012	Sep 30 2013	Sep 30 2014	Sep 30 2015			U.S.
Overall Caseload Statistics	Filings ¹	1,780	1,613	1,699	1,693	1,569	1,531			
	Terminations	1,926	1,691	1,788	1,691	1,604	1,541			
	Pending	1,159	1,138	1,110	1,166	1,158	1,141			
	Percent Change in Total Filings Current Year Over Earlier Year	-14.0	-5.1	-9.9	-9.6	-2.4		57	8	
Number of Judgeships		3	3	3	3	3	3			
Vacant Judgeship Months ²		0.0	0.0	1.7	0.0	0.0	12.0			
Actions per Judgeship	Filings	Total	593	538	566	564	523	510	40	5
		Civil	250	230	244	218	213	215	77	8
		Criminal Felony	218	211	206	240	214	201	7	2
		Supervised Release Hearings	126	97	116	107	96	95	7	2
	Pending Cases		386	379	370	389	386	380	65	7
	Weighted Filings ²		513	470	468	483	434	450	44	5
	Terminations		642	564	596	564	535	514	34	4
	Trials Completed		30	24	23	21	16	20	27	7
Median Time (Months)	From Filing to Disposition	Criminal Felony	8.2	7.8	8.0	7.6	7.9	8.0	29	2
		Civil ²	8.6	8.3	7.7	9.0	8.8	7.4	19	3
	From Filing to Trial ² (Civil Only)		19.0	21.7	20.8	25.2	25.9	28.6	42	5
Other	Number (and %) of Civil Cases Over 3 Years Old ²		18 3.1	28 4.9	21 3.6	30 5.2	25 4.4	40 6.9	56	8
	Average Number of Felony Defendants Filed per Case		1.2	1.2	1.2	1.2	1.2	1.2		
	Jurors	Avg. Present for Jury Selection	34.9	31.5	37.8	34.6	33.8	33.6		
		Percent Not Selected or Challenged	20.6	11.8	27.8	16.8	23.1	18.9		

Caseload Take Aways

- ▶ Pandemic backlog has slowed dispositions peaked
 - ▶ Disposition times have hopefully peaked
- ▶ There will be more help with criminal trials
- ▶ Civil and Criminal filings are down
 - ▶ With a new judge there will be more caseload capacity than there has been in some time

Recent Rule Amendments

- ▶ Expert Discovery under Federal Rule of Criminal Procedure 16
 - ▶ [Rule 16.pdf](#)
- ▶ Change of Plea Hearings under Nebraska Criminal Rule 11.1
 - ▶ [Rule 11.1.pdf](#)
- ▶ Motions to Continue Trial under Nebraska Criminal Rule 12.1
 - ▶ [Rule 12.1.pdf](#)





Expert Discovery under Federal Rule of Criminal Procedure 16

- ▶ Federal Rule of Criminal Procedure 16 (Amended 12/1/2022)
 - ▶ [Fed Crim Rule 16.pdf](#)
- ▶ Case Progression Orders
 - ▶ Omaha
 - ▶ [Omaha MJ Progression Order.pdf](#)
 - ▶ Lincoln
 - ▶ [Lincoln MJ progression order.pdf](#)
- ▶ Nebraska Criminal Rule 16.1 (Amended effective 12/1/2009)
 - ▶ [Rule 16.1.pdf](#)

Change of Plea Hearings Under Nebraska Criminal Rule 11.1



- ▶ Rule 11.1
 - ▶ Scheduling
 - ▶ Paperwork
- ▶ Rule 11.2
 - ▶ Referral to Magistrate Judge
 - ▶ Consent

[Rule 11.1.pdf](#)

[Rule 11.2.pdf](#)

Motions to Continue Trial under Nebraska Criminal Rule 12.1

- ▶ Statement of consent or opposition by any party
- ▶ Good Cause
 - ▶ Ends of justice
 - ▶ Best interests
 - ▶ Public
 - ▶ Defendant
- ▶ Details
 - ▶ Trial date
 - ▶ Length of continuance
 - ▶ Request for hearing
 - ▶ Be specific





[18 USC § 3142\(f\).pdf](#)
[Rule 12.5.pdf](#)
[Rule 49.1.1.pdf](#)

MOTIONS TO REVIEW DETENTION

New information having a material bearing on conditions mitigating flight and safety concerns. 18 U.S.C. § 3142(f).

Magistrate Judge Case Management Practices

Substance abuse evaluations, acceptance letters, program descriptions

Statements as to positions of the government and Pretrial Services

Sealing/redacting documents under Nebraska Criminal Rules 12.5(1), 49.1.1

Pretrial Motion Progression



[Rule 16.2.pdf](#)

- ▶ Deadlines
 - ▶ Initial case progression orders
 - ▶ Extending deadlines under Nebraska Criminal Rule 16.2
 - ▶ Affidavit/statement
 - ▶ Unusual cases/good cause
 - ▶ Diligence
 - ▶ Be specific
- ▶ Evidentiary hearings
 - ▶ Progression order
 - ▶ Conferencing
 - ▶ Scheduling

Rule 17.1 Status Conferences

- ▶ Promote a fair and expeditious trial
- ▶ Trial setting and continuances
 - ▶ Request/sua sponte
 - ▶ Memorandum
 - ▶ Statements must be in writing and signed



I Consent!

Consent to Magistrate Judge

Misdemeanor cases under Nebraska Criminal Rule 59.3

[Rule 59.3.pdf](#)



- ▶ **Supervised Release
Violation Petitions and
Initial Appearances**



Sentencing

Pretrial Release & Detention

U.S. Magistrate Judge Cheryl Zwart

RULE 16

16.1 Disclosure Requirements.

This court presumes that a defendant has requested disclosure of Federal Rule of Criminal Procedure Rule 16(a)(1) discovery and that the government has requested reciprocal discovery, unless the procedures of this rule overcome the presumption.

(a) Government's Disclosure.

(1) No Discovery Requested.

If the defendant does not request federal Rule 16(a)(1) discovery, the defendant must file a notice within 2 days after the arraignment stating that the defendant does not request the discovery. If this notice is filed, the government is relieved of any federal Rule 16 discovery obligations to the defendant.

(2) Partial Discovery Requested.

If the defendant requests federal Rule 16(a)(1)(A)-(D) discovery but files a notice within 2 days after the arraignment stating that the defendant does not request Rule 16(a)(1)(E), (F), or (G) discovery, then the government must provide Rule 16(a)(1)(A)-(D) discovery and any Rule 16(a)(1)(E)(F) and (G) discovery not specifically identified in the defendant's notice.

(3) Disclosure Deadline.

Unless the court orders otherwise, the government must provide discovery under this rule no sooner than 2 but not later than 14 days after the arraignment.

(4) Certificate of Service.

Upon providing the required discovery, the government must file and serve a notice of compliance.

(b) Defendant's Disclosure.

(1) Reciprocal Disclosure; Deadline.

If the government provides Rule 16(a)(1)(E), (F), or (G) discovery, unless the court orders otherwise, the defendant must then disclose reciprocal discovery under Federal Rule of Criminal Procedure 16(b)(1)(A), (B), and (C) within 30 days after the arraignment.

(2) Certificate of Service.

Upon providing the required discovery, the defendant must file and serve a notice of compliance.

16.2 Motion for Extending or Shortening Discovery Time.

An affidavit or other statement explaining the reasons for the request must accompany a motion to continue a discovery deadline. The court only extends a motion to continue a discovery deadline in unusual cases and upon a showing of good cause, which must include facts showing that the moving party diligently pursued discovery during the originally specified period.

Rule 11.1

11.1 Change of Plea Hearing.

(a) Notice.

If a defendant decides to change a previously entered "not guilty" plea, the defense attorney must notify the government's attorney and assigned judge as soon as possible.

(b) Requirements for Scheduling Hearing.

Defense counsel may not contact the court to schedule a change of plea hearing until (1) a plea agreement has been reached between the parties and (2) counsel has advised the defendant that, by pleading guilty, the defendant waives the constitutional right to a jury trial. The defendant may orally state to the defense attorney the defendant's understanding of the applicable constitutional rights and acceptance of the plea agreement. A change of plea hearing may be scheduled before the plea agreement and petition to enter a plea of guilty are signed.

(c) Interpreter Assistance.

If, in order to consider or enter a change of plea, a defendant requires an interpreter's assistance:

- (1) the government must send a request for interpreter form to the courtroom deputy at least 7 days before the hearing; and
- (2) the defense attorney must ensure that the petition to enter a plea of guilty, any plea agreement, and the indictment or information have been properly translated for the defendant before the change of plea hearing.

(d) Copies of Petition and Plea Agreement; Copy of Information.

The defense attorney must send copies of the petition to enter a plea of guilty, any plea agreement and the information (if applicable), to the judge presiding over the change of plea hearing at least 24 hours before the plea hearing, absent extenuating circumstances.

(e) Original Signed Petition and Plea Agreement; Original Information.

The government's attorney must bring the fully signed original petition to enter a plea of guilty, any fully signed original plea agreement, and the information (if applicable), to the change of plea hearing.

Rule 12.1

12.1 Motions to Continue Trial.

(a) Content.

Unless excused by the court in an individual case, a motion to continue the trial setting of a criminal case must state facts demonstrating that the ends of justice served by a continuance outweigh the best interests of the public and the defendant in a speedy trial, see 18 U.S.C. § 3161(h)(7)(A), or that for some other reason the continuance will not violate the Speedy Trial Act.

(b) Standard.

The court may grant a motion to continue a trial of a criminal case for good cause shown.

(c) Parties.

Counsel for the movant must confer with the counsel for all other parties before filing a motion to continue the trial setting. The motion

Rule 16. Discovery and Inspection

Primary tabs

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in [Rule 16\(a\)\(1\)\(A\)](#) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects*. 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.

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

- (i) the item is within the government's possession, custody, or control;
- (ii) the attorney for the government knows—or through due diligence could know—that the item exists; and
- (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses*.

(i) *Duty to Disclose*. At the defendant's request, the government must disclose to the defendant, in writing, the information required by (iii) for any testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C). If the government requests discovery under the second bullet point in (b)(1)(C)(i) and the defendant complies, the government must, at the defendant's request, disclose to the defendant, in writing, the information required by (iii) for testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 on the issue of the defendant's mental condition.

(ii) *Time to Disclose*. The court, by order or local rule, must set a time for the government to make its disclosures. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) *Contents of the Disclosure*. The disclosure for each expert witness must contain:

- a complete statement of all opinions that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);
- the bases and reasons for them;

- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) *Information Previously Disclosed.* If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) *Signing the Disclosure.* The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) *Supplementing and Correcting a Disclosure.* The government must supplement or correct its disclosures in accordance with (c).

(2) *Information Not Subject to Disclosure.* Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), 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](#).

(3) *Grand Jury Transcripts.* This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules [6](#), [12\(h\)](#), [16\(a\)\(1\)](#), and [26.2](#).

(b) *Defendant's Disclosure.*

(1) *Information Subject to Disclosure.*

(A) *Documents and Objects.* If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, 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:

- (i) the item is within the defendant's possession, custody, or control; and
- (ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) *Reports of Examinations and Tests.* If a defendant requests disclosure under Rule Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon

request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert Witnesses.*

(i) **Duty to Disclose.** At the government's request, the defendant must disclose to the government, in writing, the information required by (iii) for any testimony that the defendant intends to use under Federal Rule of Evidence 702, 703, or 705 during the defendant's case-in-chief at trial, if:

- the defendant requests disclosure under (a)(1)(G) and the government complies; or
- the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) **Time to Disclose.** The court, by order or local rule, must set a time for the defendant to make the defendant's disclosures. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) **Contents of the Disclosure.** The disclosure for each expert witness must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief;
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) **Information Previously Disclosed.** If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) **Signing the Disclosure.** The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(iv) **Supplementing and Correcting a Disclosure.** The defendant must supplement or correct the defendant's disclosures in accordance with (c).

(2) *Information Not Subject to Disclosure.* Except for scientific or medical reports, [Rule 16\(b\)\(1\)](#) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) **Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) **Regulating Discovery.**

(1) *Protective and Modifying Orders.* At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) *Failure to Comply.* If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

_____ ,

Defendant.

8: CR

ORDER FOR THE PROGRESSION OF A
CRIMINAL CASE

Judge _____

Upon arraignment of Defendant this date and the entry of plea of not guilty,

IT IS ORDERED:

1. **Trial Scheduling.** Trial of this case will be scheduled upon the expiration of the pretrial motion deadline, or final ruling on any motions filed.

2. **Discovery Deadline; Exculpatory Evidence.** By **May 1, 2023**, if requested, counsel shall confer and accomplish the discovery as required under Federal Rules of Criminal Procedure 16(a)(1)(A)-(F) and 16(b)(1)(A)-(B), and must comply with the continuing duty to disclose such matters pursuant to Rule 16(c).

Pursuant to the Due Process Protections Act, the Court confirms the United States' obligation to disclose to the defendant all exculpatory evidence as required by Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and orders the United States to do so. Failure to disclose exculpatory evidence in a timely manner may result in consequences, including, but not limited to, exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, or sanctions by the Court.

3. **Pretrial Motion; Prerequisites.** The filing, briefing, and hearing of pretrial motions, including ex parte motions and applications, shall be governed by NECrimR 12.1 - 12.5.

- (a) Pretrial motions, as defined under Federal Rule of Criminal Procedure 12(b)(3), shall be filed on or before **May 15, 2023**, and that deadline will not be extended by the Court except for good cause shown.
- (b) In the event that any motions are filed seeking bills of particulars or discovery of facts, documents, or evidence, including Brady material, the moving party's motion must state that counsel for the movant has talked to opposing counsel regarding the subject of the motion in an attempt to reach an agreement on the contested matters without involving the court and that such attempts have been unsuccessful. The motion shall further state the dates and times of such conferences.
- (c) In the event any pretrial motion is filed, a supporting brief required by the provisions of NECrimR 12.3(b)(1) and, if applicable, evidence required by the provisions of NECrimR 12.3(b)(2), shall be simultaneously filed. Any request for hearing must be made as required by the provisions of NECrimR 12.3(b)(4). Any response to a motion shall be filed **within fourteen (14) days** in accordance with NECrimR 12.3(c).
- (d) Any request for leave to file a post-hearing brief must be made prior to or at the close of the evidentiary record for the hearing. Requests for post-hearing briefs must explain the specific reasons the requesting party cannot be expected to argue its position before the hearing. Post-hearing briefs will not generally be permitted unless the facts are so complex as to require them, or the evidence adduced at the hearing is so different from that expected to be adduced that it triggers different law, the applicability of which could not have been anticipated by the parties before the hearing.
- (e) Any ex parte application for the subpoena of a witness pursuant to Federal Rule of Criminal Procedure 17(b) shall contain the satisfactory showing required by said rule and shall be filed sufficiently in advance of the time needed for such testimony so as to allow the United States Marshal adequate time in which to serve any subpoena. Absent good cause shown, any application or motion for an order to produce the appearance of an incarcerated witness shall be filed sufficiently in advance of the time needed for such testimony so as to allow the United States Marshal **at least fourteen (14) days** to arrange for such appearance.

4. **Experts; Disclosures.** Any request for expert disclosures under the provisions of Federal Rules of Criminal Procedure 16(a)(1)(G) or (b)(1)(C) shall be filed **within five (5) days** of an order setting trial. If a request be made, the government shall make its case-in-chief expert disclosures under Rule 16(a)(1)(G) **within twenty-one (21) days** before trial. If a request be made, a defendant shall make its case-in-chief expert disclosures under Rule 16(b)(1)(C) **within fourteen (14) days** before trial. If a request be made, the government shall make its rebuttal expert disclosures under Rule 16(a)(1)(G) **within seven (7) days** before trial. In lieu of a request for expert disclosures under Rule 16(a)(1)(G) or (b)(1)(C), any party may file a request for a status conference with the assigned magistrate judge to discuss case progression, to include, but not be limited to, discovery or expert disclosure deadlines, change of plea hearings, Federal Rule of Criminal Procedure 17.1 conferences, and trial scheduling.

5. **Continuances.** Any motion for a continuance or an extension of deadlines shall be filed in accordance with the provisions of NECrimR 12.1 - 12.3.

6. **Change of Plea.** If plea negotiations are to be instituted, they shall be concluded and advice thereof given to the trial judge **not less than seven (7) days** before the trial date;

7. **Sealed Filings.** Financial affidavits, pretrial services reports, the Court's statement of reasons for sentencing, presentence investigation reports, sentencing recommendations, and other sentence-related motions will be filed under seal.

In addition, on motion presented to the court during a hearing for entry of a plea of guilty, for the reasons explained in General Order 2018-2, the Court may order portions of any plea agreement to be filed under seal. If the motion is granted, the motion to seal, order granting the motion, and the sealed portion of the plea agreement will be filed in a separate and sealed docket of the court.

8. **Incarcerated Witnesses.** Absent good cause shown, any application or motion for an order to produce the appearance of an incarcerated witness shall be made sufficiently in advance of the time needed for such testimony so as to allow the United States Marshal **at least fourteen (14) days** to arrange for such appearance. Any ex parte application for the subpoena of a witness pursuant to Federal Rule of Criminal Procedure 17(b) shall contain the satisfactory showing required by said rule and shall be submitted sufficiently in advance of the time needed for such testimony so as to allow the United States Marshal adequate time in which to serve any subpoena.

9. **CJA Vouchers.** Applications or vouchers pursuant to the Criminal Justice Act (“CJA”) for authorization to hire third parties, to exceed CJA spending limits, or for the expenditure of CJA funds shall be submitted through the CJA eVoucher system and supported by a statement of:

- a. The name, address and telephone number of the person sought to be hired (if applicable);
- b. A specific statement of the amount sought and the method for computing it; and
- c. A statement of the factual and legal bases supporting the request; including specific argument for exceeding the CJA’s limits.

10. **Defendant’s Presence.** The defendant shall be present at all pretrial proceedings unless the defendant’s presence is excused by the Court, or the proceeding is scheduled with counsel only. A defendant’s request to be absent from a proceeding must be filed **at least three (3) business days** prior to the proceeding, and it must be supported by either the defendant’s written declaration or affidavit stating that the defendant knowingly, intelligently and voluntarily gives up the right to attend the proceeding, or by counsel’s statement that counsel has advised the defendant of the right

to attend the proceeding, the defendant acknowledges understanding that right, and the defendant knowingly and voluntarily waives the right to attend the proceeding.

DATED this ____ day of _____, 2023.

BY THE COURT:

s/ _____
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Defendant.

ORDER FOR THE PROGRESSION
OF A CRIMINAL CASE

Senior Judge John M. Gerrard

Upon arraignment of defendant this date and the entry of a plea of not guilty,

IT IS ORDERED:

1. **Discovery.** Within 14 days, counsel shall confer and accomplish the discovery as required under Federal Rules of Criminal Procedure 16(a)(1)(A)-(F) and 16(b)(1)(A)-(B), and they must comply with the continuing duty to disclose such matters pursuant to Rule 16(c).

Pursuant to the Due Process Protections Act, the Court confirms the United States' obligation to disclose to the defendant all exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and orders the United States to do so. Failure to disclose exculpatory evidence in a timely manner may result in consequences, including, but not limited to, exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, or sanctions by the Court.

2. **Pretrial Motions; Prerequisites.** The filing, briefing, and hearing of pretrial motions, including ex parte motions and applications, shall be governed by NECrimR 12.1 - 12.5.

- (a) Pretrial motions, as defined under Federal Rule of Criminal Procedure 12(b)(3), shall be filed on or before **May 30, 2023**.
- (b) In the event that any motions are filed seeking bills of particulars or discovery of facts, documents, or evidence, including Brady material, the moving party's motion must state that counsel for the movant

has talked to opposing counsel regarding the subject of the motion in an attempt to reach an agreement on the contested matters without involving the court and that such attempts have been unsuccessful. The motion shall further state the dates and times of such conferences.

- (c) If any pretrial motion is filed by either side, a copy thereof and the supporting brief required by the provisions of NECrimR 12.3(b)(1) shall be simultaneously filed. Opposing briefs shall be filed within fourteen (14) thereafter.
- (d) Any request for leave to file a post-hearing brief must be made prior to or at the close of the evidentiary record for the hearing. Requests for post-hearing briefs must explain the specific reasons the requesting party cannot be expected to argue its position before the hearing. Post-hearing briefs will not generally be permitted unless the facts are so complex as to require them, or the evidence adduced at the hearing is so different from that expected to be adduced that it triggers different law, the applicability of which could not have been anticipated by the parties before the hearing.
- (e) Motions in limine addressed to matters at trial shall be filed no earlier than fourteen (14) days before a scheduled trial date, and no later than two (2) business days before trial. Any motions filed outside this time period may be summarily denied.

3. A telephonic conference with counsel will be held before the undersigned magistrate judge at **9:50 a.m. on June 6, 2023** to discuss setting a hearing, if necessary, on any pretrial motion filed, or a change of plea hearing, or the date of the jury trial and the deadlines for expert disclosures, or further disclosures under Rules 16(a)(1)(G) and/or 16(b)(1)(C) of the Federal Rules of Criminal Procedure. Counsel for all parties shall use the conferencing instructions provided by the court to participate in the call. Unless the court states otherwise, Defendants are excused from and need not attend these hearings. If a defendant chooses to attend, defense counsel must notify the court of that intent at least 2 business days before the hearing.

This telephonic conference may be continued or cancelled if:

- (a) the pretrial motion deadline was continued; or
- (b) upon advance notice that the defendant, or a defendant in a multi-defendant case, is engaged in plea discussions (including the

anticipated time needed to complete those discussions), intends to enter a plea of guilty; or has a plea hearing set.

4. **Continuances.** Any motion for a continuance or an extension of deadlines shall meet the requirements of the Court's local rules. See NECrimR 12.1, 12.2, 12.3.

5. **Sealed filings.** Financial affidavits, pretrial services reports, the court's statement of reasons for sentencing, presentence investigation reports, sentencing recommendations, and other sentence-related motions will be filed under seal.

In addition, on motion presented to the court during a hearing for entry of a plea of guilty, for the reasons explained in General Order 2018-2, the court may order portions of any plea agreement to be filed under seal. If the motion is granted, the motion to seal, order granting the motion, and the sealed portion of the plea agreement will be filed in a separate and sealed docket of the court.

6. **CJA Vouchers.** Applications or vouchers pursuant to the Criminal Justice Act ("CJA") for authorization to hire third parties, to exceed the CJA spending limits, or for the expenditure of CJA funds shall be submitted through the CJA eVoucher system and supported by a statement of:

- (a) The name, address and telephone number of the person sought to be hired (if applicable);
- (b) A specific statement of the amount sought and the method of computing it; and
- (c) A statement of the factual and legal bases supporting the request, including specific argument for exceeding the CJA's limits.

7. **Speedy Trial Act.** The prosecuting attorney to whom this case is assigned shall advise the court, by letter to the undersigned, at such time as the Speedy Trial Act requires that the trial of this case be scheduled within ten days, if trial is not then scheduled to begin within the period allowed by the Speedy Trial Act and no exceptions have tolled the Act's time limitations. Such notification shall set forth the number and dates of the days elapsed and days remaining under the Speedy Trial Act as applied to the events of this case.

8. **Defendant's Presence.** The defendant shall be present at all pretrial arguments or hearings unless the defendant's presence is excused by the court

or the court scheduled the hearing with counsel only. A defendant's request to be absent from a hearing must be filed as least three business days prior to the hearing, and it must be supported by either the defendant's written declaration or affidavit stating that the defendant knowingly, intelligently and voluntarily gives up the right to attend the argument or hearing, or by counsel's statement that counsel has advised the defendant of the right to attend the argument or hearing, the defendant acknowledges understanding that right, and the defendant knowingly and voluntarily waives the right to attend.

DATED this ____ day of ____, 2023.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

Rule 11.2

11.2 Change of Plea Hearing Before Magistrate Judge.

(a) Hearing.

With the assigned district judge's and the parties' consent, a magistrate judge may hold a change of plea hearing in:

- (1) a felony case; or
- (2) a misdemeanor case requiring consent but in which the parties did not consent to trial, judgment, and sentencing by a magistrate judge.

If the magistrate judge at the hearing finds that the defendant's written or oral consent to proceed with the change of plea before the magistrate judge is knowing and voluntary, the magistrate judge conducts the change of plea hearing. The magistrate judge must inquire about the existence and understanding of the terms of any plea agreement but may not accept or reject a plea agreement.

(b) Findings of Fact and Recommendation.

The magistrate judge must state on the record findings concerning the guilty plea's knowing and voluntary nature, the adequacy of the factual basis for the plea, and any other relevant matter, and must recommend to the district judge whether the guilty plea should be accepted. If there is a plea agreement, the magistrate judge must also recommend to the district judge whether the plea agreement should be rejected, accepted, or taken under advisement until sentencing. A transcript of the hearing must be prepared and filed with the clerk.

(c) Objection to Recommendation.

Unless the judge extends or shortens the time, any objection to the magistrate judge's recommendation must (1) be in writing, (2) specify the parts of the findings or recommendation objected to, and (3) be filed and served within 14 days after the filing of the plea transcript. See NECrimR 59.2(a).

(d) District Judge's Review.

The district judge must conduct a de novo review of the magistrate judge's recommendation regarding the proposed plea and issue an appropriate order. The district judge may defer acceptance of the plea agreement until sentencing. In conducting this review, the district judge may reconduct or refer back to the magistrate judge all or part of the plea hearing, affirm or set aside any finding by the magistrate judge, and make additional findings.

18 U.S.C. 3142(f)

(f) Detention hearing. The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community--

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs

(A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses;
or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon,
or involves a failure to register under section 2250 of title 18, United States Code; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves—

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the

appearance of such person as required and the safety of any other person and the community.

Rule 12.5

12.5 Sealed Documents and Objects.

(a) Procedure.

(1) Motion to Seal.

A party seeking to file a sealed document or object must electronically file a motion to seal. The motion must state why sealing is required and whether redaction could eliminate or reduce the need for sealing. A motion to seal is not required if the document or object is (1) already subject to a protective order or (2) included within a category of documents or objects considered sealed under a federal statute or federal rule of procedure, local rule, or standing order of this court.

(2) Sealed Document not Attached.

The document to be sealed must not be attached to the motion, but rather filed separately as a provisionally sealed document. This document stays provisionally sealed until the court rules on the motion to seal.

(3) Order.

In ruling on the motion, the assigned judge may also unseal the document, strike it, or order the filing party to electronically file a redacted copy.

(b) Notice.

When a sealed document is filed, the System does not provide notice of electronic filing to all parties in the case. The filing party must use alternate forms of service to provide all parties entitled to notice with copies of the sealed document.

(c) Docket Sheet Entries.

When a sealed document is filed, an entry appears on the electronic docket sheet only for court users. The parties and the public do not have remote access to the sealed document from the docket sheet unless otherwise ordered by the court.

(d) Motion to Unseal.

A motion to unseal or view a document or object may be made on any legal grounds.

Rule 49.1.1

49.1.1 Privacy.

(a) Mandatory Redaction.

See Federal Rule of Criminal Procedure 49.1 and 18 U.S.C. § 3509(d) for specific rules regarding mandatory redaction in electronic and nonelectronic filings. The following privacy rules also apply to all documents and exhibits filed in this court.

(b) Discretionary Redaction.

The filing party may also redact the following information from all documents and exhibits filed electronically or nonelectronically, unless the assigned judge orders otherwise:

- (1) personal identifying numbers, including driver's license numbers;
- (2) employment history;
- (3) individual financial information;
- (4) proprietary or trade secret information;
- (5) information that may identify a cooperating individual;
- (6) information regarding an adult crime victim (see 18 U.S.C. § 3509(d) for mandatory redaction requirements concerning a child victim);
- (7) national security information;
- (8) sensitive security information as described in 49 U.S.C. § 114(s);
- (9) education records as defined by 20 U.S.C. § 1232g(a)(4)(A); and
- (10) other data as the court orders.

(c) Restricting Access to Unredacted Documents.

With the court's leave, a party may restrict access to a document containing the unredacted personal data identifiers listed in Nebraska Criminal Rule 49.1.1(b) or in Federal Rule of Criminal Procedure 49.1.

(d) Timely Filing.

A document is considered timely filed if filed before midnight Central Standard Time (or Central Daylight Time, if in effect). However, the assigned judge may order a document filed by a time certain.

(e) Official Record.

The clerk does not maintain a paper court file in any case unless required by law or local rule. When a document is filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed.

(1) Motion.

(A) Procedure.

A party seeking to file an unredacted document must file electronically file a motion to restrict access to the document under the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002) (codified at 5 U.S.C. §§ 3701-3707 and scattered sections) ("E-Government Act"). The motion must state why filing an unredacted document is necessary and why redaction would not reduce or eliminate the need for restriction.

(B) Unredacted Document not Attached.

The unredacted document must not be attached to the motion, but rather filed separately as a restricted document. The document remains provisionally restricted pending the ruling on the motion to restrict access. If the court denies the motion, it will direct the clerk to lift the restriction on the unredacted document.

(2) Order.

In ruling on the motion, the assigned judge may lift the restriction on the document, strike it, or order the filing party to place a redacted copy of the document on the public docket.

(3) Docket Sheet Entries.

When access to a document is restricted under the E-Government Act, an entry noting the restricted access appears on the public electronic docket sheet; however, only parties of record and court users may routinely access the document electronically. The public does not have remote access to the restricted document from the docket sheet. The court may grant the public leave for remote access upon motion.

(f) Medical, Mental Health, and Drug Rehabilitation Records.

In criminal cases, medical, mental health, and drug rehabilitation records and evaluations, even if offered in support of an unsealed motion, must be filed under seal. See NECrimR 12.5(a). These records may be unsealed only on a court order issued sua sponte or in response to a motion to unseal filed under Nebraska Criminal Rule 12.5(d).

Rule 16.2

16.2 Motion for Extending or Shortening Discovery Time.

An affidavit or other statement explaining the reasons for the request must accompany a motion to continue a discovery deadline. The court only extends a motion to continue a discovery deadline in unusual cases and upon a showing of good cause, which must include facts showing that the moving party diligently pursued discovery during the originally specified period.

Rule 17.1

17.1 Subpoenas and Writs.

(a) Subpoenas; Service by Marshal.

The serving party is responsible for providing the marshal with an original and 2 copies of each subpoena to be served by the marshal. The serving party must deliver to the marshal a subpoena for a hearing or trial to be served by the marshal (1) within this district at least 14 days and (2) outside this district at least 21 days before the hearing or trial at which the witness is to testify. Service of a subpoena delivered to the marshal after these deadlines is not guaranteed. Without a court order under Nebraska Criminal Rule 17.1(c), the marshal serves a tardy subpoena only if the marshal can conveniently do so.

(b) Delivery of Writ to Obtain Incarcerated Person's Presence.

The serving party must deliver to the marshal a writ of habeas corpus ad testificandum to be served (1) within the district at least 14 days and (2) outside the district at least 30 days, before the hearing or trial at which the witness is to testify. If the government has made prior arrangements for obtaining a defendant's presence, it may deliver a writ of habeas corpus ad prosequendum to the marshal at any time before the hearing at which the defendant is to appear.

(c) Exception to Delivery Deadlines.

The time periods and deadlines in Nebraska Criminal Rule 17.1(a) and (b) may be shortened by court order upon motion and for good cause shown.

(d) Service at Federal Public Defender's Request.

The marshal serves subpoenas and makes fact witness payments for the Office of the Federal Public Defender. Fact witness vouchers issued for payment must be approved by the federal public defender or assistant federal public defender assigned to the case, whose signature is maintained on record by the marshal.

(e) Issuance of Electronic Subpoenas and Writs Authorized.

The clerk is authorized to sign, seal, and issue subpoenas and writs electronically. Such electronically issued subpoenas and writs may not, be served electronically.

Rule 59.3

59.3 Magistrate Judge Duties in Misdemeanor Cases.

(a) Authority.

A full-time magistrate judge is responsible for all pretrial matters in misdemeanor cases. When the misdemeanor charge is for a petty offense, or when the misdemeanor charge is not for a petty offense and the defendant has consented orally or in writing to proceed with trial, judgment, and sentencing before a magistrate judge rather than a district judge, a full-time magistrate judge is authorized under 18 U.S.C. § 3401 to:

- (1) try persons accused of, and sentence persons convicted of, misdemeanors committed within this district;
- (2) direct the probation and pretrial services office to conduct a presentence investigation in any misdemeanor;
- (3) conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to a jury trial under the Constitution and laws of the United States;
- (4) conduct any necessary hearings relating to petitions to revoke probation and supervised release and enter final orders when a magistrate judge imposed probation or supervised release after conviction of a misdemeanor; and
- (5) with the defendant's consent, hear and determine cases brought under 28 U.S.C. § 2255 in which the magistrate judge entered judgment in the underlying misdemeanor criminal prosecution.

(b) Part-Time Magistrate Judge.

Designation of part-time magistrate judges to conduct duties under 18 U.S.C. § 3401 is made by specific order as required.

(c) Exception.

This rule does not preclude a district judge from (1) reserving any proceeding for conduct by a district rather than a magistrate judge or (2) modifying the method of assigning matters to a magistrate judge as required.